

PUNISHING HOMELESSNESS

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Homelessness is punishing to those who experience it, not just from the inherent and protracted trauma of living exposed on the street, but also due to widespread and pervasive laws that punish people for being homeless. People experiencing homelessness, particularly chronic homelessness, often lack reasonable alternatives to living in public. Yet cities throughout the country are increasingly enacting and enforcing laws that punish the conduct of necessary, life-sustaining activities in public, even when many people have no other option. These laws are frequently challenged in court and often struck down as unconstitutional. But legally sound, cost-effective, and non-punitive alternatives to ending chronic homelessness exist. This article exposes some of the problems with criminalization laws, not only for people experiencing homelessness, but also for the broader community. It discusses how current approaches often make chronic homelessness worse and explains why non-punitive alternatives, especially Housing First and permanent supportive housing, are the most cost-effective means of addressing chronic homelessness. Ultimately, this article urges cities and their constituents to stop punishing homelessness and instead to start solving it.

Keywords: *homeless, constitutional law, human rights, poverty, ordinances, begging, camping, First Amendment, Fourth Amendment, Eighth Amendment, Fourteenth Amendment, stigma, marginalized groups, race, incarceration*

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INTRODUCTION

Is poverty a crime? A quick answer is, of course, yes: poverty is systemically created and punished. Debtors' prisons,¹ mass incarceration,² and the structure of the welfare system³ are just a few examples of systemic designs that produce and reproduce poverty.

The intersectionality of poverty and homelessness suggests its systemic nature. Poverty disproportionately impacts already and otherwise marginalized groups, such as people of color, immigrants, people with mental illness or physical disabilities.⁴ For example, consider links between race, poverty, and homelessness. Nationally, white people comprise approximately 74 percent of the population, but only 49 percent of the country's homeless population.⁵ By contrast, black Americans represent 13 percent of the general population, but over 40 percent of

1. *Out of Reach 2018*, NAT'L LOW INCOME HOUSING COAL., <http://nlihc.org/oor> (last visited Sept. 14, 2018); see, e.g., AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS' PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR (Feb. 2014), <https://www.aclu-wa.org/docs/modern-day-debtors-prisons-washington> (writing that "[t]he practice of imposing and collecting excessive [legal financial obligations] results in a counterproductive system that punishes people simply for being poor."); AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISON (Oct. 2010), https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/InForAPenny_web.pdf (stating that "day after day, indigent defendants are imprisoned for failing to pay legal debts they can never hope to manage"); ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (Russell Sage 2016).

2. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

3. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (examining "the treatment of welfare recipients in the courts, where the poor have been relegated to an inferior status of rights-bearing citizenship, a status on par with parolees and probationers").

4. See KAYA LURIE & BREANNE SCHUSTER, SEATTLE UNIV. HOMELESS RIGHTS ADVOC. PROJECT, DISCRIMINATION AT THE MARGINS: THE INTERSECTIONALITY OF HOMELESSNESS & OTHER MARGINALIZED GROUPS 2 (Sara K. Rankin ed., May 2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1002&context=hrap> (finding that "marginalized groups disproportionately experience homelessness, including its many burdens—such as laws that criminalize the conduct of necessary, life-sustaining activity in public").

5. JEFFREY OLIVET ET AL., CTR. FOR SOCIAL INNOVATION, SUPPORTING PARTNERSHIPS FOR ANTI-RACIST COMMUNITIES: PHASE I STUDY FINDINGS 4 (Mar. 2018), <http://center4si.com/wp-content/uploads/2018/03/SPARC-Phase-I-Findings-March-20181.pdf>.

the homeless population.⁶ Latinos represent at least 16.9 percent of those experiencing homelessness in the United States.⁷ Native American rates of homelessness are also disproportionately high, occurring at rates three to eight times higher than their proportion of the general population.⁸ In total, over 68 percent of the nation's homeless population are people of color, even though they represent one-third of the U. S. population overall.⁹ Race or, more pointedly, racism and homelessness are inseparable.

Like race and incarceration,¹⁰ homelessness and incarceration are also closely linked, leading some to characterize the United States' penal system as the nation's largest homeless shelter.¹¹ Homelessness is a risk factor for incarceration: over 15 percent of those in jail were homeless prior to incarceration, a rate of 7.5 to 11.3 times higher than the general adult population.¹² Approximately 25–50 percent of the general homeless population has a criminal history,¹³ oftentimes sparked by arrests for non-violent

6. *Id.* at 6.

7. *Id.*

8. *Id.*

9. *Id.* (quantifying racial statistics for homeless populations); *Racial and Ethnic Minority Populations*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (Aug. 16, 2018), <https://www.samhsa.gov/specific-populations/racial-ethnic-minority> (quantifying racial statistics for the national population).

10. *See, e.g.*, ALEXANDER, *supra* note 2.

11. *See, e.g.*, LOÏC WACQUANT, *PRISONS OF POVERTY* (Univ. of Minn. Press 2009).

12. Sarah Knopf-Amelung, *Incarceration & Homelessness: A Revolving Door of Risk*, 2 IN FOCUS 2, 1 (Nov. 2013), https://www.nhchc.org/wp-content/uploads/2011/09/infocus_incarceration_nov2013.pdf.

13. Stephen Metraux & Dennis P. Culhane, *Recent Incarceration History Among a Sheltered Homeless Population*, 52 CRIME & DELINQ. 3, 507 (2006) (finding that 23.1% of individuals surveyed at adult shelters had a record of incarceration); N. Tejani et al., *Incarceration Histories of Homeless Veterans and Progression Through a National Supported Housing Program*, 50 CMTY. MENTAL HEALTH J. 5, 516 (2013) (finding that 43.4% of individuals who entered a supported housing program for homeless veterans reported a past incarceration history); Martha R. Burt et al., *Homelessness: Programs and the People They Serve, Findings of the National Survey of Homeless Assistance Providers and Clients* (Dec. 1999), <http://webarchive.urban.org/UploadedPDF/homelessness.pdf> (finding that “54% of currently homeless clients have spent some time incarcerated, compared with 45% of formerly homeless clients”). These records may be generated when poor or homeless people commit crimes of desperation. Randeep Ramesh, *A Fifth of all Homeless People Have Committed a Crime to Get Off the Streets*, GUARDIAN (Dec. 22, 2010), <https://www.theguardian.com/society/2010/dec/23/homeless-committing-crimes-for-shelter>.

offenses associated with homelessness, such as camping or begging.¹⁴ And nationwide, approximately 49 percent of homeless adults reported spending five or more days in jail, while 18 percent had been incarcerated in a state or federal prison.¹⁵ Even if inmates were not homeless just before they are arrested or jailed, once they are processed through the criminal justice system, they are more likely to become homeless upon exit.¹⁶

Key drivers for the criminalization of homelessness are increasingly popular laws and policies that seek to expel visibly poor people from public space. In the broadest sense, the term “visibly poor” and its various iterations “encompass individuals currently experiencing homelessness, but also include individuals experiencing poverty in combination with housing instability, mental illness, or other psychological or socio-economic challenges that deprive them of reasonable alternatives to spending all or the majority of their time in public.”¹⁷ In the more specific sense, the term “visibly poor” refers to people experiencing chronic homelessness. Chronic homelessness “is characterized by few spells lasting long periods of time, reflecting a persistent homeless state.”¹⁸ In other words, chronic homelessness is the most visible category compared to other homeless populations

“Since results indicated that the likelihood of committing a nonviolent crime increases as homelessness increases, a strong argument can be made that homelessness encourages nonviolent crime. Rather than thinking of homeless individuals as criminals, it may be more accurate to think of them as people struggling to get by whose engagement in non-violent illegal activities is driven by survival needs.” Sean N. Fischer et al., *Homelessness, Mental Illness, and Criminal Activity: Examining Patterns Over Time*, 42 AM. J. CMT. PSYCH. 251, 262 (2008).

14. See, e.g., COALITION ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 2, <http://www.cohsf.org/Punishing.pdf> (last visited Sept. 14, 2018) (reporting that 69% of homeless respondents were cited for “quality of life” offenses in the year prior to the study; 90% were unable to pay for their last citation, which results in high fees, an arrest warrant, and driver’s license suspension).

15. Burt et al., *supra* note 13.

16. Once burdened with a criminal record, people face extraordinary difficulty finding housing (or employment to pay for housing). Zoe Carpenter, *Think It’s Hard Finding a Place to Live? Try Doing So with a Criminal Record*, NATION (Nov. 4, 2015), <https://www.thenation.com/article/public-housing-criminal-record/>; Pat Hartman, *How to Become Homeless: Have a Criminal Record*, HOUSE THE HOMELESS, INC. (Jan. 31, 2012), <http://www.housethehomeless.org/how-to-become-homeless-have-a-criminal-record/>.

17. Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 6 (2016) (citing, e.g., JOEL BLAU, *THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES* (1993)).

18. Adam M. Lippert & Barrett A. Lee, *Stress, Coping, and Mental Health Differences Among Homeless People*, 85 SOCIOLOGICAL INQUIRY 3, 345 (2015).

because, unlike most cases of homelessness that are briefly episodic or transitional, people experiencing chronic homelessness are homeless more frequently and for longer periods of time.¹⁹ As a more technical matter, chronic homelessness is defined as sleeping in places not meant for human habitation or staying in emergency shelters for a year or longer—or experiencing at least four such episodes of homelessness in the last three years—and also living with a disabling condition such as a chronic health problem, psychiatric or emotional condition, or physical disability.²⁰ These co-occurring conditions help to explain the persistence of their homelessness. By virtue of their sustained visibility in public space, chronically homeless people are the primary target of ordinances punishing homelessness.²¹ These laws, fueled by the stigma of visible poverty, function to purge chronically homeless people from public space.²²

19. *Id.* Chronically homeless individuals are also more likely to live unsheltered, compared to homeless populations generally, which are more likely to benefit from rapid rehousing or other transitional housing interventions.

20. The United States Department of Housing and Urban Development (HUD) defines a disabling condition as “a diagnosable substance abuse disorder, a serious mental illness, developmental disability, or chronic physical illness or disability, including the co-occurrence of two or more of these conditions” that “[l]imits an individual’s ability to work or perform one or more activities of daily living.” U.S. DEP’T OF HOUS. & URBAN DEV. OFFICE OF CMTY. PLANNING & DEV. & OFFICE OF SPECIAL NEEDS ASSISTANCE PROGRAMS, *DEFINING CHRONIC HOMELESSNESS: A TECHNICAL GUIDE FOR HUD PROGRAMS* (Sept. 2007), <https://www.hudexchange.info/resources/documents/DefiningChronicHomeless.pdf>. The nexus between chronic homelessness and disabilities is plain in the federal definition: a “chronically homeless individual” is “an individual with a disability who has been continuously homeless for one year or more or has experienced at least four episodes of homelessness in the last three years where the combined length of time homeless in those occasions is at least 12 months.” U.S. DEP’T OF HOUS. & URBAN DEV. OFFICE OF CMTY. PLANNING & DEV., *THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 2* (Dec. 2017) [hereinafter *AHAR 2017*], <https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf>.

21. Chronic homelessness increases the likelihood of interacting with law enforcement; mental illness commonly associated with chronic homelessness also presents a greater risk of violent outcomes. Mental illness played a role in approximately one quarter of 987 police killings in 2017. Micah Lee & Alice Speri, *Police Broke Into Chelsea Manning’s Home with Guns Drawn—In a “Wellness Check”*, *THE INTERCEPT* (June 5, 2018, 7:13AM), <https://theintercept.com/2018/06/05/chelsea-manning-video-twitter-police-mental-health/> (internal citation omitted). The American Civil Liberties Union reports that, in the first eight months of 2018 alone, police shot and killed at least 64 people who were suicidal or had other mental health issues. *Id.*

22. See generally Rankin, *supra* note 17.

Criminalization laws and policies express collective disdain for visible poverty, but many supporters of criminalization are not aware of how such laws actually make homelessness worse. Many are not aware that criminalization, along with other traditional approaches that manage homelessness, are the most expensive and least effective ways to address it. Some are not prepared to accept evidence that non-punitive alternatives, such as permanent supportive housing, are the most cost-effective ways to solve chronic homelessness. They cannot fathom giving housing or help to someone who does not appear worthy.²³ Such resistance to shifting from criminalization to non-punitive alternatives is fueled by fear, stereotypes, and discrimination.²⁴ But for other supporters of criminalization, they simply do not realize that criminalization is such an urgent problem and that more effective non-punitive alternatives exist.

This article is structured in four parts. Part I of this article lays an important, human-centric context for understanding how homelessness, itself, is punishment. The inherent traumas of homelessness besiege those who experience it. Understanding this context compels more thoughtful legal and policy responses. Part II provides an overview of laws that punish homelessness, gives common examples, and explains how these laws are often constitutionally infirm and make homelessness worse. Part III surveys some reasons why American cities commonly criminalize homelessness, explaining some psychological and sociological motivations, and giving examples of common myths that perpetuate damaging stereotypes and discrimination against people experiencing homelessness. And finally, Part IV examines Housing First and permanent supportive housing, non-punitive alternatives to criminalization, which are proven to be more cost-effective solutions to homelessness.

I. PUNISHING HOMELESSNESS

Being homeless, in and of itself, is punishment. Trauma is both a cause and a consequence of homelessness.²⁵ Poor physical and mental health, abuse, drug and alcohol abuse, and victimization can contribute to the likelihood

23. *Id.* at 21–22.

24. *Id.*

25. Jennifer Castellow, Bret Kloos, & Greg Townley, *Previous Homelessness as a Risk Factor for Recovery from Serious Mental Illness*, 51 CMty. MENTAL HEALTH J. 6, 674–84 (2015) (noting “the experience of homelessness is inherently traumatic and thus has the

that someone will become homeless; however, once a person becomes unsheltered, the likelihood that they will experience such trauma is virtually guaranteed.

Psychiatric disorders affect at least 30 to 40 percent of all people experiencing homelessness.²⁶ Severe mental illness, present in a significant portion of chronically homeless people, “describes severe and persistent psychiatric disability that generally has a profound impact on a person’s behavior, cognition, affect, and social functioning.”²⁷ Common examples include depression, schizophrenia, suicidal ideation, bipolar disorder, and debilitating mood disorders.²⁸ At least half of chronically homeless people struggle with alcohol and drug abuse or both.²⁹ By comparison, approximately one fourth of housed people “meet criteria for any mental or drug/alcohol disorder in the past year.”³⁰ Significantly, studies clearly associate these mental and health disorders with “selected stress and coping measures” inherent in dealing with the trauma of homelessness,³¹ and these traumas are especially and disproportionately concentrated among those experiencing chronic homelessness.³²

Homelessness is also acutely associated with other forms of trauma, such as material deprivation, including lack of shelter, food insecurity, and unmet health care needs.³³ Indeed, homelessness makes mental illness worse: “not only are they at risk related to the detection and treatment of the condition, but the exposure to multiple stressors apart from that vulnerability might actually precipitate or exacerbate the manifestation of symptomatology.”³⁴

potential to affect the manifestations of mental illness,” psychiatric distress, alcohol and drug abuse, and other measures of vulnerability).

26. Lippert & Lee, *supra* note 18, at 344 (citing Barrett A. Lee, Kimberly A. Tyler, & James D. Wright, *The New Homeless Revisited*, 36 ANN. REV. SOC., 501–21 (2010)).

27. Castellow, Kloos, & Townley, *supra* note 25, at 674 n.1.

28. *Id.* at 674; Lippert & Lee, *supra* note 18, at 344 (internal citations omitted).

29. Lippert & Lee, *supra* note 18, at 343.

30. *Id.* (citing Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-month DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES GEN. PSYCHIATRY 617–27 (2005)).

31. *Id.*

32. *Id.* at 345.

33. *Id.* at 347.

34. Castellow, Kloos, & Townley, *supra* note 25, at 675.

Such resource deprivation naturally contributes to poor physical health indicators, such as malnutrition, hunger, lack of medical care and medicine, and “difficulties following treatment protocols.”³⁵ Common examples of health problems that disproportionately affect people experiencing homelessness include “tuberculosis, HIV/AIDS, heart and lung disease, hypertension, hepatitis, and most other infectious and chronic conditions.”³⁶

Physical, sexual, or emotional abuse is another common hallmark of homelessness. More than half of people experiencing homelessness “report some kind of victimization while they are homeless, ranging from theft to beatings and sexual assault.”³⁷ In fact, exposure to violence and victimization disproportionately affects people experiencing chronic homelessness who suffer from severe mental illness, with approximately 80 percent “reporting some form of lifetime victimization.”³⁸ Victimization can be direct or can be experienced indirectly or vicariously by exposure to violence on the streets and in the homeless communities around them.³⁹

Social isolation is a significant traumatizing factor for people experiencing homelessness. “[T]he loss of one’s home and social status can be traumatic and stressful, therefore increasing risk to learned helplessness and social isolation, both of which are prominent contributors to various mental health problems.”⁴⁰ Even the maintenance of social networks to other people experiencing homelessness, such as homeless encampment communities, can help to fulfill critical basic psychological, emotional, and social needs.⁴¹ The potential traumatizing impacts of social isolation are profound, particularly among chronically homeless people.⁴²

II. CRIMINALIZING HOMELESSNESS

The inherent trauma of homelessness is exacerbated by punitive laws and policies that criminalize homelessness. In this context, “criminalization”

35. Lippert & Lee, *supra* note 18, at 347 (internal citations omitted).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 348.

40. Castellow, Kloos, & Townley, *supra* note 25, at 675.

41. Lippert & Lee, *supra* note 18, at 348.

42. *Id.*

refers to laws that prohibit or severely restrict one's ability to engage in necessary life-sustaining activities in public, even when that person has no reasonable alternative.⁴³ Examples include laws that prohibit sitting, standing, sleeping, receiving food, going to the bathroom, asking for help, or protecting one's self from the elements⁴⁴—all basic behaviors necessary for survival. But most people can engage in these behaviors in some private or relatively private place, such as a home or a business.

For people experiencing chronic homelessness, who lack resort to a private place, surviving in public is fraught with risk. Indeed, chronically homeless people are frequently burdened with civil infractions and criminal charges related to their homelessness.⁴⁵ Living in public often triggers criminal charges, such as loitering or trespassing. But living in public also commonly triggers civil infractions: a ticket imposing conditions and requirements, such as an order to show up to court, avoid an area for significant period of time, or pay a fee.⁴⁶ These conditions are extremely difficult for chronically homeless individuals, who are not only poor but also burdened with secondary disabling conditions, to meet. When they fail to do so, because of conditions such as sickness, lack of money, lack of transportation, mental illness, or some other common barrier, a civil infraction can mutate into a misdemeanor through failure-to-appear or failure-to-pay provisions.⁴⁷ Without an address and without sufficient financial

43. Rankin, *supra* note 17, at 41 (internal citations omitted).

44. *Id.* at 44 (citing, e.g., NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 18 (2014), https://nlchp.org/documents/No_Safe_Place; JUSTIN OLSON & SCOTT MACDONALD, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, WASHINGTON'S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT (Sara K. Rankin ed., 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602318; KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA (2010)).

45. CHRISTOPHER MAYER & JESSICA REICHERT, ILL. CRIM. JUSTICE INFO. AUTH. & CTR. FOR JUSTICE RESEARCH AND EVALUATION, THE INTERSECTION OF HOMELESSNESS AND THE CRIMINAL JUSTICE SYSTEM 8 (July 9, 2018), http://www.icjia.state.il.us/assets/articles/Homelessness_PDF.pdf ("Disproportionate contact with the criminal justice system is due to a combination of laws that seem to criminalize the state of homelessness, mental illness, victimization, and substance use disorders."). Further, "these disproportionately high rates are driven by homeless individual who commit minor 'survival crimes.'" *Id.* at 7.

46. See generally BECKETT & HERBERT, *supra* note 44.

47. See, e.g., Melissa Hellmann, *For Homeless Seattleites, a Reprieve from the Debilitating Burden of Warrants*, SEATTLE WEEKLY (Jan. 10, 2018, 1:30AM), <http://www.seattleweekly.com>.

resources, homeless people are often unaware of or unable to respond to these conditions, resulting in bench warrants and crushing legal financial obligations.⁴⁸

Once individuals are saddled with a misdemeanor or a warrant, they are often rendered ineligible to access shelter, food, services, and other benefits that might support their ability to emerge from homelessness.⁴⁹ Even an unpaid civil infraction can generate staggering, insurmountable fees.⁵⁰ By criminalizing public survival, such laws actually render chronically homeless people more resistant to recovery and more likely to remain homeless, to become sick, to self-medicate, to be incarcerated, and even to die.⁵¹

com/news/for-homeless-seattleites-a-reprieve-from-the-debilitating-burden-of-warrants/ (Seattle Municipal Court staff and public defenders opining that many of the nearly 10,000 outstanding warrants issued to people who lack permanent addresses because they are homeless and often unaware they have been ordered to appear).

48. *See, e.g.*, Columbia Legal Servs., *King County Superior Court Rules in Favor of Seattle Resident Whose Vehicle and Home Were Impounded by City* (Mar. 2, 2018), <http://columbialegal.org/king-county-superior-court-rules-favor-seattle-resident-whose-vehicle-and-home-were-impounded-city>.

49. *E.g.*, SUZANNE SKINNER, SEATTLE UNIV. HOMELESS RIGHTS ADVOC. PROJECT, SHUT OUT: HOW BARRIERS OFTEN PREVENT MEANINGFUL ACCESS TO EMERGENCY SHELTER (Sara Rankin ed., May 10, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776421 (explaining that the conditions and rules of many shelters effectively bar many individuals experiencing homelessness from entry to the shelters due to their criminal record, which results from the criminalization of laws that punish individuals for being homeless); *see generally* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012) (writing that “[t]he consequences of these [misdemeanor] convictions are significant: in addition to the stigma of a criminal record, misdemeanants are often heavily fined or incarcerated, and can lose jobs, housing, or education opportunities.”).

50. HARRIS, *supra* note 1; *see also* Vianna Davila, *Judge Rules Seattle Homeless Man’s Truck is a Home*, SEATTLE TIMES (Mar. 3, 2018), <https://www.seattletimes.com/seattle-news/homeless/judge-rules-seattle-homeless-mans-truck-is-a-home/> (ruling that Seattle’s impoundment of a vehicle resident’s truck violated the state’s Homestead Act because he was using it as a home and the city-imposed fees violated constitutional protections against excessive fines).

51. “Exposed on the street, [chronically homeless individuals] suffer from higher rates of poor health, mental illness, and substance abuse when compared to homeless populations generally.” SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, *Frequently Asked Questions About Homelessness*, <https://law.seattleu.edu/Documents/korematsu/FAQs%20About%20Homelessness.pdf> (last visited Sept. 21, 2018) (linking to *Health*, HOMELESS HUB [hereinafter HOMELESS HUB Health], http://www.homelesshub.ca/about-homelessness/topics/health?_ga=2.215176535.155110989.1530558055-2108360416.1526944142 (last visited Sept. 21, 2018)); and *Homelessness and Housing*, SUBSTANCE ABUSE AND MENTAL

The criminalization of homelessness comes at a significant cost, not just to the lives and liberties of poor men, women, and children, but to society overall. Several studies show it is far more expensive to criminalize poverty and homelessness than it is to pursue non-punitive alternatives such as permanent supportive housing, and mental health and substance abuse treatment.⁵² Despite these punishing effects, cities increasingly deploy the strategy of criminalization as a favored response to chronic homelessness.

Criminalization laws take many forms, but are pervasive. Common examples include bans on loitering, loafing, or vagrancy; bans on sitting or lying down in public; begging restrictions; and bans on living in vehicles.⁵³ The National Law Center on Homelessness and Poverty surveyed hundreds of cities nationwide, and found dramatic spikes in criminalization laws in recent years.⁵⁴ For example, over the last decade, city-wide

HEALTH SERVS. ADMIN. [hereinafter SAMHSA Homelessness and Housing] (Sept. 15, 2017), <https://www.samhsa.gov/homelessness-housing>.

52. See, e.g., JOSHUA HOWARD & DAVID TRAN, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE AND SPOKANE, at iii (Sara K. Rankin ed., May 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602530 (examining costs in Seattle and Spokane); GREGORY A. SHINN, RETHINK HOMELESSNESS & IMPACT HOMELESSNESS, THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA: THE CURRENT CRISIS AND THE ECONOMIC IMPACT OF PROVIDING SUSTAINABLE HOUSING SOLUTIONS 8 (2014), <https://shnny.org/uploads/Florida-Homelessness-Report-2014.pdf> (examining costs in Central Florida); SARAH B. HUNTER ET AL., EVALUATION OF HOUSING FOR HEALTH PERMANENT SUPPORTIVE HOUSING PROGRAM, RAND CORPORATION, at viii (2017), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1694/RAND-RR1694.pdf (examining costs in Los Angeles County). In 2016 alone, Los Angeles police arrested 14,000 people experiencing homelessness for everyday activities such as sitting on the sidewalk. Gale Holland & Christine Zhang, *Huge Increase in Arrests of Homeless in L.A.—But Mostly for Minor Offenses*, L.A. TIMES (Feb. 4, 2018, 8:20AM), <http://www.latimes.com/local/politics/la-me-homeless-arrests-20180204-story.html>. In San Francisco, the City/County Budget analyst's office determined that it cost \$20 million in a single year to enforce prohibitions against loitering, panhandling, and so on against people experiencing homelessness. Adam Brinklow, *San Francisco Spends \$20 Million on Anti-Homeless Laws: Millions of Dollars Resulted in 125 Arrests in 2015*, CURBED (June 3, 2016, 10:30AM), <https://sf.curbed.com/2016/6/3/11852832/homeless-san-francisco>.

53. For more information and resources on this topic, see *The Criminalization of Homelessness: Additional Resources*, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, <https://law.seattleu.edu/centers-and-institutes/korematsu-center/initiatives/homeless-rights-advocacy-project/additional-resources> (last visited Sept. 14, 2018).

54. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 10 [hereinafter NLCHP

bans on camping in public increased by 69 percent; city-wide bans on begging increased by 43 percent; city-wide bans on standing around increased by 88 percent; and bans on sitting or lying down increased by 52 percent.⁵⁵ Bans on sleeping in vehicles—the thin tin line that separates a human being from the street—increased by a staggering 143 percent nationwide since 2006.⁵⁶

Statewide studies also suggest the dizzying popularity of criminalization laws.⁵⁷ In Washington state, for example, criminalization laws are not only prevalent,⁵⁸ but many people spend over 90 days in jail for violating these laws.⁵⁹ Moreover, Washington state data suggests that as rates of income disparity rise in any particular city, so does the rate at which that city enforces its criminalization laws.⁶⁰ In other words, the greater the gap between the rich and the poor in a particular city, the more punitive that space becomes for the poor people within its boundaries.

HOUSING NOT HANDCUFFS], <https://www.nlchp.org/documents/Housing-Not-Handcuffs> (last visited Sept. 27, 2018) (finding that “laws punishing the life-sustaining conduct of homeless people has [*sic*] increased in every measure category since 2006, and in some cases dramatically so.”).

55. *Id.* at 10–11.

56. *Id.* at 11.

57. *See, e.g.*, OLSON & MACDONALD, *supra* note 44 (Washington state study); UC BERKELEY SCH. OF LAW POLICY ADVOCACY CLINIC, CALIFORNIA’S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE (Feb. 12, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558944 (California study) RACHEL A. ADCOCK ET AL., UNIV. OF DENVER, STURM COLL. OF LAW, HOMELESS ADVOCACY POLICY PROJECT, TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO, <https://www.law.du.edu/documents/homeless-advocacy-policy-project/2-16-16-Final-Report.pdf> (last visited Sept. 14, 2018) (Colorado study); ALLARD K. LOWENSTEIN, INTERNATIONAL HUMAN RIGHTS CLINIC, YALE L. SCH., “FORCED INTO BREAKING THE LAW”: THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT (Nov. 2016), https://law.yale.edu/system/files/area/center/schell/criminalization_of_homelessness_report_for_web_full_report.pdf (Connecticut study).

58. *E.g.*, OLSON & MACDONALD, *supra* note 44, at 3 (surveying criminalizing ordinances in Washington and finding that 78% of surveyed municipalities criminalize sitting or standing in public, 78% of surveyed municipalities criminalize sleeping in public places, and 75% criminalize urination or defecation in public).

59. *E.g.*, *id.* at ii (finding that in Washington, “custody times revealed a high number of individuals spending more than 90 days in jail for violating criminalization ordinances”).

60. *E.g.*, *id.* (“As rates of income disparity rise, so does the rate of citations issued for purported violations of criminalization ordinances.”).

Although criminalization laws are increasingly popular, they are also commonly and successfully challenged as unconstitutional under various provisions of the federal Constitution, including the First, Fourth, Sixth, Eighth, and Fourteenth Amendments.⁶¹ Recently, favorable results have been reported in 75 percent of cases challenging encampment sweeps or seizure and destruction of homeless people's belongings, 57 percent of cases challenging anti-camping or sleeping laws, and 100 percent of the cases challenging anti-begging laws.⁶²

Criminalization laws are often unconstitutional, make homeless people less likely to emerge from homelessness, and waste public resources and taxpayer dollars. Still, cities persist, seeking new ways to skirt constitutional restrictions to achieve the same desired result of pushing homeless people away from public view.⁶³ A closer look at a few specific examples of criminalization laws reveals not only their common constitutional infirmities, but their punishing impact on already vulnerable people.

A. Punishing Unauthorized Communities

The growing number of unauthorized encampments reflect the reality that many cities lack sufficient emergency shelter and transitional housing. With no safe and legal place to go, many homeless people find community in unauthorized encampments. Encampments can offer several benefits to people experiencing homelessness, such as a sense of safety, security, community, autonomy, stability; they can also lessen health care burdens.⁶⁴

61. *See, e.g.*, NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL II [hereinafter NLCHP LITIGATION MANUAL], <https://www.nlchp.org/documents/Housing-Not-Handcuffs-Litigation-Manual> (last visited Sept. 14, 2018).

62. *Id.* at 6.

63. JOCELYN TILLISCH & DREW SENA, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, BEGGING FOR CHANGE: BEGGING RESTRICTIONS THROUGHOUT WASHINGTON 3 (Sara Rankin & Justin Olson eds., 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173191 (writing that cities are attempting to circumvent First Amendment jurisprudence by enacting aggressive begging laws that “hinge on subjective perceptions of the person being solicited for help—for example, a person might be guilty of aggressive begging if someone listening to them feels intimidated, regardless of the means and manner of the solicitation.” (internal citation omitted)).

64. EVANIE PARR, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, IT TAKES A VILLAGE: PRACTICAL GUIDE FOR AUTHORIZED ENCAMPMENTS 4–5 (Sara K. Rankin ed., 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173224.

As the population of unsheltered people experiencing homelessness has increased across the country, so have encampments. One national study found a 1,342 percent increase in the number of encampments reported across the country.⁶⁵ Encampments have been reported in every state and the District of Columbia.⁶⁶ In response to growing encampments, many cities sweep unauthorized homeless encampments.⁶⁷ Sacramento County alone closed 1,579 camps in 2016.⁶⁸

Through sweeps, cities disrupt and evict encampment residents without providing a safe and legal alternative place for them to go. Such sweeps often provoke Fourth Amendment challenges.⁶⁹ The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”⁷⁰ Some cases turn on whether tents or other makeshift shelters fall within the Fourth Amendment’s prohibition of unreasonable searches of one’s “home” or “house.”⁷¹ Advocates argue that privacy rights should not apply only to conventional homes with four walls and a lockable door; such constructions could effectively mean that unsheltered people have no Fourth Amendment protections.⁷² Courts often agree: although governments may conduct sweeps to clean public areas, seizing and destroying encampment residents’ personal property often violates their Fourth Amendment rights to be free from unreasonable searches and seizures.⁷³

65. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, TENT CITY, USA: THE GROWTH OF AMERICA’S HOMELESS ENCAMPMENTS AND HOW COMMUNITIES ARE RESPONDING 21 (2017), https://www.nlchp.org/Tent_City_USA_2017.

66. *Id.*

67. NLCHP HOUSING NOT HANDCUFFS, *supra* note 54, at 8; OLSON & MACDONALD, *supra* note 44.

68. *Latest Ranger Activity Data, Ranger Activity Reports*, SACRAMENTO COUNTY REGIONAL PARKS, <http://www.regionalparks.saccounty.net/Rangers/Pages/Latest-Ranger-Activity-Data.aspx> (last visited Sept. 21, 2018).

69. NLCHP LITIGATION MANUAL, *supra* note 61, at II.

70. U.S. Const. Amend. IV. In addition, the Fourth Amendment provides that “No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *Id.*

71. *See, e.g.*, Evanie Parr, Note, *When a Tent is Your Castle: Constitutional Protection Against Unreasonable Searches of Makeshift Dwellings of Unhoused Persons*, 42 SEATTLE U. L. REV. (forthcoming Jan. 2019).

72. *Id.*

73. NLCHP LITIGATION MANUAL, *supra* note 61, at II; *e.g.*, *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012) (finding that Los Angeles violated the Fourth and Fourteenth

Homeless plaintiffs can also prevail on due process claims under the Fourteenth Amendment when cities fail to follow certain procedures when managing confiscated private property.⁷⁴

But in addition to often being illegal, sweeps frequently inflict real and lasting damage on people experiencing homelessness. Sweeps not only displace homeless people from public space, they also exact significant emotional and psychological tolls on encampment residents.⁷⁵ Sweeps often devour and destroy encampment residents' valuable property, such as state identification cards, social security cards, passports, and birth certificates.⁷⁶ Personal identification cards are needed to qualify for countless services and are difficult to replace.⁷⁷ Items of significant sentimental value such as photos of lost family members, or vital property such as medication, are commonly taken or destroyed.⁷⁸

The loss of these items can be devastating to homeless people. For example, the loss of identification documents can make it difficult, if not impossible, for someone to access employment, gain access to housing, or

Amendment rights of individuals experiencing homelessness by "seizing and immediately destroying their unabandoned personal possessions, temporarily left on public sidewalks while [the individuals] attended to necessary tasks such as eating, showering, and using the restrooms").

74. See, e.g., *Mitchell v. City of Los Angeles*, Case No.: 16-cv-01750 SJO (JPR) (C.D. Cal. Apr. 2016).

75. See, e.g., TAI DUNSON-STRANE & SARAH SOAKAI, DEP'T OF URBAN & REG'L PLANNING UNIV. OF HAWAII AT MANOA, THE EFFECTS OF CITY SWEEPS AND SIT-LIE POLICIES ON HONOLULU'S HOUSELESS 25 (June 2015), http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small_.pdf.

76. In a 2011 survey by the Law Center of homeless service providers, advocates, and homeless individuals in 26 states, over 75% of respondents reported that sweeps of homeless people in their communities have resulted in the loss of homeless persons' valuables, medications, identification documents, or other personal items. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 21 (Nov. 2011), https://www.nlchp.org/Criminalizing_Crisis. Similarly, a survey of homeless adults at three large homeless encampments in Honolulu, Hawai'i, in February and March of 2015, found that the single largest effect of sweeps in that area was "significant property and economic losses," including loss of property needed to survive in public space. DUNSON-STRANE & SOAKAI, *supra* note 75, at 4. Monetary losses can also occur in the form of citations, which were given out to half of encampment residents in one study of Honolulu. *Id.* at 16. For a broader look at the detrimental impact of citations, see generally COALITION ON HOMELESSNESS, *supra* note 14.

77. DUNSON-STRANE & SOAKAI, *supra* note 75, at 24–25.

78. *Id.* at 22.

even to exercise their basic right to vote.⁷⁹ The loss of warm clothing, protective tents, and medication directly threatens the health of already vulnerable people.⁸⁰ Sweeps also create or worsen existing physical and mental health problems for those experiencing chronic homelessness, who are particularly vulnerable to such harms.⁸¹

Meanwhile, sweeps are ineffective at reducing homelessness. For example, California's state transportation agency eliminated 217 homeless encampments between July 2014 and February 2015, only to have some reopen the very same day.⁸² Sweeps are often conducted, as in Seattle, when there are no adequate alternative places to live. Because this exercise merely disperses, rather than reduces, homelessness, new encampments inevitably reappear.⁸³ Indeed, sweeps can actually worsen the problem of unsheltered homelessness and make it less likely for people to enter or remain in homeless services.⁸⁴

This forced displacement of already vulnerable people, especially in the absence of adequate housing or shelter alternatives, leaves them with no safe and legal place to go. Meanwhile, sweeps can create real harm to encampment residents by disrupting whatever fragile community may have existed, forcing people to constantly move, and sending “a message to people experiencing homelessness that they are not allowed anywhere.”⁸⁵

79. NLCHP HOUSING NOT HANDCUFFS, *supra* note 54.

80. *See, e.g.*, Kincaid v. City of Fresno, 2006 WL 3542732 (E.D. Cal. 2006). In *Kincaid*, a Fresno police officer destroyed the asthma medication and nebulizer machine that a homeless woman, Jeannine Nelson, needed to breathe. *Id.* at *11 (E.D. Cal. 2006). The destruction of this property landed Ms. Nelson in the emergency room, a costly medical intervention, and required her to eventually replace her medications and breathing machine—all at taxpayer expense. *Id.*

81. *See generally* INSTITUTE OF MEDICINE (US) COMMITTEE ON HEALTH CARE FOR HOMELESS PEOPLE, HOMELESSNESS, HEALTH, AND HUMAN NEEDS (1988), <https://www.ncbi.nlm.nih.gov/books/NBK218236/>.

82. COALITION ON HOMELESSNESS, *supra* note 14, at 27.

83. NLCHP HOUSING NOT HANDCUFFS, *supra* note 54.

84. For example, in a report from the University of Hawaii at Manoa, 21% of homeless people subjected to sweeps reported that they were less able or less likely to seek shelter. DUNSON-STRANE & SOAKAI, *supra* note 75, at 19.

85. SAMIR JUNEJO & SUZANNE SKINNER, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, NO REST FOR THE WEARY: WHY CITIES SHOULD EMBRACE HOMELESS ENCAMPMENTS 6 (Sara K. Rankin ed., May 11, 2016), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1006&context=hrap>.

But sweeps also punish the broader community because they do nothing to solve homelessness; instead, they are a costly, rotating door that wastes taxpayer dollars. Certainly sweeps might appease constituents by creating a temporary illusion that homelessness is being solved when it is not. But by failing to ensure a safe and legal place for homeless people to exist, sweeps are an expensive exercise in displacement, generating municipal expenses of millions of dollars by forcing chronically homeless people from one place to another. In 2017, for example, Seattle spent \$10 million on homeless sweeps alone.⁸⁶ For 2018, Seattle is reported to be doubling the rates of sweeps;⁸⁷ accordingly, it is on pace this year to spend \$20 million displacing homeless people. If this \$20 million were redirected from sweeps to permanent supportive housing, Seattle could end homelessness for approximately 37 percent of its chronically homeless population.⁸⁸ But there is no indication that such cities are relenting.⁸⁹

B. Punishing Sleeping, Lying Down, Sitting, or Protecting Oneself from the Elements

Other common criminalization laws ban or severely restrict camping, sleeping, lying down, or sitting in public. Because many cities lack sufficient affordable housing or shelter space, homeless people are often left

86. Chris Daniels, *Seattle Spent \$10 Million on Homeless Sweeps in 2017*, K5 NEWS (May 28, 2018, 8:28PM PDT), <https://www.king5.com/article/news/local/homeless/seattle-spent-10-million-on-homeless-sweeps-in-2017/281-554503199>.

87. Erica C. Barnett, *City Accelerates Homeless Encampment Removals, Doubling Pace in 2018*, THE C IS FOR CRANK (Aug. 21, 2018), <https://thecisforcrank.com/2018/08/21/homeless-encampment-removals-accelerated-this-year-doubling-in-pace-since-january/>.

88. See, e.g., *Introduction to Housing First/Permanent Supportive Housing*, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT (July 11, 2018), <https://law.seattleu.edu/Documents/korematsu/Introduction%20to%20Housing%20First%20and%20Permanent%20Supportive%20Housing.pdf> (explaining that, on average, it costs approximately \$16,000 to \$22,000 to provide permanent supportive housing to each chronically homeless individual). This projection is based on dividing \$20 million by the \$16K baseline number, suggesting that \$20 million could fund approximately 1,250 new units, which would house 37% of the 3,552 chronically homeless people in King County, based on the 2018 point-in-time count.

89. See, e.g., Vianna Davila, *San Francisco is Cracking Down on Tent Camps. Will Seattle do the Same?*, SEATTLE TIMES (Sept. 20, 2018, 6:00AM), <https://www.seattletimes.com/seattle-news/homeless/san-francisco-is-cracking-down-on-tent-camps-will-seattle-do-the-same/>.

with no reasonable alternative but to conduct these unavoidable activities in public spaces.

The Ninth Circuit recently addressed the question of whether cities can punish homeless people for such activities in *Martin v. City of Boise*.⁹⁰ Given the particular prevalence of homelessness in Western states within the Ninth Circuit,⁹¹ *Martin* has extraordinary implications for the criminalization of homelessness. The plaintiffs, a group of people currently or formerly experiencing homelessness in Boise, Idaho, alleged that the city violated their Eighth Amendment rights⁹² by outlawing sleeping or camping in public under its Camping and Disorderly Conduct Ordinances, even when the City failed to offer sufficient shelter.⁹³ Boise sits within Ada County, where approximately 125 unsheltered individuals live.⁹⁴ The City's three shelters offer a total of "354 beds and 92 overflow mats."⁹⁵ One shelter "is open to men, women, and children of all faiths"; it has 96 beds, but is routinely full.⁹⁶ A second shelter is open to men only, and the third is open exclusively to women and children.⁹⁷ The latter two also require adherence to certain religious classes or otherwise impose religious messages on those seeking shelter.⁹⁸ The court held that Boise could not "criminalize indigent, homeless people for sleeping outdoors, on public property, on the

90. *Martin v. City of Boise*, No. 145-35845 (9th Cir. Sept. 4, 2018).

91. States in the Ninth Circuit have been hit especially hard by the increase in unsheltered populations. California, Nevada, Oregon, and Hawaii are the only four states in which more than half of all people experiencing homelessness were staying in unsheltered locations. AHAR 2017, *supra* note 20, at 12. The State of California alone had nearly half of all unsheltered people in the country. *Id.* The State of Washington is also experiencing an unprecedented unsheltered homeless crisis. According to the Washington State Department of Commerce, the number of people experiencing homelessness in Washington State has increased since 2013. See *Why is Homelessness Increasing?*, WASH. DEPT' OF COMMERCE (Jan. 2017), <https://www.commerce.wa.gov/wp-content/uploads/2017/01/hau-why-homelessness-increase-2017.pdf>.

92. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amend. VIII. The *Martin* court's analysis of the Eighth Amendment is detailed at pages 28–33. *Martin*, *supra* note 90, at *28–33.

93. *Id.* at *5.

94. *Id.* at *6–7.

95. *Id.* at *9.

96. *Id.* at *7.

97. *Id.* at *8.

98. *Id.* at *9.

false pretense they had a choice in the matter.”⁹⁹ The court reasoned that the Eighth Amendment’s prohibition against cruel and unusual punishment precluded enforcement of the law prohibiting homeless residents from conducting such activities in public when they have no reasonable alternative but to do so.¹⁰⁰

Thus, *Martin* stands for the proposition that laws criminalizing homelessness are unconstitutional when (1) a city punishes a homeless person for engaging in necessary, life-sustaining activity in public; (2) that person has no reasonable alternative but to survive in public space; and (3) existing shelters are inadequate in number or are functionally accessible to their homeless population.

Martin also clarifies that determining whether a city provides reasonable alternatives is not a simple mathematical calculation of shelter beds. Instead, that sufficient reasonable alternative shelter must be functionally accessible. In *Martin*, the religious requirements imposed as a condition to accessing many shelter beds created an unacceptable barrier; therefore, those beds were not reasonable alternatives.¹⁰¹

Martin is also significant because many shelters throughout the country not only lack capacity, they also impose various barriers to entry that render them functionally inaccessible to many homeless people.¹⁰² For example, a “shortage of emergency shelters leads to overcrowding, which creates unhealthy, unsanitary, and even dangerous conditions in some shelters.”¹⁰³ A complex system of rules and regulations also commonly creates obstacles to access.¹⁰⁴ Common requirements force families or partners to split up, exclude LGBTQ youth or pet owners, or “refuse admittance to substance abusers and the mentally ill.”¹⁰⁵ These common barriers apply to many chronically homeless individuals, excluding them and forcing them to

99. *Id.* at *3.

100. *Id.* at *28–33.

101. *Id.*

102. See SKINNER, *supra* note 49.

103. *Id.* at 2.

104. *Id.*; see also Castellow, Kloos, & Townley, *supra* note 25, at 675 (“[T]he simple act of accessing and utilizing services can be unpredictable and dangerous; the network of resources for people experiencing homelessness is intricate, frustrating, and time-consuming. Shelters, although often essential commodities, can be disruptive and unsafe as multiple individuals from various backgrounds are placed in most quarters with minimal regulation.”).

105. SKINNER, *supra* note 49, at 2.

remain on the street. *Martin* pushes cities to reconsider the punitive, widespread, and cumulative impact of such common barriers to accessing shelter. Several cities are already taking note of *Martin*, proactively declining to enforce existing anti-camping laws.¹⁰⁶

Still, other cities, like Seattle, suggest that they are not criminalizing homelessness because they do not always charge or cite for violations but instead issue move-along warnings.¹⁰⁷ Such positions miss the point. Not only did the *Martin* case reject similar arguments made by the City of Boise,¹⁰⁸ but move-along warnings are a prevalent form of criminalization that has “detrimental consequences for wide swaths of the homeless population.”¹⁰⁹ Such warnings are a form of punishment, conducted under the explicit or implicit threat of criminal prosecution, and thus press against the essential boundaries of the Eighth Amendment—whether it is illegal to be poor, whether having no housing is a crime, or whether resting in public space is against the law.

Moreover, as a policy matter, move-along warnings are highly problematic. Move-along orders “are not recorded or reported in many jurisdictions,” amounting to a “virtually invisible practice [that is] common, pervasive, and potent.”¹¹⁰ In terms of punishing homelessness, criminal charges and civil citations may well represent the tip of the proverbial iceberg: below the surface lurks the virtual guarantee of constant exposure to move-along orders and threats of arrest, resulting in forced displacement, social isolation, destruction of property, loss of community, heightened interpersonal conflict, and increased fear of engagement with police.¹¹¹

106. See, e.g., Maggie Vespa, *Portland Police Will Not Cite Homeless for Sleeping on Streets, Citing Court Ruling*, KGW8 (Sept. 7, 2018), <https://www.kgw.com/article/news/local/homeless/portland-police-will-not-cite-homeless-for-sleeping-on-streets-citing-court-ruling/283-591977968>.

107. E.g., Vianna Davila, *Federal-Court Ruling on Homeless Camps Won't Affect Seattle, City Attorney Says*, SEATTLE TIMES (Sept. 7, 2018, 5:13PM), <https://www.seattletimes.com/seattle-news/homeless/federal-court-ruling-on-homeless-camps-wont-affect-seattle-city-attorney-says/> (quoting Seattle City Attorney Pete Holmes: “Seattle has no blanket citywide policy that criminalizes sleeping outside, therefore we don’t expect that this decision will affect the way the City is able to respond to people living outdoors[.]”).

108. *Martin*, *supra* note 90, No. 145–35845, *at 18–19.

109. Christopher Herring, Dilara Yarbrough, & Lisa Marie Alatorre, *Pervasive Penalty: How the Criminalization of Homelessness Perpetuates Poverty*, SOC. PROBS. (forthcoming 2019).

110. TILLISCH & SENA, *supra* note 63, at 31.

111. See, e.g., Herring, Yarbrough, & Alatorre, *supra* note 109, at 11 (noting that in San Francisco, “over 80% of homeless complaints are not resolved through citation or arrest, but

Exacting punishment through move-along warnings is also costly and futile. Aside from the obvious expenses associated with law enforcement time, move-along orders, like the enforcement of criminalization laws generally, do not serve as an effective deterrent.¹¹² Move-along warnings do not move homeless people indoors. Instead, common responses to such orders are to simply move “down the street, around the corner, or to walk around” and return after police depart.¹¹³ Accordingly, move-along warnings are persistent and pervasive punishments of homelessness.

C. Punishing Requests for Help or Acts of Giving Help

Homeless people are commonly associated with needing help or charity. The First Amendment provides fundamental protection to requests for help and acts of giving it. Among other provisions, the First Amendment protects freedom of speech and religion.¹¹⁴ In homeless rights advocacy, the First Amendment commonly applies to laws that restrict both begging and food sharing. Peaceful begging is, at its most fundamental level, a request for help.¹¹⁵ Members of the faith community commonly share food with homeless people as an expression of their faith.¹¹⁶ Accordingly,

by police warnings and requests that homeless people stop engaging in activities that violate the law”). For example, recent surveys in San Francisco show that 70% of homeless individuals had been forced to move from public space by law enforcement; over one third experienced such displacement at least once a month, and 20% on a weekly basis. For chronically homeless people, forced displacement through move-along orders was much more common: approximately 90% were forced to move at least once in the past year, and nearly 50% were evicted from public spaces monthly. *Id.* at 12.

112. NLCHP HOUSING NOT HANDCUFFS, *supra* note 54, at 12 (“In addition to being futile, use of ‘move along’ orders discriminates against homeless people who have not violated any laws, and who are merely present in public.”).

113. Herring, Yarbrough, & Alatorre, *supra* note 109, at 22.

114. “Congress shall make no law respecting an establishment of *religion*, or prohibiting the free exercise thereof; or abridging the *freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Const. Amend. I. (emphasis added).

115. TILLISCH & SENA, *supra* note 63.

116. See generally Marc-Tizoc González, *Hunger, Poverty, and the Criminalization of Food Sharing in the New Gilded Age*, 23 J. OF GENDER, SOCIAL POLICY & L. 2 (2015); see also Joshua Stewart, *After a Hiccup with Permits, a Pacific Beach Church is Back to Feeding the Homeless*, SAN DIEGO UNION-TRIBUNE (June 10, 2017), <http://www.sandiegouniontribune.com/news/homelessness/sd-me-church-homeless-20170610-story.html>; *City of Philadelphia Sued Over New Regulations that Prevent Religious Groups from*

laws that prohibit or severely restrict begging or food sharing are often successfully challenged as violating First Amendment rights.

Indeed, since the U.S. Supreme Court's 2015 decision in *Reed v. Town of Gilbert*, courts have uniformly rejected laws restricting begging. *Reed* actually had nothing to do with begging: it involved a city ordinance that provided different restrictions for signs depending on their content.¹¹⁷ A small church brought a First Amendment challenge, contending that the law discriminated against free speech because church and other non-profit signs were subjected to the highest regulations, while other messages were not.¹¹⁸ The Court agreed.¹¹⁹ It held that the law impermissibly discriminated against certain kinds of speech, but not others.¹²⁰ In its reasoning, the Supreme Court stressed that the government cannot restrict speech based on its content or single out one form of speech over another based on the perceived worthiness of the speech.¹²¹ The *Reed* decision cleared the way for cases challenging begging restrictions that disfavor even peaceful requests for help, a protected form of free speech.¹²²

Many cities have caught on and recast their begging restrictions as so-called “aggressive begging” laws, even though many of these laws can encompass even non-aggressive conduct.¹²³ Violations can be triggered solely on a witness's subjective perception: If someone witnesses begging and feels fearful or even feels “compelled” to give, such feelings may be

Providing Food for the Homeless in City Parks, AM. CIVIL. LIBERTIES UNION PA (June 5, 2012), <https://www.aclupa.org/news/2012/06/05/state-house-committee-passes-bill-to-increase-spying-power-of-government-and-civilians,-says-aclu-of-pa>.

117. Specifically, the ordinance differentiated among signs based its content. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015). The law provided the greatest flexibility and fewest restrictions for political and ideological signs. The church's signs and some other non-profit, event-related signs could only be six square feet, displayed for no more than fourteen hours, and were limited to four per property. *Id.* at 2225. Other restrictions applied to the other two categories. *Id.* at 2224–25.

118. *Id.* at 2226.

119. *Id.* at 2223.

120. *Id.*

121. *Id.* at 2229 (“Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppressed disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e. ‘the abridg[ement] of speech’—rather than merely the motives of those who enacted them.” (internal citation omitted)).

122. TILLISCH & SENA, *supra* note 63, at 12.

123. *Id.* at 3.

sufficient to make begging criminal even if the person begging has not engaged in any objectively aggressive conduct.¹²⁴ Such reliance on whether a witness “subjectively” feels fear is highly problematic in light of studies proving people tend to feel fear simply when viewing a homeless person, regardless of that person’s conduct.¹²⁵ Accordingly, homeless rights advocates have recommended that cities repeal begging restrictions and instead rely on existing laws, such as assault, battery, or harassment, to address truly aggressive behavior.¹²⁶

Some cities also seek to punish those who try to help homeless people, including through food-sharing restrictions.¹²⁷ “United States cities are enacting ordinances that regulate, under threat of criminal punishment, sharing food with hungry people in public properties, like parks, sidewalks, and streets.”¹²⁸ Such restrictions not only limit food availability to homeless people, but they also subject individuals or organizations, often faith-based organizations, to fines or criminal charges for sharing food. Perhaps the most infamous instance of a city’s enforcement of an anti-food-sharing law was in Fort Lauderdale, Florida, where police arrested a 90-year-old veteran and two pastors attempting to feed homeless neighbors.¹²⁹ More recently, California Governor Brown approved Assembly Bill 2178, which reaffirms criminal sanctions against “temporary” feeding operations.¹³⁰ Advocates maintain that such food-sharing restrictions are constitutionally or statutorily infirm under judicial precedent and the Religious Land Use

124. *Id.* at 20.

125. Rankin, *supra* note 17, at 6–7.

126. TILLISCH & SENA, *supra* note 63, at iv.

127. David L. Abney, *Religion and Housing for the Homeless: Using the First Amendment and the Religious Land Use Act to Convert Religious Faith into Safe, Affordable Housing*, 8 ST. MARY’S L. REV. ON MINORITY ISSUES I (2005).

128. González, *supra* note 116, at 47.

129. This event received national media coverage. See, e.g., Peter Holley, *After 90-Year-Old is Arrested Florida Judge Halts Law that Restricts Feeding the Homeless*, WASH. POST (Dec. 3, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/12/03/after-90-year-old-is-arrested-florida-judge-halts-law-that-restricts-feeding-the-homeless/?utm_term=.03c40f009e2d.

130. Cal. Assembly Bill 2178 (2018) (enacted). For an initial analysis of the AB 2178’s predictable negative impacts on hungry people and the religious and political activists who peaceably assemble to publicly share food with them, see Marc-Tizoc González, *California Assembly Bill 2178 Threatens Food Sharing Throughout the State*, FOOD SHARING LAW (Sept. 18, 2018), <https://foodsharinglaw.net/2018/09/18/california-assembly-bill-2178-threatens-food-sharing-throughout-the-state/>.

and Institutionalized Persons Act (RLUIPA).¹³¹ Food-sharing restrictions have decreased slightly, perhaps due to recent successful challenges in some high-visibility cases.¹³² But at least 6 percent of cities still punish sharing food with people experiencing homelessness.¹³³

III. WHY WE CRIMINALIZE HOMELESSNESS

Criminalizing homelessness is often illegal, always expensive, and generally ineffective. If criminalizing homelessness is such a bad idea, why do cities across the country continue to do it? A persistent contributor of the criminalization of homelessness is the power of our instinctive response to visible poverty. Americans are stained by “the influence of exile”: deeply ingrained class and status distinctions that can inconspicuously, even unconsciously guide us to create and enforce laws and policies that restrict the visibility of poverty—of poor people—in public space.¹³⁴

Studies suggest that Americans react to evidence of visible poverty with higher rates of negativity than to any other marginalized trait, including traits historically associated with discrimination, such as race or gender.¹³⁵ Exposure to evidence of human struggle or desperation commonly provokes fear, annoyance, disgust, or anger from those who witness it.¹³⁶ Other researchers explain that disgust of visible poverty expresses “a behavioral immune system,” activated by an association of homeless people with “pathogens,” a human expression of disease, lack of cleanliness, or disorder.¹³⁷ These deeply rooted “physiological mechanisms” compel us to prevent contact with homeless people because we implicitly associate

131. See, e.g., Marc-Tizoc González, *Criminalizing Charity: Can First Amendment Free Exercise of Religion, RFRA, and RLUIPA Protect People who Share Food in Public?*, 7 U.C. IRVINE L. REV. 291, 300, 320–21, 323, 335–37 (2017) (discussing California-based litigation brought by religious food-sharing plaintiffs under RLUIPA).

132. See, e.g., *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, No. 16–16808 (11th Cir. Aug. 22, 2018).

133. NLCHP HOUSING NOT HANDCUFFS, *supra* note 54, at 10.

134. Rankin, *supra* note 17, at 7.

135. *Id.* at 17.

136. *Id.* at 7.

137. Scott Clifford & Spencer Piston, *Explaining Public Support for Counterproductive Homelessness Policy: The Role of Disgust*, 39 POLIT. BEHAV. 2, 507–509 (2017).

them with disease, perceiving them as “pathogenic threats” we must avoid through “physical distancing” to avoid potential contamination.¹³⁸

This deeply rooted, often unconscious, stigmatization of visible poverty is expressed in common mythologies about homelessness. For example, a persistent myth is that homelessness is a consequence of bad choices. But the top five causes of homelessness are lack of affordable housing, lack of a living wage, domestic violence, medical bankruptcy, and untreated mental illness.¹³⁹ These causes can happen to anyone. Trauma can also play a large role.¹⁴⁰ When coping with mental illness or addiction, maintaining independent housing may not be feasible. Lawyers, doctors, film directors, entrepreneurs, university professors, professional musicians, and many others have experienced homelessness.¹⁴¹ Anyone can become homeless if they cannot pay for housing and lack other resources or support.

Many causes of homelessness have nothing to do with choice.¹⁴² For example, many homeless women are survivors of domestic abuse.¹⁴³ These women lack a support system and may be unable to seek resources. If they depend on their abuser for financial stability, they will face challenges in

138. *Id.* at 507.

139. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES (Jan. 2015), https://www.nlchp.org/documents/Homeless_Stats_Fact_Sheet.

140. *Trauma*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS, ADMIN., <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/trauma> (last visited Sept. 14, 2018) (“Homelessness is traumatic . . . Some such people, particularly women, may have histories of trauma, including sexual, psychological, or physical abuse.”).

141. Jens Erik Gould, *Down and Out in L.A.: When the Middle Class Goes Homeless*, TIME (Sept. 2, 2011), <http://content.time.com/time/nation/article/0,8599,2090997,00.html> (writing that there has been an increase in homeless families that were once “secure members of the middle class,” such as movie producers and collections agents); Emily Crane, *California's Hidden Homeless: Teachers, Chefs, Nurses and Other Middle Class Workers Living in Cars in Parking Lots Because of the State's Crazy Property Prices*, DAILY MAIL (Dec. 26, 2017), <https://www.dailymail.co.uk/news/article-5212977/Californias-middle-class-homeless-living-parking-lots.html> (“Hundreds of people, including nurses and chefs, are sleeping in parking lots in affluent areas like Santa Barbara as they make the most of the only homes they can afford.”); see also Charles Mudede, *Seattle's New Normal: Homelessness is Now Middle Class*, THE STRANGER (Mar. 23, 2018), <https://www.thestranger.com/slog/2018/03/23/25950929/seattles-new-normal-homelessness-is-now-normal>.

142. See LURIE & SCHUSTER, *supra* note 4.

143. *Id.* at 14 (“Homelessness has a discriminatory impact on female victims of domestic violence in Washington State. Mirroring the national data, domestic violence is a leading cause of homelessness for women and children statewide.” (internal citation omitted)).

finding the money for a new home, especially if they have been prevented from working by their abuser.¹⁴⁴ Veterans also suffer homelessness disproportionately due to trauma, poverty, lack of support networks, and dismal living conditions in overcrowded or substandard housing.¹⁴⁵

Some attempt to support such a “homeless by choice” narrative by pointing to statistics showing some unsheltered people decline offers of services or emergency shelter.¹⁴⁶ But many cities lack sufficient shelter, not only due to an insufficient number of beds, but also due to the functional inaccessibility of existing shelter. Some people sleep outside rather than in shelters because they do not fare well in crowded environment, or they fear having to leave pets and belongings outside.¹⁴⁷ In addition, many shelters and homeless housing programs have stringent eligibility criteria and rules that screen out the most vulnerable people.¹⁴⁸ Finally, most shelters are a place to sleep for a few hours, not a place to live. Moreover, offers of services and treatment, without also offering stable housing, are unlikely to benefit someone who must return to the trauma of homelessness after a session of service.

Setting aside the “homeless by choice” narrative, others favor criminalization over investments in positive solutions, such as housing or services,

144. See, generally *Domestic Violence and Homelessness*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/sites/default/files/pdfs/dvhomelessness032106.pdf> (last visited Sept. 25, 2018) (“A lack of alternative housing often leads women to stay in or return to violent relationships. In Minnesota in 2003, for instance, 46% of homeless women reported that they had previously stayed in abusive relationships because they had nowhere to go.”). “The intersection of homelessness and domestic violence is complex . . . [A] survivor may be unable to pay rent because of actions taken by an abusive partner to undermine her economic stability and ability to live independently.” *Homelessness Prevention and Rapid Re-Housing for Survivors of Domestic Violence*, NAT’L ALLIANCE TO END HOMELESSNESS, <http://endhomelessness.org/wp-content/uploads/2011/03/prevention-rapid-rehousing-for-dv-survivors.pdf> (last visited Sept. 25, 2018).

145. *Veteran Homelessness Facts*, GREEN DOORS, <http://greendoors.org/facts/veteran-homelessness.php> (last visited Sept. 14, 2018).

146. E.g., Vernal Coleman & Vianna Davila, *Seattle Officials at Odds on How Many Homeless Get Shelter After Camps Cleared*, SEATTLE TIMES (Nov. 4, 2017), <https://www.seattletimes.com/seattle-news/homeless/seattle-officials-at-odds-on-how-many-homeless-get-shelter-after-camps-cleared/> (“79 percent of people offered shelter either declined or ruled ‘ineligible’ because of their criminal records, lack of identification or other complications.”).

147. SKINNER, *supra* note 49, at Part II.

148. *Id.* at II–14.

because they believe such investments will serve as a beacon, attracting new homeless people from other locations and overwhelming the host city. This “magnet” myth is closely related to the belief that people experiencing homelessness in any given city are not residents, but outsiders. But the best available evidence suggests otherwise. For example, in Seattle/King County, the vast majority (95%) of the county’s homeless population were Washington state residents—83 percent from within King County—before they became homeless.¹⁴⁹ The city of Seattle’s Homeless Needs Assessment showed similar results: 49 percent of respondents reported they were living in the city of Seattle when they most recently became homeless; 31 percent reported being originally from Seattle; of the 69 percent of respondents not originally from Seattle, 15 percent reported living in Seattle for a decade or more.¹⁵⁰ These results, which suggest people experiencing homelessness are homegrown, are not uncommon.¹⁵¹

149. ALL HOME, SEATTLE/KING COUNTY POINT-IN-TIME COUNT OF PERSONS EXPERIENCING HOMELESSNESS 2018, at 30 (2018), <http://allhomekc.org/wp-content/uploads/2018/05/FINALDRAFT-COUNTUSIN2018REPORT-5.25.18.pdf>.

150. CITY OF SEATTLE & ASR, 2016 HOMELESS NEEDS ASSESSMENT 16 (2016), <https://assets.documentcloud.org/documents/3480319/City-of-Seattle-Homeless-Needs-Assessment-March.pdf>.

151. *E.g.*, APPLIED SURVEY RESEARCH, SAN FRANCISCO 2017 HOMELESS COUNTY & SURVEY COMPREHENSIVE REPORT 22 (2017), <http://hsh.sfgov.org/wp-content/uploads/2017/06/2017-SF-Point-in-Time-Count-General-FINAL-6.21.17.pdf> (finding that 69% of respondents in the 2017 San Francisco point-in-time (PIT) survey were living in San Francisco at the time they most recently became homeless); METRO DENVER HOMELESS INITIATIVE, 2017 POINT-IN-TIME REPORT: SEVEN-COUNTY METRO DENVER REGION AT 9 (2017), https://d3n8a8pro7vvhmx.cloudfront.net/mdhi/pages/12/attachments/original/1498599733/2017_Metro_Denver_PIT_Final.pdf?1498599733 (finding 32.9% of individuals reported their last permanent residence to be in the City or County of Denver, 37.7% within state, while only 17.2% of individuals reported that their last permanent residence was either out of state or out of country); BITFOCUS, HELP HOPE HOME: 2017 SOUTHERN NEVADA HOMELESS CENSUS & SURVEY COMPREHENSIVE REPORT 48 (2017), <http://helphopehome.org/wp-content/uploads/2017/07/2017-S-Nevada-Census-and-Survey-for-posting.pdf> (finding in the Southern Nevada PIT survey, 79% of respondents reported living in Southern Nevada when they most recently become homeless). Contrary indications are not the norm. *See, e.g.*, Amelia Templeton, *How Portland Tried, and Failed, to Provide a Bed for All its Homeless Children*, OPB (Mar. 13, 2018), <https://www.opb.org/news/article/portland-oregon-homeless-children-shelter-families/> (reporting Portland’s “no turn away” shelter policy attracted 45% of local county residents, but “significant” numbers came from other Oregon counties, and about one-third were from out of state).

Laziness is another stereotype applied to people experiencing homelessness: many believe that homeless people do not work even though they can. Many homeless people do work (some reports estimate 44% nationally),¹⁵² but still have no reasonable alternative to living in their cars, emergency shelters, or even outside. But it is hard to get or maintain employment without a place to bathe, to prepare meals, or to set an alarm. Getting and keeping a job can be especially challenging. Applying for work can be difficult without a permanent address or regular access to a shower or transportation. Other obstacles such as mental illness, physical disabilities, and even a non-violent criminal history can be a barrier to seeking employment.¹⁵³

Even having a job is no guarantee against homelessness. There is no state in the United States where a minimum wage worker working full time can afford a two-bedroom apartment at fair market rent.¹⁵⁴ For example, currently in Washington State, a resident must work 75 hours a week at minimum wage to afford the rent of a one-bedroom apartment.¹⁵⁵ Accordingly, the price of housing is out of reach for most, especially and including people experiencing chronic homelessness.

Closely related to myths about laziness and unemployment is the misperception that homeless people heavily rely on government assistance, such as disability benefits in Supplemental Security Income (SSI) or welfare benefits in Temporary Assistance to Needy Families (TANF). To the contrary, a relatively small percentage of homeless people receive such

152. *Employment and Homelessness*, NAT'L COAL. FOR THE HOMELESS (July 2009), <https://www.nationalhomeless.org/factsheets/employment.html> (“As bad as it is for the 44% of homeless people who have jobs and can’t escape homelessness, climbing out of homelessness is virtually impossible for those without a job.”).

153. OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING & EVALUATION, EMPLOYMENT AND INCOME SUPPORTS FOR HOMELESS PEOPLE: BARRIERS TO WORK FACED BY HOMELESS PEOPLE 3 (Mar. 1, 2007), <https://aspe.hhs.gov/report/toward-understanding-homelessness-2007-national-symposium-homelessness-research-employment-and-income-supports-homeless-people/barriers-work-faced-homeless-people> (stating that all segments of the homeless population face significant and multiple barriers to employment, including: transportation, educational credentials, mental and physical health, disabilities, substance use disorders, incarceration history, child care, and the digital divide).

154. See NAT'L LOW INCOME HOUSING COAL., *supra* note 1.

155. *Out of Reach 2018: Washington*, NAT'L LOW INCOME HOUSING COAL., <http://nlhdc.org/oor/washington> (last visited Sept. 14, 2018).

assistance.¹⁵⁶ Although over 40 percent of homeless persons are eligible for disability benefits, only 11 percent actually receive them.¹⁵⁷ Most homeless families are eligible for welfare benefits, but only 52 percent receive them.¹⁵⁸ Even when homeless individuals do receive benefits, they rarely receive enough to afford housing. Since 2017, every state's TANF benefits for a family of three are at or far below the poverty line, woefully inadequate to pay a fair market rent.¹⁵⁹

Another potent stereotype is the association of homeless people with criminality. But a person who is homeless is no more likely to be a criminal than a housed person, with one legal exception: camping ordinances.¹⁶⁰ People who are homeless break that law by being homeless. Criminal records for homeless single adults are overwhelmingly due to misdemeanor offenses related to living outdoors, such as trespass.¹⁶¹ A person who is homeless is no more likely to perpetrate a violent crime than a housed person,¹⁶² but is much more likely to be the victim of a violent crime, such as murder, assault, rape, and theft.¹⁶³ Homeless people are also often the

156. DAVID LONG, JOHN RIO, JEREMY ROSEN, EMPLOYMENT AND INCOME SUPPORTS FOR HOMELESS PEOPLE 6 (2007), <https://aspe.hhs.gov/system/files/pdf/180356/report.pdf>; see also Burt et al., *supra* note 13, at 12 (finding that the “the highest rates of participation [in government benefits] among homeless clients were food stamps (37%) and Medicaid (30%).”).

157. LONG, RIO, & ROSEN, *supra* note 156, at 6 (“In 2000 . . . 39 percent of homeless persons reported mental health problems and 46 percent of homeless persons had chronic physical disabilities, far more than the 11 percent receiving SSI. While not all persons with disabilities are eligible for SSDI or SSI, these disparities suggest that at least some eligible individuals who are homeless are not receiving benefits.”); Burt et al., *supra* note 13, at xx (“11 percent receive Supplemental Security Income”).

158. LONG, RIO, & ROSEN, *supra* note 156, at 9.

159. Ife Floyd, *TANF Cash Benefits Have Fallen by More Than 20 Percent in Most States and Continue to Erode*, CTR. ON BUDGET AND POLICY PRIORITIES (Oct. 13, 2017), <https://www.cbpp.org/research/family-income-support/tanf-cash-benefits-have-fallen-by-more-than-20-percent-in-most-states>.

160. OLSON & MACDONALD, *supra* note 44.

161. Social science studies have found that individuals experiencing homelessness are at risk for engaging in non-violent criminal activity, and that “homeless jail inmates were more likely to have been arrested for nuisance offenses (e.g., camping without a permit, indecent exposure) than domiciled inmates.” Fischer, *supra* note 13, at 251.

162. *Myths and Facts of Homelessness in Washington State: Building a New Public Narrative to Combat Criminalization and Advance Real Solutions*, WASH. LOW INCOME HOUS. ALL., <https://www.wliha.org/sites/default/files/myths.pdf> (last visited Sept. 24, 2018).

163. About half of homeless people (49%) report being victims of violence compared with only 2% of the general U.S. population. NAT'L COAL. FOR THE HOMELESS,

victims of hate crimes.¹⁶⁴ The misattribution of heightened criminality to people experiencing homelessness, like many other stereotypes, fuels their criminalization.

IV. ALTERNATIVES TO CRIMINALIZATION

The instinct to criminalize likely is also driven by the misperception that homelessness cannot be solved. But well-established studies show that even chronic homelessness—the most persistent form of homelessness—can be solved.

Although chronically homeless people do not constitute the majority of the overall homeless population,¹⁶⁵ they warrant particular attention for reasons beyond the degree of punishment they bear through criminalization. First, while some other subpopulations are decreasing,¹⁶⁶ many major cities, especially along the West Coast, continue to experience increases in

VULNERABLE TO HATE: A SURVEY OF HATE CRIMES & VIOLENCE COMMITTED AGAINST HOMELESS PEOPLE IN 2013, at 22 (2014), <http://nationalhomeless.org/wp-content/uploads/2014/06/Hate-Crimes-2013-FINAL.pdf>. See Molly Meinbresse et al., *Exploring the Experiences of Violence Among Individuals who are Homeless Using a Consumer-Led Approach*, 29 VIOLENCE & VICTIMS 1 (2014), http://www.nhchc.org/wp-content/uploads/2014/08/vv-29-1_ptr_a8_122-136.pdf (“The prevalence of violence victimization in the homeless population has been estimated to range from 14% to 21% and approximately one-third report having witnessed a physical attack on another person who was homeless.” (internal citations omitted)).

164. NAT’L COAL. FOR THE HOMELESS, NO SAFE STREET: A SURVEY OF VIOLENCE COMMITTED AGAINST HOMELESS PEOPLE IN 2014 & 2015, at 3 (July 13, 2016), <http://nationalhomeless.org/category/civil-rights/violence-against-the-homeless/> (“Over the past 17 years, NCH has recorded 1,650 incidents of crimes committed against this unprotected group. In 2014 and 2015, NCH became aware of 192 attacks, 58 of which resulted in death.”).

165. In 2017, HUD issued its Annual Homeless Assessment Report (AHAR) to Congress which reported data from a national PIT count of individuals experiencing homelessness. AHAR 2017, *supra* note 20. The 2017 PIT count found that 553,742 individuals were experiencing homelessness, and of that base number, 86,962 were individuals with chronic patterns of homelessness. *Id.* at 1.

166. For example, the 2017 AHAR reported a 5% decrease in the number of unhoused families with children since 2016. AHAR 2017, *supra* note 20, at 1. Additionally, despite a 2% increase in unhoused veterans between 2016 and 2017, “homelessness among veterans dropped 45 percent since 2009.” *Id.*

chronic homelessness.¹⁶⁷ So chronic homelessness is increasing in severity and remains at the epicenter of many homelessness crises.

Second, this subpopulation is the most visible. Their sustained visibility not only renders them frequent targets of criminalization laws, but also positions them as a lightning rod for polarized, charged debates around housing and homelessness. Their presence controls the narrative that drives societal perspectives and associated laws and policies.¹⁶⁸ To many homeless rights advocates, if non-punitive interventions can show progress in mitigating chronic homelessness—the so-called “hardest to house”—such progress may help to change the way people think, talk, legislate, and litigate about criminalizing homelessness generally.

Third, in many ways, chronically homeless people are also the most vulnerable. Exposed on the street, they suffer from higher rates of poor health,¹⁶⁹ mental illness, and substance abuse¹⁷⁰ when compared to homeless populations generally. Because chronic homelessness always involves the presence of at least one other significant disabling condition,¹⁷¹ their pronounced vulnerability contributes to their persistent homelessness. Accordingly, they are the least likely to exit homelessness without intervention.

Fourth, chronic homelessness is the most costly segment. Although they do not constitute a majority within homeless populations overall, chronically homeless individuals generate a disproportionate share of public costs because they are among the highest frequency users of emergency services and hospitalization, as well as police, court, and probation resources, and jail time.¹⁷²

167. Specifically, “[o]ver half of all states, 28, experienced an increase between 2016 and 2017 in the number of individuals with chronic patterns of homelessness. *California* by far had the largest increase, with 5,996 more chronically homeless individuals in 2017 than in 2016. The next largest increase occurred in *Washington*, with 2,050 more individuals with chronic patterns of homelessness there in 2017.” *Id.* at 66 (emphasis added).

168. *See, e.g.*, Robert P. Agans et al., *Public Attitudes Toward the Homeless*, PROCEEDINGS OF THE AMERICAN STATISTICAL ASSOCIATION 5934–46 (2011), <https://www.amstat.org/sections/srms/Proceedings/y2011/Files/400188.pdf> (suggesting public opinions about homelessness drive personal action, such as voting for or against certain related laws and policies).

169. HOMELESS HUB Health, *supra* note 51.

170. SAMHSA Homelessness and Housing, *supra* note 51.

171. *See supra* p. 6 and note 20 (defining “chronic homelessness”).

172. *See Ending Chronic Homelessness in 2017*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, https://www.usich.gov/resources/uploads/asset_library/Ending_Chronic_

Fifth and finally, studies consistently show that solving chronic homelessness is achievable through the evidence-based solutions¹⁷³ of Housing First¹⁷⁴ and permanent supportive housing (PSH).¹⁷⁵

A. What is Housing First?

A seminal, widely known theory sets helpful context for understanding Housing First.¹⁷⁶ Regardless of whether someone has studied business, medicine, psychology, or some other discipline, they have likely learned about Maslow's Hierarchy of Needs.¹⁷⁷ Maslow's Hierarchy demonstrates that people must satisfy basic physiological needs—like breathing, eating, drinking, excreting, sleeping, and having stable housing—before they can successfully attend to successively higher-order needs.¹⁷⁸ Since this theory's publication in 1943, it illuminated understanding of human motivation, performance, and capability, immeasurably impacting psychology, psychiatry, health care, business, education, social work, and numerous other fields.

Unfortunately, traditional approaches to homelessness often defy what Maslow's Hierarchy teaches, expecting or requiring people experiencing

Homelessness_in_2017.pdf (last visited Sept. 11, 2018) (“Ending chronic homelessness could reduce avoidable public costs such as avoidable emergency department visits, jail, and shelter costs.”).

173. See *Evidence Base*, CTR. FOR EVIDENCE-BASED SOLUTIONS TO HOMELESSNESS, <http://www.evidenceonhomelessness.com/evidence-base/> (last visited Sept. 11, 2018).

174. *Fact Sheet: Housing First*, NAT'L ALL. TO END HOMELESSNESS I, <http://endhomelessness.org/wp-content/uploads/2016/04/housing-first-fact-sheet.pdf> (last visited Sept. 11, 2018) (“Consumers in a Housing First model access housing faster and are more likely to remain stably housed.” (internal citations omitted)).

175. *Chronic Homelessness, Ctr. For Evidence-Based Solutions to Homelessness*, <http://www.evidenceonhomelessness.com/topic/chronic-homelessness/> (last visited Sept. 11, 2018) (“[Permanent supported housing] can lead to substantial savings and, among the heaviest service users, may even be a cost-neutral investment, with the cost of housing subsidies and services offset by reductions in other spending for public services.”).

176. *Deploy Housing First System Wide*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Aug. 15, 2018), <https://www.usich.gov/solutions/housing/housing-first/> (“A Housing First system orientation recognizes that people experiencing homelessness—like all people—need the safety and stability of a home in order to best address challenges and pursue opportunities.”).

177. A.H. Maslow, *A Theory of Human Motivation*, 50 PSYCH. R. 370–96 (1943).

178. *Id.*

the trauma of homelessness to accept offers of service or treatment without also offering a stable place to live.¹⁷⁹ Not surprisingly, such traditional approaches are often unsuccessful. Housing First is an exception.

Housing First is a homelessness intervention that prioritizes providing permanent housing to people experiencing homelessness, ending their homelessness and serving as a platform from which they can improve their quality of life. This pragmatic approach reflects the reality that people need basic necessities like food, sleep, and a stable place to live before attending to any secondary issues, such as getting a job, budgeting properly, or attending to substance use issues.¹⁸⁰ It also reflects evidence that allowing residents to exercise choice in housing selection and supportive service participation is key to making them more successful in remaining housed and improving their life.

Housing First does not require people experiencing homelessness to address all of their problems, including behavioral and health problems, or to graduate through a series of services programs before they can access housing. It does not mandate participation in services either before obtaining housing or in order to retain housing. The Housing First approach views housing as the foundation for life improvement and enables access to permanent housing without prerequisites or conditions beyond those of a typical renter. Supportive services are offered to help people with housing stability and individual well-being, but participation is not required: services are proven to be more effective when the recipient chooses to engage. Other approaches make such requirements for a person to obtain and retain housing; these approaches are far less effective.

B. What is Permanent Supportive Housing?

Supportive housing is an evidence-based housing intervention that combines non-time-limited affordable housing assistance with wrap-around

179. See, e.g., Amanda Stafford & Lisa Wood, *Tackling Health Disparities for People who are Homeless? Start with Social Determinants*, 14 INT. J. ENVIRON. RES. PUBLIC HEALTH 12, 1535 (noting the low degree of effectiveness in treating the health needs of people experiencing homelessness then simply sending them back to the conditions that compromise their health).

180. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 176.

supportive services for people experiencing homelessness and other people with disabilities.¹⁸¹ Research shows supportive housing is a cost-effective solution to homelessness, particularly for people experiencing chronic homelessness.¹⁸² Studies consistently show that supportive housing not only resolves homelessness and increases housing stability, but also improves health and lowers public costs by reducing the use of publicly funded crisis services, including shelters, hospitals, psychiatric centers, jails, and prisons.¹⁸³

Together, Housing First and permanent supportive housing programs have demonstrated success in ending homelessness for even the “hardest” to reach.¹⁸⁴ Moreover, once people are housed, they eventually begin to accept services and treatment at higher rates than before, and the impact of those services is far more robust and enduring.¹⁸⁵ Once housed, people can

181. *E.g.*, Kristofor Husted, *A Permanent Home that Allows Drinking Helps Homeless Drink Less*, NPR (Jan. 23, 2012, 11:08AM ET), <https://www.npr.org/sections/health-shots/2012/01/19/145477493/a-permanent-home-that-allows-drinking-helps-homeless-drink-less> (writing about a supported housing program in Seattle that allowed alcohol consumption found that its participants’ consumption of alcohol decreased by about 25% at the end of a two-year study: “the data show that finding homeless people a permanent home first may provide them with the support they need to tackle other health concerns later.”).

182. *The Effectiveness of Housing First & Permanent Supportive Housing*, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT (July 25, 2018) [hereinafter HRAP Effectiveness of Housing First & PSH], <https://law.seattleu.edu/Documents/korematsu/HRAP-Excerpts-of-Studies-on-Housing-First-Permanent-Supportive-Housing.pdf> (providing “a non-exhaustive sampling of studies concerning the Effectiveness of Housing First and Permanent Supportive Housing”).

183. *Id.*; see also Husted, *supra* note 181.

184. *Id.*

185. *E.g.*, SARAH B. HUNTER ET AL., *EVALUATION OF HOUSING FOR HEALTH: PERMANENT SUPPORTIVE HOUSING PROGRAM* (2017), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1694/RAND_RR1694.pdf (finding a 60% reduction in use of public services among PSH participants and a reduction in emergency medical services, illustrating the impact of supporting housing services on stability); M.E. Larimer, D.K. Malone, M.D. Garner, et al., *Health Care and Public Service Use and Costs Before and After Provision of Housing for Chronically Homeless Persons with Severe Alcohol Problems*, 301 J. OF AMER. MED. ASSOC. 13, 1349–57 (2009) (finding that prior to receiving Housing First intervention, the participants received a median of \$4066 in public services per person, but after six months of receiving Housing First intervention, this cost dropped to a median of \$1492 per person, illustrating the enduring impact of public services while being in permanent housing).

more easily and effectively work toward resolving issues such as alcoholism, drug addiction, and mental illness.

Providing permanent supportive housing to individuals with chronic patterns of homelessness is proven to significantly reduce use of expensive acute care services such as emergency shelters, hospital emergency rooms, and detoxification and sobering centers.¹⁸⁶ As a result, permanent supportive housing can lead to substantial savings.¹⁸⁷ Even among the heaviest service users, it may be a cost-neutral investment, with the cost of housing subsidies and services offset by reductions in other spending for public services.

Numerous communities throughout the United States are taking note, taking action, and making significant progress toward ending chronic homelessness.¹⁸⁸ States like Utah¹⁸⁹ and Hawaii,¹⁹⁰ cities such as New Orleans,¹⁹¹

186. HRAP Effectiveness of Housing First & PSH, *supra* note 182.

187. NAEH, *Study Data Show that Housing Chronically Homeless People Saves Money, Lives*, NAT'L ALL. TO END HOMELESSNESS: ENDING HOMELESSNESS TODAY (June 30, 2015), <https://endhomelessness.org/study-data-show-that-housing-chronically-homeless-people-saves-money-lives/> (including a map of PSH cost studies, the majority of which “show significant savings that completely or nearly offset the cost of housing”).

188. David Bornstein, *A Growing Drive to Get Homelessness to Zero*, NY TIMES (June 5, 2018), https://www.nytimes.com/2018/06/05/opinion/homelessness-built-for-zero.html?rref=collection%252Fcolumn%252Ffixes&action=click&contentCollection=opinion®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection.

189. Kelly McEvers, *Utah Reduced Chronic Homelessness by 91 Percent; Here's How*, NPR (Dec. 10, 2015, 6:08PM ET), <https://www.npr.org/2015/12/10/459100751/utah-reduced-chronic-homelessness-by-91-percent-heres-how> (writing that Utah nearly met its goal of ending chronic homelessness in 2015, when the population of chronically homeless people decreased by 91% within the state).

190. Max Dible, *Homeless Ranks Shrink Statewide, Islandwide for Second Straight Year*, WEST HAWAII TODAY (May 8, 2017, 12:05AM), <http://www.westhawaii.com/2018/05/08/hawaii-news/homeless-ranks-shrink-statewide-islandwide-for-second-straight-year/> (“This year, Hawaii saw a 9.6 percent decrease in overall homelessness compared with a 9 percent decrease the year before.”).

191. Noelle Swan, *In a U.S. First, New Orleans Finds Homes for All Its Homeless Veterans*, CHRISTIAN SCIENCE MONITOR (Jan. 9, 2015), <https://www.csmonitor.com/USA/Society/2015/0109/In-a-US-first-New-Orleans-finds-homes-for-all-its-homeless-veterans> (“New Orleans [became] the first U.S. city to effectively eliminate veteran homelessness.”).

San Antonio,¹⁹² Detroit,¹⁹³ and Tulsa,¹⁹⁴ and countries like Finland,¹⁹⁵ Denmark,¹⁹⁶ and Canada¹⁹⁷ have all made significant progress through such programs. The demonstrated success of such non-punitive alternatives to criminalization underscores the problem with current laws and policies that punish already vulnerable people.

CONCLUSION

Seattle and many other cities throughout the country need to know that our current approach to criminalizing homelessness is an often illegal and always expensive rotating door. It costs far less for cities to invest in non-punitive alternatives that actually solve homelessness, like permanent

192. John Stephens, *A Public-Private Homeless Solution in Texas Might Work for Costa Mesa and O.C.*, LOS ANGELES TIMES (Feb. 7, 2018, 12:00PM), <http://www.latimes.com/socal/daily-pilot/opinion/tn-dpt-me-commentary-stephens-20180207-story.html> (writing that in 2017, San Antonio, Texas, experienced an 80% decrease in numbers of individuals experiencing homeless since 2010).

193. *Detroit's Focus on Supportive Housing Drives Down Homelessness 15 Percent*, DETROIT JOURNALISM COOPERATIVE, <https://www.detroitjournalism.org/2018/05/09/detroits-focus-on-supportive-housing-drives-down-homelessness-15-percent/> (last visited Sept. 11, 2018) (“The number of people in Detroit experiencing homelessness continued a steady decline in 2017, dropping 15% over the previous year.”).

194. Corey Jones, *Built for Zero Tulsa Surpasses 1,000 People Housed in Effort to Stymie Chronic, Veteran Homelessness*, TULSA WORLD (Apr. 20, 2018), https://www.tulsaworld.com/news/local/built-for-zero-tulsa-surpasses-people-housed-in-effort-to/article_3d648c71-b614-5a7c-a0c1-7a2c2dbdfaf9.html (writing that the Built for Zero Tulsa initiative, a Housing First model, placed 1,000 individuals into permanent housing).

195. Gordon F. Sander, *Finland's Homeless Crisis Nearly Solved. How? By Giving Homes to all who Need*, CHRISTIAN SCIENCE MONITOR (Mar. 21, 2018), <https://www.csmonitor.com/World/Europe/2018/0321/Finland-s-homeless-crisis-nearly-solved.-How-By-giving-homes-to-all-who-need> (writing that “the number of homeless people in Finland has declined from a high of 18,000 30 years ago, to approximately 7,000”).

196. *Housing First in Denmark*, DANISH NAT'L CTR. FOR SOC. RESEARCH, <https://en.sf.dk/publications/housing-first-in-danmark-12839/> (last visited Sept. 11, 2018).

197. Vicky Stergiopoulos et al., *Effect of Scattered-Site Housing Using Rent Supplements and Intensive Case Management on Housing Stability Among Homelessness Adults with Mental Illness: A Randomized Trial*, JAMA NETWORK (Mar. 3, 2015), <https://jamanetwork.com/journals/jama/fullarticle/2174029> (finding that “scattered-site supportive housing using rent supplements and ICM services led to significantly greater housing stability for homeless adults with mental illness and moderate support needs compared with usual care in 4 cities across Canada over the 24-month follow-up period”).

supportive housing. In Seattle and elsewhere on the West Coast, the rapid rise in homelessness has overwhelmed existing systems,¹⁹⁸ generating crisis responses not capable of actually ending homelessness. Cities throughout America can and should do more to end the criminalization of homelessness and redirect such investments to non-punitive alternatives such as Housing First and permanent supportive housing. The status quo is punishment, broadly borne by us all.

198. West coast cities may be responsible for most increases in homelessness nationally. See, e.g., Pam Fessler, *Homeless Population Rises, Driven by West Coast Affordable-Housing Crisis*, NPR (Dec. 6, 2017, 12:02AM ET), <https://www.npr.org/2017/12/06/568605069/homeless-population-rises-driven-by-west-coast-affordable-housing-crisis> (“The increase is almost entirely due to a surge in homelessness in Los Angeles and other cities facing severe shortages of affordable housing, say HUD officials. Many of the cities are on the West Coast, including Seattle, San Diego, and Sacramento, Calif.”); Christopher Weber & Geoff Mulvihill, *For the First Time in 7 Years There are More Homeless in US*, WASH. POST (Dec. 6, 2017), https://www.washingtonpost.com/business/us-homeless-count-rises-pushed-by-crisis-on-the-west-coast/2017/12/06/fof8c2de-da42-11e7-a241-0848315642do_story.html?utm_term=.634848dc165d (“The nation’s homeless population increased this year for the first time since 2010, driven by a surge in the number of people living on the streets in Los Angeles and other West Coast cities.”); Jeff Andrews, *West Coast Spike in Homelessness Drives National Increase: Tight West Coast Housing Markets Cause the First Rise in Homelessness in Years*, CURBED (Dec. 7, 2017, 10:30AM ET), <https://www.curbed.com/2017/12/7/16743122/west-coast-homelessness-national-increase> (“[T]he slight increase in homeless was mostly driven by increases on the West Coast, particularly in tight housing markets like Los Angeles and Seattle.”).