

WITH LIBERTY AND JUSTICE FOR ALL: THE CASE FOR DECRIMINALIZING HOMELESSNESS AND MENTAL HEALTH IN AMERICA

SIYA HEGDE AND CARLTON MARTIN*

I. INTRODUCTION

I remember the heartbreak I felt when my best friend deserted me shortly after our wedding . . . I spiraled into an even deeper depression, leading to my resignation from Apple and eventual homelessness in North Carolina. Events turned even more harrowing when an unfortunate encounter with the police led to my hospitalization and official diagnoses of psychosis, schizophrenia, and bipolar disorder. All these experiences hammered home the true weight of loneliness.¹

Although the study of America’s homelessness epidemic has deepened in the past two decades,² public narratives about homelessness are misconceived and inconsistent. When we look beyond the numbers and delve into accounts of advocates like Jha’asryel-Akquill Bishop, whose lived expertise offers a heartbreaking perspective of homelessness, policing, and mental illness, we realize how increased access to voluntary, community-based mental health supports and decriminalization are necessary means to ending homelessness. Personal accounts also reinforce how conditions of homelessness are intrinsically intersectional. Predominantly Black and Brown racial and ethnic

* Siya (she/her) is a civil and human rights lawyer at the National Homelessness Law Center (NHLC), based in New York City, where she is building strategic litigation and policy advocacy capacity in the movement to decriminalize homelessness and make housing a human right. Prior, she was a civil public defender and movement lawyer at The Bronx Defenders, mostly representing clients in eviction proceedings and supporting state and city grassroots tenant groups on housing policy priorities. Carlton is the Director of the Homeless Persons Representation Project’s Montgomery and Prince George’s County Office. Carlton leads a team dedicated to providing direct representation to people experiencing homelessness and people who are at risk of homelessness, organizing community-based outreach and educational programs, and advocating for just policies at the local and statewide level. He is a former Director at NHLC, where his work involved a range of legal and policy issues impacting people experiencing homelessness nationwide. Additionally, he was formerly a Staff Attorney with the Indiana Supreme Court and an Indiana Deputy State Public Defender.

The authors sincerely thank Eric Tars (Senior Policy Director, NHLC), Tristia Bauman (Directing Attorney of the Housing Unit, Law Foundation of Silicon Valley), and Monica Porter Gilbert (Policy & Legal Advocacy Attorney, Bazelon Center for Mental Health Law) for their constructive editorial support of this writing, as well as the diligent student board of the Indiana Health Law Review for this publication opportunity.

1. Jha’asryel-Akquill Bishop, *The Solitude and Power of Self-Love in Overcoming Hardships*, MEDIUM (Nov. 3, 2023), <https://medium.com/@jhaasryel/the-solitude-and-power-of-self-love-in-overcoming-hardships-914bef8cebe1> [perma.cc/3VUM-P6Q3].

2. See generally *State of Homelessness: 2023 Edition*, NAT’L ALL. TO END HOMELESSNESS (2023), <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/#homelessness-trends-over-time> [perma.cc/79LV-M36F] (detailing homelessness trends, noting that homelessness “has largely been defined by steady but modest progress since data collection began in 2007”) [hereinafter *State of Homelessness*].

groups suffer the highest incidences of homelessness and have historically been the most susceptible to land and property exclusion, displacement, eviction, and housing discrimination.³ Gender-based subgroups, such as members of the LGBTQIA community, also suffer disproportionately higher rates of unsheltered homelessness and “may not be equally benefitting from government investments in solutions to homelessness.”⁴

Central to each account is the reality that one’s experience of living unsheltered can, and often does, adversely affect their health, safety, and security. Living unsheltered can lead to higher rates of chronic disease (i.e., COVID-19, tuberculosis, and lung disease) and exacerbate pre-existing serious mental illness.⁵ Living unsheltered also heightens one’s risk of being physically or sexually victimized, robbed, or otherwise subjected to additional traumas.⁶

This article examines the criminalization of people with mental health disabilities who experience homelessness,⁷ incorporating various race and poverty factors associating housing with health. Section II critiques the judicial landscape of homelessness criminalization by first turning to the seminal decisions of *Martin v. Boise* and *Johnson v. City of Grants Pass*, which have shaped the past five years of homeless rights law and policy. It then assesses how the insufficient framework of the Equal Protection Clause of the federal Constitution limits courts’ abilities to protect the rights of poor people experiencing homelessness and resolve related socioeconomic issues.

Against this backdrop, Section III details the history of homelessness criminalization, focusing more narrowly on the criminalization of mental health and the emergence of involuntary civil commitments as a proxy of the criminal legal system. The section will address the involuntary mental health directive promulgated in New York City and California’s CARE Act, showcasing the different legal standards governing the commitment processes of people with mental disabilities who experience homelessness in both locations, and the increased role of law enforcement as first responders. Our analysis of these

3. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (discussing how U.S. governments in the twentieth century systematically imposed racial segregation laws and policies on African Americans and other communities of color living in white neighborhoods).

4. *State of Homelessness*, *supra* note 2.

5. See Jessica Richards & Randall Kuhn, *Unsheltered Homelessness and Health: A Literature Review*, 2 *AJPM FOCUS* 1, 6 (2022); see also “About Homelessness & Health,” CDC OFF. READINESS & RESPONSE (May 6, 2022), <https://www.cdc.gov/orr/science/homelessness/about.html#:~:text=Homelessness%20is%20known%20to%20increase%20the%20risk%20for,Immunodeficiency%20Virus%20%28HIV%29%2C%20and%20Coronavirus%20Disease%2019%20%28COVID-19%29> [perma.cc/7C3X-FPXV].

6. Hsun-Ta Hsu et al., *Location, Location, Location: Perceptions of Safety and Security Among Formerly Homeless Persons Transitioned to Permanent Supportive Housing*, 7 *J. SOC’Y SOC. WORK & RSCH.* 65, 66 (2016).

7. Throughout this article, we have chosen to use “people experiencing homelessness” and “people with mental disabilities” in sensitivity to people-first language. This humanizes individuals’ identities and unique needs, rather than suggest that their conditions, statuses, and experiences define their worth and capabilities.

involuntary commitment schemes critiques the judicial and policymaking authorities responsible for implementing them. We also incorporate findings from our recent related advocacy before the United Nations, emphasizing how such practices that criminalize mental health also violate key civil and political rights—i.e., the right to life—under international law.

Section IV comments on what “justice” should look like outside the utility of judicial, legislative, and other political bodies when addressing the root causes of homelessness and the criminalization of mental health. Our policy recommendations and philosophies draw from a grounding poverty abolitionist framework and set of international human rights principles, with hopes of advancing anti-policing, humane housing solutions across the homelessness decriminalization and eradication movement. Section V concludes.

II. LEGAL PRECEDENTS OF THE MOVEMENT TO DECRIMINALIZE HOMELESSNESS

A. *Martin, Johnson, and Safeguarding the Rights of People Experiencing Homelessness*

2019 marked a pivotal affirmation of federal Eighth Amendment jurisprudence regarding the rights and protections of people living in encampments.⁸ In its seminal opinion of *Martin v. Boise*,⁹ the Ninth Circuit held that the Eighth Amendment’s Cruel and Unusual Punishment Clause precludes enforcement of ordinances prohibiting publicly sleeping, sitting, and lying down when an individual had no practical access to shelter.¹⁰ Further, it determined that so long as people experiencing homelessness lacked the option of sleeping

8. While *Martin v. Boise* (2019) garnered widespread notice for affirming these principles at a time of rapidly accelerating unsheltered homelessness on the West Coast, its Eighth Amendment applications were predated by other cases: *Robinson v. California*, 370 U.S. 660 (1962) (finding that punishing someone for their involuntary status of addiction constituted cruel and unusual punishment under the Eighth Amendment); *Powell v. Texas*, 392 U.S. 514 (1968) (extending the *Robinson* principle to distinguish how convicting an individual for public intoxication did not constitute cruel and unusual punishment under the Eighth Amendment); *Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D.F.L. 1992) (finding that Miami’s practice of arresting individuals experiencing homelessness for involuntary, harmless public acts is an Eighth Amendment violation, a Fourteenth Amendment violation as per their “fundamental right to travel,” and a Fourth Amendment violation when their personal property is seized and destroyed in non-compliance with their “own written procedure”); and *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) (finding that Los Angeles could not punish people experiencing homelessness for sleeping on the streets, as doing so would violate the Eighth Amendment with regard to involuntary conduct).

9. *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

10. The case settled in favor of the six Boise residents who were experiencing or recently experienced homelessness, spanning over a decade of litigation, and considered their lack of choice to sleep anywhere but publicly when shelters were at full capacity.

indoors, the government could not criminalize them “for sleeping outdoors, on public property, on the false premise they had a choice in the matter.”¹¹

While the *Martin* ruling is only binding in the Ninth Circuit, it has reverberated nationally in other legal battlegrounds. Dozens of courts, including federal district courts in Pennsylvania,¹² Illinois,¹³ Hawai’i,¹⁴ Ohio,¹⁵ and Texas,¹⁶ have cited *Martin* in their opinions. More recently, the Ninth Circuit reiterated its *Martin* holding and affirmed a district court’s ruling that the City of Grants Pass, Oregon cannot, consistent with the Eighth Amendment, enforce its anti-camping laws against people experiencing homelessness for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there was no shelter available.¹⁷

The Ninth Circuit’s ruling in *Johnson v. City of Grants Pass*, in part, barred the issuance of fines for violations and a trespass order that banned people experiencing homelessness from public parks prior to charging them with misdemeanor criminal trespass.¹⁸ In fact, *Johnson* clarified how civil fines levied against people experiencing homelessness were a method of cruel and unusual punishment. However, on January 12, 2024, the U.S. Supreme Court granted the City of Grants Pass’ petition for *certiorari*¹⁹ to reconsider the ruling.

11. *Martin*, 920 F.3d at 617.

12. See *Better Days Ahead Outreach v. Borough of Pottstown*, 2023 WL 8237255 1, 4-5 (E.D.P.A. 2023) (examining the Pottstown case as “strikingly similar to *Martin*” for Pottstown’s increasing homeless population, lack of sufficient shelter space, and the shelter policies in existence that precluded people experiencing homelessness to access their services, while reaffirming how “the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being.”).

13. See *Barnes v. Jeffreys*, 529 F.Supp.3d 784, 794-95 (N.D.I.L. 2021) (granting plaintiffs’ (i.e., sex offenders experiencing homelessness) motion for summary judgment on Eighth Amendment grounds as a statute operating “to keep indigent and homeless sex offenders incarcerated beyond their term of imprisonment” was deemed unconstitutional under the *Martin* principle).

14. See *Char v. Simeona*, 2018 WL 4323894 1, 5 (D. Hawai’i, 2018) (relying, in part, on *Martin* for assessing the validity of a malicious prosecution claim before seeking relief under Sec. 1983).

15. See *Phillips v. City of Cincinnati*, 2019 WL 2289277 1, 2 (S.D. O.H. 2019) (acknowledging that though the Sixth Circuit has not addressed criminalization of homelessness issues, the Ninth Circuit, in *Martin*, ruled that an “ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them”).

16. See *Gbalazeh v. City of Dallas*, 394 F.Supp.3d 666, 671 (N.D. T.X. 2019) (adopting the Ninth Circuit’s logic under *Martin* for determining scope of retroactive and prospective relief).

17. *Johnson v. City of Grants Pass*, 50 F.4th 787, 804 (9th Cir. 2022) (amended and superseded on denial of re-hearing *en banc* by *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023)).

18. *Johnson v. City of Grants Pass*, 72 F.4th 868, 896 (9th Cir. 2023) (“Our decision reaches beyond *Martin* slightly. We hold, where *Martin* did not . . . that *Martin* applies to civil citations where, as here, the civil and criminal punishments are closely intertwined.”).

19. See *Petition for Writ of Certiorari, City of Grants Pass v. Johnson*, U.S. 1, 6 (2023) (No. 23-175) (signaling a written request on behalf of the City of Grants Pass, Oregon, for the U.S.

Should the case be overturned, cities and localities across the country could renew efforts to arrest or fine people experiencing homelessness for simply surviving in public in the absence of safe shelter elsewhere.²⁰ Of graver concern, overturning could lead to a dangerous slippery slope around Eighth Amendment limits: deciding what other involuntary statuses may be criminalized or fined.

Currently, with unsheltered homelessness exceeding sheltered homelessness since 2020²¹—cities “are scrambling to comply with” *Martin* and its progeny.²² While *Martin* and *Johnson* have offered much needed commentary decrying the criminalization of homelessness, local governments, like Boise, have erroneously claimed that their decisions have created a constitutional “right” to camp and reside in public parks and on sidewalks, mostly on public health and safety grounds.²³ Mayors,²⁴ governors,²⁵ chambers

Supreme Court to review the judgment of the U.S. Court of Appeals for the Ninth Circuit—”The Ninth Circuit’s arrogation of quintessential policymaking authority over public health and safety has struck a blow not only to the principle of democratic governance, but also to the practical ability of cities to address the growth of public encampments. Only this Court can end this misguided project of federal courts dictating homelessness policy under the banner of the Eighth Amendment.”).

20. See “STATEMENT: SCOTUS takes up *Johnson v. Grants Pass*, the most significant case about homelessness in 40+ years,” NAT’L HOMELESSNESS L. CTR. (Jan. 12, 2024), <https://homelesslaw.org/statement-johnsonvgrantspass/>. [<https://perma.cc/F842-DJGC>]

21. See “Fact Sheet: 2023 Annual Homelessness Assessment Report,” U.S. DEP’T HOUS. & URBAN DEV. (Dec. 1, 2023), https://www.hud.gov/sites/dfiles/PA/documents/HUD_No_23_278_4.pdf [<https://perma.cc/RH75-VZ8V>]; see also generally NAT’L L. CTR. ON HOMELESSNESS & POVERTY, DON’T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA (2017), <https://homelesslaw.org/wp-content/uploads/2018/10/HUD-PIT-report2017.pdf> [<https://perma.cc/E48H-X4M4>] (examining how HUD’s PIT Count is a substantial undercount that applies a narrow definition of homelessness, systematically undercounts unsheltered adults and youth, and varies in its methodology).

22. Rachel Cohen, *The little-noticed court decision that changed homelessness in America*, VOX (June 12, 2023), <https://www.vox.com/23748522/tent-encampments-martin-boise-homelessness-housing> [<https://perma.cc/ZRH4-2999>].

23. Patrick Sisson, *Homeless people gain ‘de facto right’ to sleep on sidewalks through federal court*, CURBED (Dec. 16, 2019, 11:23 AM), <https://archive.curbed.com/2019/4/5/18296772/supreme-court-homeless-lawsuit-boise-appeals-court> [<https://perma.cc/G7XT-KKK3>].

24. See Brandon Hollingsworth, *Woodward joins national push to overturn Martin v. Boise ruling*, SPOKANE PUB. RADIO (Oct. 4, 2023, 4:55AM PDT), <https://www.spokanepublicradio.org/regional-news/2023-10-04/woodward-joins-national-push-to-overturn-martin-v-boise-ruling> [<https://perma.cc/29EP-QJFG>].

25. See Jay Barmann, *City of San Francisco Files Brief With Supreme Court on Homeless Encampment Case*, SF NEWS (Oct. 5, 2023), <https://sfist.com/2023/10/05/san-francisco-mayor-and-city-attorney-file-brief-with-supreme-court-on-homeless-encampment-case/> [<https://perma.cc/F4LJ-UVJX>] (“Governor Gavin Newsom, for his own political reasons, has been vocal in seeking Supreme Court intervention on the issue, and essentially admitting that he hopes the conservative majority on the court will help in this case.”).

of commerce,²⁶ public civic organizations,²⁷ and other entities have opposed these rulings, invoking separation of powers concerns. Primarily, they argue that courts are intervening in policy matters reserved to the legislature. Specifically claiming that judges are not well-suited in micromanaging public policy issues—like homelessness—that are based on apparent ill-defined rules.²⁸

Neither *Martin* nor *Johnson* overturned laws punishing people experiencing homelessness on account of their poverty status, nor did they equip local municipalities with the appropriate financial or political incentives to invest in humane, adequate housing solutions. Both rulings were insufficient in jurisdictions where alternative shelter accommodation is available, enabling the false narrative of service resistance²⁹ that continues to paint people experiencing homelessness in a culpable light for refusing to accept temporary shelter services. The courts left “ample power to police [to] punish homeless people” while also “regulat[ing] and restrict[ing] their access to public space.”³⁰

26. See generally Brief of Amici Curiae Los Angeles Area Chamber of Commerce and Central City Association of Los Angeles in Support of Petitioner, *City of Grants Pass v. Johnson*, ___ U.S. 1 (2023) (No. 23-175) (arguing that should *Martin* and *Johnson* remain intact, “they will continue to interfere with the efforts of local governments to enact and enforce reasonable regulations to protect public health and safety”).

27. See Alexander L. Merritt et al., *Supreme Court Weighs Whether to Clarify Camping Bans and Homelessness Policies*, 14 NAT’L L. REV. (Nov. 16, 2023), <https://www.natlawreview.com/article/supreme-court-weighs-whether-clarify-camping-bans-and-homelessness-policies> [<https://perma.cc/SV88-MFTH>] (stating how the California State Association of Counties and the League of California Cities contend that *Martin* and *Johnson* have created an “unworkable” standard for governments to address homelessness).

28. See, e.g., Brief for California Governor Gavin Newsom as Amicus Curiae Supporting Petitioner at 2, *City of Grants Pass v. Johnson*, 217 L. Ed. 2d 341 (2024) (No. 23-175), 2024 U.S. LEXIS 422 (“The Governor thus has a strong interest in ensuring that judicially created rules . . . do not hamstring state and local governments’ ability to address these problems, and do not impede common-sense measures to keep people safe.”).

29. See New York University, *Study counters narrative that street homeless are ‘service resistant,’* PHYS.ORG (June 10, 2019), <https://phys.org/news/2019-06-counters-narrative-street-homeless-resistant.html> [<https://perma.cc/FJF4-U92J>] (“These barriers [for finding housing] are exacerbated by [people experiencing homelessness]’ reasonable aversion to shelters seen as overcrowded and unsafe. ‘In the process of trying to secure safe, permanent housing there is almost no light at the end of the tunnel and little to be gained by cooperation when the results are so disappointing. In this context, homeless people are not ‘service resistant,’ they are rational actors all too familiar with un-kept promises,”) (quoting Dr. Deborah Padgett at N.Y.U. Silver School of Social Work).

30. *Eighth Amendment – Criminalization of Homelessness – Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public*, 133 HARV. L. REV. 699, 704 (2019); see also Lillian Hernandez Caraballo, *Despite public criticism, Orlando passes ordinance banning people from blocking sidewalks*, WMFE (Jan. 9, 2024, 10:32AM EST), <https://www.wmfe.org/housing-homelessness/2024-01-09/orlando-passes-ordinance-banning-people-blocking-sidewalks> [<https://perma.cc/8QTZ-F8TY>] (reporting a new ordinance enacted by the Orlando City Council that allows police to arrest or fine anyone intentionally blocking public sidewalks, which community members and homeless rights advocates fear “might be used to disproportionately target Orlandoans living unsheltered.”).

B. The Courts' Failure to Recognize Poverty as a Suspect Class Under the Equal Protection Clause and Their Limited Power to Fix Socioeconomic Issues

Even as the *Martin* and *Johnson* rulings have defended and enforced the Eighth Amendment rights of people experiencing homelessness, the courts' adjudicatory authority to rule on matters of poverty and wealth is still concerningly limited. The dicta interpreting the Equal Protection Clause of the federal Constitution's Fourteenth Amendment did not recognize poverty as a suspect classification. In what some scholars have argued is the "most famous footnote in constitutional law,"³¹ Justice Harlan Stone penned that the U.S. Supreme Court would continue to apply a heightened scrutiny standard to laws and regulations "prejudice[d] against discrete and insular minorities."³² Subsequent decisions relied on this broad language to ascribe constitutional protections to minority groups based on race, birthing the "strict scrutiny" standard to say that a law needed to be "narrowly tailored . . . to achieve a compelling governmental interest" to survive a standard of review predicated on race.³³ This scrutiny standard often attributed to a class of individuals historically subjected to discrimination—termed "suspect classification"³⁴—was never extended to individuals with disabilities, nor has constitutional law offered sufficient space outside of the Equal Protection Clause context to explore the intersections of disability law, mental health, and poverty.³⁵ Recognizing this gap in legal doctrine is important for establishing broader interpretations and reforms of the strict scrutiny standard so as to embolden the rights of people experiencing homelessness and people with mental health disabilities.

31. Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusk and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMM. 277, 277 (1995).

32. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (determining that the rational basis standard of review applied to "regulatory legislation affecting ordinary commercial transactions" may not be extended to other legislation that "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments," as the latter may be subjected to higher judicial scrutiny).

33. See generally April J. Anderson, CONG. RSCH. SERV., R47471, *THE CONSTITUTION AND RACE-CONSCIOUS GOVERNMENT ACTION: NARROW TAILORING REQUIREMENTS*, (March 14, 2023), (analyzing the strict-scrutiny test as it focuses on racial classifications).

34. See generally Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE UNIV. L. REV. 135 (2011) (discussing how courts have varied in their interpretation of suspect classification, weighing factors of historical discrimination, political powerlessness, and discrete and insular minority statuses).

35. See Michael Waterstone, *Disability Constitutional Law*, 63 EMORY L. J. 527, 527 (2014) ("The largest constitutional 'moment' for disability law was the Supreme Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.* There, while striking down a zoning ordinance as infringing the Equal Protection rights of individuals with mental retardation, the Court held that the disability classification was only entitled to rational basis scrutiny. . . . Constitutional law has evolved, but it has stayed frozen in time for people with disabilities.").

In the mid-1950s, the U.S. Supreme Court began narrowly considering Equal Protection principles and socioeconomic issues of poverty. The 1956 decision of *Griffin v. Illinois* held that a denial of an indigent person's appeal of their criminal conviction for their inability to afford a transcript was discriminatory on the basis of poverty.³⁶ Although the *Griffin* court assessed equal protection in the context of one's economic conditions, its ruling was still restricted to the way those conditions were shown to affect convicted indigent persons in criminal appellate procedure. Accordingly, it did not declare that a State should "correct or cushion" those conditions responsible for indigents' status of poverty.³⁷

A string of subsequent decisions linking individuals' status of indigency, economic oppression, and the Equal Protection Clause arose regarding court fees,³⁸ welfare benefits,³⁹ and education.⁴⁰ The outcomes of these cases varied, based on what the Court considered a fundamental constitutional right (i.e., education was not treated as such, while access to court process was). Relatedly, the U.S. Supreme Court ruled that "the assurance of adequate housing" was a legislative rather than a judicial function,⁴¹ interpreting one's "need for decent shelter" and "right to retain peaceful possession of [his or her] home" as outside the scope of a constitutional mandate for court systems to decide on.⁴² We extrapolate that the courts were underscoring judicial economy when opining a limited availability of judicial remedies and operations in redressing "every

36. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) ("In criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color.").

37. *Id.* at 23 (concurring, J. Frankfurter) ("A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct to correct or cushion. But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court . . .").

38. *See generally* *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that denying those who could not afford a fee the access to a divorce proceeding was unconstitutional on procedural due process grounds (i.e., requiring a meaningful opportunity to be heard) and substantive due process grounds (i.e., recognizing marriage as a fundamental interest at stake)).

39. *See generally* *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding a Maryland state law that allocated its welfare payments to families with dependent children on the basis that the State demonstrated a "legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor").

40. *See generally* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 406 U.S. 966 (1973) (upholding a funding scheme across a Texas school district by finding it not to have discriminated against the poor, and deciding further that because education is not a fundamental right under the Constitution, strict scrutiny of the funding scheme was not required); *but see generally* *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that undocumented persons, as persons "in any ordinary sense of the term" were to be afforded Fourteenth Amendment protections and that a state law severely disadvantaging the children of undocumented persons by denying them a right to education was unconstitutional under the Equal Protection Clause).

41. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

42. *Id.* at 73-74.

social and economic ill,”⁴³ including inadequate, unaffordable housing. In turn, this limitation affected the ways that litigants experiencing poverty could challenge facially discriminatory laws and policies. It is, thus, unsurprising that the courts’ failure to recognize a fundamental constitutional right to housing bore direct consequences on people experiencing homelessness as a cause and consequence of their condition of poverty.

The U.S. Supreme Court’s failure in determining if “the indicia of suspectness apply to the poor in America,” might help explain why laws and practices criminalizing people experiencing homelessness—especially those with health conditions—are not subject to a heightened judicial scrutiny in the ways that alienage, race, gender, and certain other protected categories are.⁴⁴ Consequently, the Court has overlooked key historical and present-day realities connecting race and racism to poverty. It has also overlooked ways that cycles of poverty stem from intergenerational trauma. These considerations qualify one’s status of poverty as an immutable characteristic or historically discriminated condition to be classified as quasi-suspect or suspect under the Equal Protection Clause.⁴⁵

III. CRIMINALIZATION OF HOMELESSNESS AND MENTAL HEALTH

The courts’ limited success in enforcing anti-discrimination and equal protection provisions on behalf of people experiencing homelessness and people with disabilities forces us to look beyond judicial powers in discussions about decriminalizing homelessness. Scapegoating these individuals for issues related to crime or public safety has perpetuated violent hate crimes against them. Research studies have demonstrated that “mental illness alone is not a predictor of violence and that people with mental illness are actually more likely to be *victims* of violence than perpetrators”.⁴⁶ The disproportionately high incidence

43. *Id.* at 74.

44. Henry Rose, *The Poor as a Suspect Class under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 421 (2010).

45. An analysis was developed to explore the Socioeconomic Bias of the judges on the bench. See generally Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 GOLDEN GATE UNIV. SCH. L. (2013) (recognizing that a privileged socioeconomic status of many judges may make them highly susceptible to implicit bias that affects their judicial opinions). We ascertain that in the context of homelessness, such judges would not understand why one would opt to sleep on the streets—subject to police interrogation, the weather, litter, etc.—instead of inside a congregate shelter. In many cases, the streets are safer.

46. Joanna Laine, *From Criminalization to Humanization: Ending Discrimination Against the Homeless*, 39 HARBINGER 1, 3-4 (2015) (citing Margarita Tartakovsky, *Media’s Damaging Depictions of Mental Illness*, PYSCH CENTRAL, <https://psychcentral.com/lib/medias-damaging-depictions-of-mental-illness#1> [<https://perma.cc/UD4R-QYJ6>] (May 17, 2016) (quoting Cheryl K. Olson, Sc.D., co-director of the Center for Mental Health and Media at Massachusetts General Hospital Department of Psychiatry)); see Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness*, 62 ARCH. GEN. PSYCHIATRY 911, 914 (2005) (“Over one quarter of the SMI sample had been victims of a violent crime . . . in the past year, 11.8 times higher than the [general population] . . .”).

of physical, mental, and psychological health disparities amongst people experiencing homelessness has worsened in recent years. An estimated 31% of people experiencing homelessness nationwide have at least one serious mental illness, contrasting to the 5.5% of the rest of the public.⁴⁷ Mental health conditions are prone to worsen with the existence of homelessness and in the absence of housing.⁴⁸ Furthermore, those individuals living in “socially underprivileged and poor city areas” more often experience “depression, anxiety and psychosis” than those in higher-income neighborhoods.⁴⁹

A. Historical Underpinnings

The dehumanizing derogatory language our culture uses to describe people with mental disabilities who experience homelessness contributes to their criminalization. Both the criminalization of homelessness and the criminalization of mental health draw from the damaging, misguided premise that these individuals are blameworthy for “causing” their own conditions, and, consequently are less deserving of life.⁵⁰ As far back as the 1700s, many people with mental health disabilities were imprisoned for being societally deemed as “barbaric” and having “incurable” moral failings, while others were hidden in attics and sheds by their families “in order to avoid [public] embarrassment.”⁵¹ Although mid-19th century reform efforts sought to help incarcerated people with mental health disabilities, the establishment of publicly funded psychiatric hospitals was closely followed by the inhumane eugenics movement.⁵² Broadly,

47. *Health*, NAT’L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/health/#:~:text=Health%20and%20Homelessness,-An%20acute%20physical&text=On%20a%20given%20night%20in,11%2C000%20people%20had%20HIV%20FAIDS> [https://perma.cc/Q6NW-F8AP] (Dec. 2023).

48. *Homelessness & Health: What’s the Connection*, NAT’L HEALTH CARE FOR HOMELESS COUNCIL 1, 1 (Feb. 2019), <https://nhhc.org/wp-content/uploads/2019/08/homelessness-and-health.pdf> [https://perma.cc/GG9R-KDS8].

49. Derin Marbin et al., *Perspectives in poverty and mental health*, 10 FRONTIERS PUB. HEALTH 1, 2 (2022), <https://doi.org/10.3389/fpubh.2022.975482> [https://perma.cc/8L8V-LVZD].

50. See Taylor Griggs, *Homelessness is Not a Personal Failure*, INVISIBLE PEOPLE (June 8, 2021), <https://invisiblepeople.tv/homelessness-is-not-a-personal-failure/> [https://perma.cc/X6JQ-7L4U].

51. *Covering Mental Health: 1840s-1890s*, PBS NEWSHOUR CLASSROOM, <https://www.journalismaction.org/case/nellie-bly> (last visited Sept. 6, 2023) [https://perma.cc/88BL-DZHY].

52. See Alisa Roth, *The Truth About Deinstitutionalization*, ATLANTIC (May 25, 2021), <https://www.theatlantic.com/health/archive/2021/05/truth-about-deinstitutionalization/618986/> [https://perma.cc/6XDG-VN4D] (“In 1841, a former schoolteacher named Dorothea Dix visited a Massachusetts jail to teach a Bible class. She was appalled to find it filled with people with mental illness, living in horrific conditions; traveling around the country, she found similar conditions in other jails. Residents were kept in ‘cages, closets, cellars, stalls, pens!’ she later wrote in a letter to the Massachusetts legislature.”); see also “The 19th Century Asylum,” HEARING VOICES, <https://librarycompany.org/hearingvoices-online/section1.html> (last visited Sept. 6, 2023) [https://perma.cc/L4UG-BEUV] (“The theory of degeneracy and the eugenics movement

this movement emerged in an attempt to eliminate so-called “social ills,” targeting certain groups of people, including those living in poverty and those experiencing homelessness.⁵³ More narrowly, its link to forced sterilization—described by the misnomer of the Progressive Era—were central issues that the U.S. Supreme Court subsequently adjudicated in one of its most harmful rulings.

In a 1927 majority opinion authored by Justice Oliver Wendell Holmes, Jr., “mental defectives” needed to be sterilized to promote their “welfare and that of society.”⁵⁴ A century later, it is beyond troubling to revisit this language coined by the nation’s highest court, which reduced the worth of persons with mental disabilities to “imbeciles” who were “manifestly unfit” for human society (“Three generations of imbeciles are enough.”).⁵⁵ The ruling triggered forced sterilization of as many as 70,000 individuals during the 20th century, dangerously upholding the State’s right to determine one’s fitness to procreate.⁵⁶ This speaks volumes about how state power has segregated and weaponized individuals with mental health disabilities, and how our country’s history of eugenics deliberately undercut their fundamental rights to life and liberty. It further reinforces the concern of why courts have failed to ascribe Fourteenth Amendment suspect classification to this population along with people living in poverty—as the eugenics movement demonstrated, these groups endured a history of purposeful unequal treatment and political powerlessness.⁵⁷

Policies born out of eugenics legacies continue to affect interconnected issues of race, poverty, and mental health. Poor women of color, particularly, were subjected to forced sterilizations well into the 1960s and 1970s, “often while seeking another type of surgery or after childbirth.”⁵⁸ It reinforced the punitive notion that people living in poverty needed to be “fixed,” and that they lacked autonomy as an “undesirable” population.⁵⁹ Concurrent with the rise of these policies was states’ increased investment in their own state-run psychiatric

it precipitated led to the forced sterilization of countless mentally ill patients to prevent the inheritance of insanity.”).

53. See “Fact Sheet: Eugenics and Scientific Racism,” NAT’L HUM. GENOME RSCH. INST. (May 18, 2022), <https://www.genome.gov/about-genomics/fact-sheets/Eugenics-and-Scientific-Racism#:~:text=Eugenicists%20worldwide%20believed%20that%20they%20could%20perfect%20human,of%20individuals%20deemed%20by%20them%20to%20be%20unfit> [https://perma.cc/47SW-6Q8C]

54. *Buck v. Bell*, 274 U.S. 200, 205-07 (1927).

55. *Id.* at 207.

56. *The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, NPR (March 7, 2016), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations> [https://perma.cc/UR5J-R9VV].

57. See Rose, *supra* note 44, at 421 (describing the ““traditional indicia of suspectness””); see also Strauss, *supra* note 34.

58. Caitlin Fendley, *Eugenics is trending. That’s a problem.*, WASH. POST (Feb. 17, 2020, 6:00AM EST), <https://www.washingtonpost.com/outlook/2020/02/17/eugenics-is-trending-thats-problem/> [https://perma.cc/DM2C-PA35].

59. Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS INDEP. LENS (Jan. 29, 2016), <https://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/> [https://perma.cc/RN7W-2Q7X].

facilities designed to involuntarily institutionalize persons with mental and behavioral health disabilities.⁶⁰ By the 1950s, the numbers of institutionalized patients had vastly exceeded discharged patients, with only twenty-five U.S. cities having a population exceeding that of public psychiatric institutions.⁶¹

In a federal effort to deinstitutionalize publicly funded hospitals, then-President John F. Kennedy issued the 1963 Community Mental Health Act (“CMHA”).⁶² We interpret the CMHA as one of the earlier preceptors of the Housing First model.⁶³ It purported to shift the treatment of people with mental health disabilities from state psychiatric facilities to local, “self-sufficient” community-based clinics.⁶⁴ This aim was furthered by the creation of Medicaid and Medicare two years after CMHA’s implementation.⁶⁵ Medicaid’s incorporated “IMD” exclusion, prohibiting the use of federal Medicaid funds to provide inpatient care or services to people between the ages of twenty-one and sixty-four in “institutions for mental disease”—e.g., facilities where over 50% of its residents were institutionalized for “mental disease” as their main reason⁶⁶—was itself a product of the deinstitutionalization movement.⁶⁷ This

60. Elliott Young, *Locking up the mentally ill has a long history*, WASH. POST (Jan. 3, 2023, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2023/01/03/history-mental-illness-incarceration/> [https://perma.cc/TT2B-24TQ]. The New York Lunacy Commission found in 1912 that one-third of New York’s budget “was spent locking up and caring for the mentally ill.” The state’s Office of Mental Hygiene was established in 1926, with its very name suggesting eugenicist undertones of “disinfecting” persons with mental and behavioral health disabilities.

61. *Id.*

62. See Vic DiGravio, *The Last Bill JFK Signed – And The Mental Health Work Still Undone*, WBUR (Oct. 23, 2013), <https://www.wbur.org/news/2013/10/23/community-mental-health-kennedy> (“ . . . President Kennedy called for society to embrace a new vision for people with mental health disorders and developmental disabilities, one in which the ‘cold mercy of custodial care would be replaced by the open warmth of community.’”).

63. Housing First is an evidence-based policy approach for connecting individuals and families experiencing homelessness to permanent supportive housing, or housing that contains few to no programmatic requirements to entry (i.e., sobriety, treatment, or service participation requirements). See *Housing First in Permanent Supportive Housing*, HUD EXCHANGE, <https://files.hudexchange.info/resources/documents/Housing-First-Permanent-Supportive-Housing-Brief.pdf> [(last visited Jan. 24, 2024)].

64. See Blake Erickson, *Deinstitutionalization Through Optimism: The Community Mental Health Act of 1963*, 16 AM. J. PSYCHIATRY RESIDENTS’ J. 6,6 (2021); see also DiGravio, *supra* note 62..

65. See JENNIFER MATHIS ET AL., MEDICAID’S INSTITUTIONS FOR MENTAL DISEASES (IMD) EXCLUSION RULE 10 (2018), <https://www.scattergoodfoundation.org/wp-content/uploads/2021/02/Medicoids-Institutions-for-Mental-Diseases-IMD-Exclusion-Rule.pdf> [https://perma.cc/7VZR-WQH6] (discussing how Medicaid and Medicare, borne out of the 1965 Social Security Amendments, financially incentivized states to shift from psychiatric hospitals to community-based services, the former of which contained dehumanizing conditions with care that were often “purely custodial” in nature); see also Jennifer Mathis, *Medicaid’s Institutions for Mental Diseases (IMD) Exclusion Rule: A Policy Debate—Argument to Retain the IMD Rule*, 70 PSYCHIATRIC SERVS. 4, 4 (2019).

66. See MEGAN HOUSTON, CONG. RSCH. SERV., MEDICAID’S INSTITUTION FOR MENTAL DISEASES (IMD) EXCLUSION 1 (2023), <https://crsreports.congress.gov/product/pdf/IF/IF10222>.

67. Mathis, *supra* note 65, at 4.

exclusion policy, in part, was intended to financially incentivize states to invest in community-based services instead of institutions.⁶⁸

Vowing to reduce the population of 600,000 people institutionalized for apparent psychological disabilities by half, President Kennedy's vision considered supportive housing advancements.⁶⁹ However, many psychiatrists cautioned that for a community model under the CMHA to operate effectively, mental health professionals needed to address specific determinants such as "poor socialization and lack of housing, food, and clothing" that were root causes of the mental health crisis.⁷⁰ Additionally, as well-intended as CHMA was, it was never adequately funded to create the community clinics needed to transition individuals with mental health disabilities from larger institutions to housing and community-based services, resulting in many of them simply being discharged into the streets. Paired with the loss of deeply affordable Single Room Occupancy ("SRO") housing units, where at least some could find housing, this contributed substantially to the growth of modern homelessness.

States and municipalities gradually adopted their own deinstitutionalization (and institutionalization) standards, while rates of homelessness and untreated mental illness still proliferated. In his capacity as California's governor, Ronald Reagan signed the Lanterman-Petris-Short ("LPS") Act,⁷¹ which set into motion "modern mental health commitment procedures".⁷² While LPS intended to end the involuntary commitment of individuals with mental and developmental disabilities, and chronic alcoholism, its funding was not reserved for community-based services or non-state funded mental health facilities. Moreover, it introduced narrower criteria for detention and greater judicial oversight of the institutionalization process.⁷³ The criteria it established for a psychiatric "5150 hold"—a strict seventy-two-hour involuntary treatment—required a probable cause showing to believe that the individual was a danger to themselves or others or considered "gravely disabled" because of their mental health condition(s).⁷⁴ The former criteria of posing a danger to self or others

68. See MATHIS ET AL., *supra* note 65, at 25; see also MACPAC, REPORT TO CONGRESS ON OVERSIGHT OF INSTITUTIONS FOR MENTAL DISEASES 4 (2019), <https://www.macpac.gov/wp-content/uploads/2020/01/Report-to-Congress-on-Oversight-of-Institutions-for-Mental-Diseases-December-2019.pdf> [<https://perma.cc/5EPT-LSX7>].

69. Erickson, *supra* note 64, at 6; see Robert C. Toth, *President Seeks Funds to Reduce Mental Illness*, N.Y. TIMES (Feb. 6, 1963), <https://timesmachine.nytimes.com/timesmachine/1963/02/06/89517937.html> [<https://perma.cc/679R-8BA6>].

70. Erickson, *supra* note 64, at 7.

71. See generally CAL. WELF. & INST. CODE § 5000 et seq. (1967) (amended by Stats. 2022) [hereinafter LPS Act].

72. *What is the Lanterman-Petris Short Act?*, SUPERIOR CT. CALI.: CNTY. L.A., <https://www.lacourt.org/division/mentalhealth/MH0017.aspx> [<https://perma.cc/PG78-L25H>] (last visited Dec. 17, 2023).

73. Nathaniel P. Morris, *Reasonable or Random: 72-Hour Limits to Psychiatric Holds*, 72 PSYCHIATRIC SERVS. 210, 210-11 (2021).

74. LPS Act § 5150; see Diane Y. Byun, *Gravely Disabled: The Vestigial Prong of 5150 Designations*, 34 J.L. & HEALTH 192, 203-05 (detailing the criteria that a police officer must rely on in making a 5150 designation).

does not require a risk of violent behavior or propensities, but most often has been qualified by threats or attempts at self-harm, suicidal ideation, or threats to harm others.⁷⁵ Meanwhile, the grave disability standard has since evolved to mean that the individual cannot provide for their own basic needs for food, clothing, or shelter on account of a mental illness.⁷⁶ Even if this definition does not read explicitly as saying people experiencing homelessness are “gravely disabled” by virtue of being homeless, it discounts the structural conditions and policy failures that make accessing housing or shelter unsustainable and untenable.

Given the state of psychiatric facilities through the 1950s and 60s, we view the ‘deinstitutionalization’ label commonly used to describe this era as a misnomer.⁷⁷ While the CMHA, LPS Act, and other related laws and policies, took effect, federal courts continued to issue conflicting rulings regarding the legal standards that authorized involuntary commitments of people with mental health disabilities. Such standards exhibited the overreach of judiciary function in establishing institutionalization parameters, though not always in a light unfavorable to institutionalized patients. The U.S. Supreme Court, for instance, sided with the state of Wisconsin’s statutory definition of “mental illness” in its 1972 decision of *Lessard v. Schmidt* in holding that institutionalization was warranted should “the potential for doing harm be ‘*great enough* to justify such a *massive curtailment* of liberty.’”⁷⁸

The *Lessard* decision established the strictest possible standard—beyond a reasonable doubt—that considered an involuntarily committed individual’s “loss of basic civil rights and loss of future opportunities,” including their access to housing and employment.⁷⁹ It also recognized the State’s responsibility to aid these individuals’ re-entry and readjustment to society, naming the stigmas of commitment in the public eye.⁸⁰ It clarified the constitutional right to counsel to those navigating civil commitment proceedings, thus strengthening procedural due process arguments, asserting that the role of guardian *ad litem* insufficiently satisfied this right.⁸¹

75. See “*Understanding the Lanterman-Petris-Short (LPS) Act*,” DISABILITY RTS. CALI. (Jan. 8, 2018), <https://www.disabilityrightsca.org/publications/understanding-the-lanterman-petris-short-lps-act> [<https://perma.cc/8TK6-83T8>].

76. LPS Act § 5008(h).

77. See Jeffrey Geller, “*The Rise and Demise of America’s Psychiatric Hospitals: a Tale of Dollars Trumping Sense*,” AM. PSYCHIATRIC ASS’N: PSYCHIATRIC NEWS (March 14, 2019), <https://psychnews.psychiatryonline.org/doi/10.1176/appi.pn.2019.3b29> [<https://perma.cc/NX73-398Y>] (“Whether deinstitutionalization has ever occurred remains a matter of debate.”).

78. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972).

79. *Id.* at 1090.

80. See, e.g., *id.*, at 1085 (arguing how the criterion of “dangerousness” upon which commitment could be based “apparently rest[s] on the assumption that a state could proceed as *parens patriae* to protect the interests of the person involved.”).

81. *Id.* at 1097-1100 (underscoring, in part, how the role of an attorney and the role of a guardian *ad litem* serve distinct functions, and that the former is no substitute for the latter when

From these lenses, we interpret *Lessard*'s holding and rationale as favorable to those individuals suffering from mental illness. But it also had its limitations, especially as it did not explicitly speak to the rights of people experiencing homelessness, their disproportionately higher propensity of undergoing an involuntary commitment, and their limited "less restrictive" alternatives for treatment outside of involuntary commitments.⁸² It also derived its requirement of "dangerousness" from a separate U.S. Supreme Court case, *Humphrey v. Cady*, that interpreted the Wisconsin statutory definition of mental illness without considering its constitutionality.⁸³ Consequently, it still left up to the courts the parameters for determining an individual's potential for harm, while arbitrarily equating the same standard for people with physical and mental health disabilities.

Three years after *Lessard* was rendered, the U.S. Supreme Court's *O'Connor v. Donaldson* ruling recognized "involuntary commitment to a mental hospital . . . for any reason, [to be] a deprivation of liberty which the State cannot accomplish without due process of law."⁸⁴ Its standard for determining such confinement centered on whether a "non-dangerous individual [was] capable of surviving safely in freedom" independently or with the support of responsible community.⁸⁵ Mental health advocates have viewed this landmark decision in a favorable light for the strict standards set for detention of individuals with serious mental health conditions. It offered the much-needed commentary that the treatment needed for an individual with mental health disabilities did not, and should not, equate to a dangerousness standard. Involuntary commitment, in the ways that an individual's prolonged confinement violated their right to liberty, was a proxy of the criminal legal system and the harmful, irreversible effects of incarceration. Moreover, its legacy gained traction over the coming decades when cities, "often under pressure from local businesses," looked to dismantle mental facilities.⁸⁶

B. Forced Treatment Schemes as Proxies of the Criminal Legal System

Even with this 'dismantlement' legacy intact, our state and municipal governments still have not prioritized a well-funded community treatment

it comes to judicial hearings on civil commitments); see Michael J. Remington, *Lessard v. Schmidt and its Implications for Involuntary Civil Commitment in Wisconsin*, 57 MARQUETTE L. REV. 65, 73-74 (1973) ("The more specific issue in the *Lessard* case . . . is whether the Wisconsin provision for a guardian *ad litem* serves a function different from that of adversary counsel . . . [and that it] does not satisfy the constitutional right to counsel.").

82. Remington, *supra* note 81, at 77-78.

83. *Humphrey v. Cady*, 405 U.S. 504, 510 (1972) ("The statute authorizes renewal of the commitment order if the court finds that discharge would be 'dangerous to the public because of the person's mental or physical deficiency, disorder or abnormality.'") (citing WIS. STAT. ANN. § 975.14 (1971)).

84. *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975).

85. *Id.* at 575.

86. Allen Pusey, *A Woman Wins the Right to Be Homeless*, 103 A.B.A. J. 72, 72 (2017).

system or allocated sufficient resources for permanent supportive housing, housing vouchers, pathways to education, and job and vocational training. Rather, we have seen the rise of civil commitment laws and policies, with countless individuals subjected to these schemes—disproportionately those experiencing homelessness—winding up in jails and prisons. These carceral facilities are “warehouses of people with serious mental illnesses, where what is most often meted out is punishment and brutality rather than treatment.”⁸⁷ An estimated 44% of pre-trial detainees and 37% of prison detainees have a mental health condition.⁸⁸ Furthermore, many people with mental health disabilities who are ensnared in the criminal legal system are also less likely to make bail, as they also often lack the financial support of friends, family, and community members and suffer instantaneous civil penalties (i.e., loss of employment and housing) because of a single arrest. 22,000 people, according to the Prison Policy Initiative, are involuntarily committed across various institutional facilities “and many without any determined release date.”⁸⁹ Consequently, these individuals experience the devastating reality of languishing in jail at a rate “nearly twice as long as [persons] without mental [health disabilities].”⁹⁰

Some states, like Idaho and Mississippi, actively fund programs designed to detain psychiatric patients in prisons, using carceral facilities to “house” those who neither face a criminal trial nor charges.⁹¹ In Idaho particularly, correction officers can decide if an individual should be placed in prison rather than in a treatment facility. It has been a practice of several decades, despite attempts by mental health and homeless rights advocates to overhaul it.⁹² This, if anything, reinforces how the carceral state violates the civil and human rights of individuals, including those committed by courts for forced treatment. It is separate from Idaho’s court-ordered involuntary mental health commitment law requiring at least two professionals to ascertain whether an individual with mental health disabilities satisfies the “gravely disabled” legal standard.⁹³

87. Ayelet Waldman, *The Legal Fight That Ended the Unjust Confinement of Mental Health Patients*, LITERARY HUB (Jan. 21, 2020), <https://lithub.com/the-legal-fight-that-ended-the-unjust-confinement-of-mental-health-patients/> [https://perma.cc/AJ6A-TKQF].

88. Aashna Lal, *New York City’s Involuntary Commitment Plan: Fulfilling a Moral Obligation?*, HASTINGS CENTER (Jan. 10, 2023), <https://www.thehastingscenter.org/new-york-citys-involuntary-commitment-plan-fulfilling-a-moral-obligation/> [https://perma.cc/DZ5W-WVYX].

89. DERECKA PURNELL, *BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM* 216 (2021).

90. *Treatment, Not Jail, for the Mentally Ill*, N.Y. TIMES (Jan. 31, 2013), <https://www.nytimes.com/2013/02/01/opinion/treatment-not-jail-for-the-mentally-ill-in-new-york-city.html>.

91. Audrey Dutton, *Idaho Keeps Some Psychiatric Patients in Prison, Ignoring Decades of Warnings About the Practice*, PROPUBLICA (Dec. 13, 2023, 6:00AM EST), <https://www.propublica.org/article/idaho-keeps-some-psychiatric-patients-in-prison-ignoring-decades-of-warnings-about-the-practice>.

92. *Id.*

93. IDAHO CODE § 66-329(2) (2023).

Relatedly, criminalization agendas enforced by former President Trump further emboldened right-winged entities like the Texas-based Cicero Institute⁹⁴ to push punitive, non-evidence-based narratives about homelessness and public safety. Specifically, the Institute drafted a template state-level “Cicero Bill” that bans camping on statewide public lands, divest funding from permanent housing solutions towards mass encampments and police-led street outreach teams, and weaken due process protections that would enable the State to involuntarily commit people with mental health disabilities who experience homelessness.⁹⁵

While at least seven states—Georgia, Missouri, Tennessee, Texas, Arizona, Wisconsin, and Oklahoma—have adopted some version of the Cicero Bill,⁹⁶ others, like Kentucky,⁹⁷ have introduced related provisions that, though not explicitly based on the Cicero Bill, will likely criminalize people experiencing homelessness through anti-Housing First agendas, under the guise of “tackling violent crime.” Moreover, Indiana introduced its own version of the Cicero Bill as of January 2024.⁹⁸ Slated to take effect on July 1, 2024, Indiana House Bill 1413 regards the prohibition of street camping and appropriation of state funds for temporary shelter, parking areas and camping facilities,⁹⁹ while it proposes to cancel FY 2025 funding appropriated for the Housing First program.¹⁰⁰

Meanwhile cities and states continue to find more creative ways to confine, rather than house. Below are case studies of how New York City and California have resorted to the civil involuntary commitment system to effectively remove people experiencing street homelessness without addressing their underlying

94. *A New Way on Homelessness*, CICERO INST., <https://ciceroinstitute.org/issues/homelessness/> [https://perma.cc/4S6Y-37Q7] (last visited Jan. 11, 2024).

95. *See Reducing Street Homelessness Act of 2022*, CICERO INST. (2022), <https://ciceroinstitute.org/wpcontent/uploads/2021/11/Reducing-Street-Homelessness-Act-Model-Bill.090821.pdf> [https://perma.cc/2XD4-LP3D] [hereinafter 2022 Cicero Bill].

96. *See* Clara Bates, *Missouri’s New Law Criminalizing Homelessness is Already Causing ‘Uncertainty and Fear*, NPR (Jan. 17, 2023, 9:17 AM), <https://www.kcur.org/news/2023-01-17/missouris-new-law-criminalizing-homelessness-is-already-causing-uncertainty-and-fear> [https://perma.cc/K499-BHUC]; *see also* Kristian Hernandez, *Homeless camping bans are spreading. This group shaped the bills*, GPB NEWS (Apr. 12, 2022, 11:30AM), <https://www.gpb.org/news/2022/04/12/homeless-camping-bans-are-spreading-group-shaped-the-bills> [https://perma.cc/7S6K-CKAY].

97. *Lawmakers file ‘Safer Kentucky Act,’ Aimed at Tackling Violent Crime*, WDRB (Jan. 9, 2024), https://www.wdrb.com/news/politics/lawmakers-file-safer-kentucky-act-aimed-at-tackling-violent-crime/article_5e3d942c-af31-11ee-8d6a-67bd1c8300d2.html (“Tuesday, lawmakers mentioned that municipalities or cities could create designated areas, like a parking lot, for encampments to operate. In an effort, their hope is to limit panhandling and dangerous conditions for those experiencing homelessness and the public.”) [https://perma.cc/M8NM-85Q8].

98. *See generally* H.B. 1413, 123rd Gen. Assemb., Reg. Sess. (Ind. 2024) (amending the Indiana Code regarding state and local administration of funds for housing or homelessness) [hereinafter Ind. H.B. 1413].

99. *Id.* § 1 (adding Chapter 12 to the Indiana Code proposing the cancelation of Housing First funds for the state from July 1, 2024, through June 30, 2025).

100. *Id.* § 1, 4 (adding Chapters 12 and 31.5 to the Indiana Code concerning funds for parking areas, camping areas, and individual shelters, and the prohibition of street camping, respectively).

housing needs. Moreover, they demonstrate how concerning it is for law enforcement officials to intervene as first responders in mental health crises.

i. New York City's Involuntary Mental Health Directive

The politics of New York City's so-called criminal justice reform measures and burgeoning homelessness epidemic are complicated and intertwined. Rikers Island, the nation's most notorious prison industrial complex for its ongoing carceral culture of abuse, neglect, and punishment of detainees, is also coined New York's largest psychiatric care provider.¹⁰¹ Half of Rikers' jail population (an estimated 2,780 detainees) have a mental health diagnosis on any given day.¹⁰² And while Rikers has operated for over ninety years, the New York City Police Department ("NYPD") predated it by nearly a full century.¹⁰³

In the early 1980s, the NYPD established a Homeless Outreach Unit aiming to relocate people experiencing homelessness out of subways and into temporary shelters and social service programs.¹⁰⁴ This structural change within the agency supplemented its pre-existing Emergency Service Unit ("ESU") that was part of the Special Operations Bureau since 1930.¹⁰⁵ The ESU deliberately invested funds and resources into training NYPD officers to deal with those they deemed "emotional disturbed people" ("EDPs").¹⁰⁶ The high-profile murder of 66-year-old Eleanor Bumpers—a Black, Bronx resident who was experiencing a mental health crisis during her eviction from public housing¹⁰⁷—in 1984 triggered citywide use-of-force policy changes to be instituted against EDPs.¹⁰⁸ One of these changes consisted of requiring street-level NYPD officers to wait until the arrival of a supervisor before confronting an EPD in their line of

101. Annie McDonough, *Mental health care on Rikers: New York's largest psychiatric provider*, CITY & STATE (Sept. 30, 2022), <https://www.cityandstateny.com/policy/2022/09/mental-health-care-rikers-new-yorks-largest-psychiatricprovider/377870/>.

102. *Id.*

103. *History of the New York City Police Department*, PURE HIST. (May 11, 2012), <https://purehistory.org/history-of-the-new-york-city-police-department/>.

104. Lal, *supra* note 88.

105. Matt Coneybeare, [WATCH] *New York Police Department Highlights a Vintage Emergency Services Unit From 1930*, VIEWING NYC (May 10, 2017, 11:30AM), <https://viewing.nyc/watch-new-york-police-department-highlights-a-vintage-emergency-services-unit-from-1930/>.

106. PURNELL, *supra* note 89, at 222.

107. Bumpers was a mother of seven and grandmother of ten. Due to her "disability," she received minimal government assistance, and she spent nearly a year in prison before moving to New York where she faced multiple arrests and involuntary commitments through the rest of her life. In the Bronx particularly, she lived in deplorable living conditions, including broken pipes, defective kitchen, and a frequently flooded toilet, causing her to withhold her rent. PURNELL, *supra* note 89, at 221-22; see Alan Feuer, *Fatal Police Shooting in Bronx Echoes One from 32 Years Ago*, N.Y. TIMES (Oct. 19, 2016),

<https://www.nytimes.com/2016/10/20/nyregion/fatal-police-shooting-in-bronx-echoes-one-from-32-years-ago.html>.

108. See Feuer, *supra* note 107.

duty.¹⁰⁹ In the revamping of the NYPD Patrol Guide, officers were generally required to “isolate . . . and establish a ‘zone of safety’” around those they believed to be “suspects in mental distress.”¹¹⁰ The year of Bumpers’ murder brought upon nearly 34,000 EPD calls to the NYPD, over half of which were eligible for ESU response.¹¹¹ However, this figure, if anything, is likely an undercount as the NYPD has also injured or killed individuals outside of the ESU’s purview. These targeted responses against EDPs have only accelerated in recent years. Between 2009 and 2019, the number of EDP calls increased from 97,000 to nearly 180,000, rising in every police precinct.¹¹²

Any discussion about New York City’s criminalization of mental health requires historical context of its policing policies and perpetual racial inequality. EDP calls have disparately affected poorer, Black and Latino city residents.¹¹³ More broadly, despite statistically suffering serious mental health conditions at a rate seven times less than non-Black New Yorkers, Black New Yorkers undergo a higher hospitalization rate.¹¹⁴ Former Mayor Ed Koch authorized involuntary commitments of New Yorkers in 1987, furthering a renewed era of institutionalization that has disproportionately targeted and affected people with mental health disabilities who experience homelessness.¹¹⁵ Almost thirty years later, former Mayor Bill De Blasio created an inaugural Task Force on Behavioral Health and Criminal Justice, which, in part, incorporated a Crisis Intervention Team (“CIT”) training protocol for NYPD officers when in contact with individuals with apparent mental health disabilities. Presently, the CIT Program is “likely the largest in the nation,” having trained an estimated 10,000 officers on “de-escalation” techniques with EDPs since its inception.¹¹⁶

Even with the eventual dissolution of the NYPD’s Homeless Outreach Unit,¹¹⁷ degrading, counterproductive practices designed to remove people

109. See Feuer, *supra* note 107.

110. See Feuer, *supra* note 107.

111. PURNELL, *supra* note 89, at 223.

112. Greg B. Smith, *The NYPD’s Mental Illness Response Breakdown*, THE CITY (Apr. 6, 2020, 4:57 PM), <https://www.thecity.nyc/2019/03/21/the-nypd-s-mental-illness-response-breakdown/> [<https://perma.cc/JP52-GVKQ>]

113. See *id.* (“ . . . precinct-specific data indicating large numbers of mental health 911 calls in poorer neighborhoods mirror data showing that poorer black and Hispanic neighborhoods register a higher number of psychiatric hospitalizations.”).

114. Transcript of The Minutes Of The Committee On Public Safety Jointly With Committee On Fire And Emergency Management And Committee On Mental Health, Disabilities, And Addiction, NYC City Council, p. 21, ll. 23-25 (Feb. 6, 2023) [hereinafter City Council Transcript].

115. David Oshinsky, *It’s Time to Bring Back Asylums*, WALL ST. J. (July 21, 2023, 10:56 AM), <https://www.wsj.com/articles/its-time-to-bring-back-the-asylum-ec01fb2>.

116. STEPHEN EIDE, SYSTEMS UNDER STRAIN: DEINSTITUTIONALIZATION IN NEW YORK STATE AND CITY, 10 (Manhattan Inst., Nov. 2018) <https://manhattan.institute/article/systems-under-strain-deinstitutionalization-in-new-york-state-and-city> [<https://perma.cc/2QXW-JSGH>].

117. See Courtney Gross, *NYPD Getting Kicked Out of Homeless Services*, SPECTRUM NEWS NY1 (Jul. 3, 2020, 6:07PM), <https://ny1.com/nyc/all-boroughs/public-safety/2020/07/03/nypd-getting-kicked-out-of-homeless-services> [<https://perma.cc/ELY9-ZF6A>]; see also #Human Plan:

experiencing homelessness from encampments and public spaces continue. Upon taking office in 2022, Mayor Eric Adams promulgated a series of criminalization agendas against people experiencing homelessness that escalated police violence. One policy—the Mental Health Involuntary Removals directive (“the Directive”)—interpreted and expanded Article 9 of the New York State Mental Hygiene Law as it regarded the involuntary removal standard. Under the guise of maintaining and improving public safety, the Directive explicitly enables patrol officers “to take into custody, for the purpose of a psychiatric evaluation, an individual who appears to be mentally ill and is conducting themselves in a manner likely to result in serious harm to self or others”¹¹⁸ when they apparently cannot meet their “basic human needs”.¹¹⁹

The Directive has been heavily criticized by homeless rights and disability rights advocates, as well as civil rights lawyers who are challenging its facially discriminatory basis in an ongoing federal court proceeding.¹²⁰ Not only does its language directly contravene the New York City Human Rights Law and the Americans with Disabilities Act regarding disability discrimination, but it suggests that even those who have not committed an overtly dangerous act may still be subjected to forced removal and hospitalization by law enforcement.

In partnership with other housing advocates across the country, the National Homelessness Law Center called for the condemnation of this Directive in extensive consultation with the United Nations’ (“UN”) Human Rights Committee (“the Committee”) and multiple UN Special Rapporteurs in the fall of 2023.¹²¹ In a detailed set of Concluding Observations expressing its concerns

Removing Law Enforcement from Homeless Outreach, HUM. NYC (last visited Dec. 20, 2023), <https://www.humanplan.nyc/removing-law-enforcement> [https://perma.cc/9UNN-3CDY].

118. Mental Health Involuntary Removals (MHIR), (Nov. 28, 2022), *In* Official Website of N.Y.C., Office of the Mayor., <https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2022/Mental-Health-Involuntary-Removals.pdf>.

119. Eric Adams, Mayor, NYC, Transcript: Mayor Eric Adams Delivers Address on Mental Health Crisis in New York City and Holds Q-and-A, (Nov. 29, 2022), <https://www.nyc.gov/office-of-the-mayor/news/871-22/transcript-mayor-eric-adams-delivers-address-mental-health-crisis-new-york-city-holds>.

120. *See generally* Second Amended Class Action Complaint, *Greene v. City of New York*, No. 21-cv-05762-PAC (S.D.N.Y. Apr. 20, 2023), ECF No. 155 (detailing a class action suit on behalf of six individuals and four similarly situated organizations against the NYPD and Mayor Eric Adams regarding the Removals Directive) [hereinafter *Greene v. City of New York*]; *see also Mayor Adams’ Plan Will Not Help People With Mental Disabilities*, NAT’L. LOW INCOME HOUS. COAL. (Dec. 12, 2022), https://nlihc.org/sites/default/files/NYC-Statement_Final_121222.pdf (containing nearly 300 organizational and individual signatories opposing the Mayor’s Removals Directive).

121. *See generally* Eric Tars et al., *Criminalization of Homelessness and Mental Health in the United States: Shadow Report to the United Nations Human Rights Committee for the United States’ Review of the International Covenant on Civil and Political Rights*, NAT’L HOMELESSNESS L. CTR & MIAMI L. HUM. RTS. CLINIC (Sept. 12, 2023) (detailing policy recommendations for the Human Rights Committee to issue upon the U.S. government, while demonstrating the prevalence of the criminalization of homelessness and mental health in the U.S.) [hereinafter *ICCPH Shadow Report*]; *see also* Eric Tars et al., *The Criminalization of Homelessness and Mental Health in the*

and policy recommendations to the U.S. government, the Committee characterized “the disproportionate impact of homelessness on . . . persons with disabilities” as a violation, *inter alia*, of the right to life.¹²² The Center further argued that the Directive is demonstrable of how *de facto* criminalization policies have, just the same as certain judicial precedent, created arbitrary legal standards around involuntary commitment. The Directive does not address the root causes of homelessness, nor does it address the range of reasons mental health disabilities are exacerbated and so widely prevalent across populations experiencing homelessness and racial and socioeconomically marginalized communities. Rather, these standards disregard the civil liberties of people with mental disabilities who experience homelessness, and their humane, basic needs, including, but not limited to, permanent supportive housing.

ii. California’s CARE Courts

California’s housing affordability and homelessness crisis has reached an unsustainable threshold. Between 2014 and 2020, the state’s homelessness count increased by 42%, compared to the 9% decrease in homelessness in the rest of the country.¹²³ The Department of Housing and Urban Development (“HUD”)’s most recent Point-in-Time (“PIT”) Count found that California’s 123,423 unsheltered individuals accounted for an estimated 48% of the U.S.’s unsheltered population,¹²⁴ while a related University of California-San Francisco (“UCSF”) study confirmed that the state contains 30% of the U.S.’s total *homeless* population.¹²⁵ Furthermore, the vastly high prevalence of mental illness amongst Californians experiencing homelessness has been a hotly contested issue in discussions about homelessness’s causes and consequences.

United States: Submission to the Special Rapporteur on Extreme Poverty and Human Rights and the Special Rapporteur on the Right to Adequate Housing, NAT’L HOMELESSNESS L. CTR. & MIAMI L. HUM. RTS. CLINIC (Sept. 19, 2023); *see also* Eric Tars et al., *Racial Injustice in Homelessness and Housing in the United States: Submission to the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, NAT’L HOMELESSNESS L. CTR. & MIAMI L. HUM. RTS. CLINIC (Oct. 6, 2023).

122. Hum. Rts. Comm. Concluding observations on the fifth periodic report of the United States of America, ¶ 40, U.N. Doc. CCPR/C/USA/CO/5 (Dec. 7, 2023) [hereinafter *2023 ICCPR Concluding Observations*].

123. Jialu L Streeter, *Homelessness in California: Causes and Policy Considerations*, STAN. INST. FOR ECON. POL’Y RSCH. (May 2022), <https://siepr.stanford.edu/publications/policy-brief/homelessness-california-causes-and-policy-considerations#:~:text=California%E2%80%99s%20homeless%20crisis%20is%20associated%20with%20high%20housing,the%20regulation%20that%20have%20hindered%20new%20housing%20development> [https://perma.cc/UU2X-JATU] [hereinafter HOMELESSNESS IN CALIFORNIA].

124. 2023 AHAR: PART 1 – PIT ESTIMATES OF HOMELESSNESS IN THE U.S., OFF. POL’Y DEV. & RSCH. (Dec. 2023), <https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf> [https://perma.cc/XFV7-QL8C] (linking to 2007-2023 PIT Estimates by state).

125. Victoria Colliver, “California Statewide Study Investigates Causes and Impacts of Homelessness,” UCSF (June 20, 2023), <https://www.ucsf.edu/news/2023/06/425646/california-statewide-study-investigates-causes-and-impacts-homelessness> [https://perma.cc/WMT2-GF58].

An individual's mental health conditions, perpetuated by multiple stress factors (i.e., loss of employment, inability to pay rent, physical health challenges, etc.) and often resulting in hospitalizations predict future homelessness—but these conditions are products of structural circumstances and policy failures rather than an individual's voluntary choice or alleged personal failings. A total of 7% of all UCSF survey participants reported mental health hospitalization in the six months prior to homelessness.¹²⁶ About 25% of all Los Angeles County adults experiencing homelessness were found to have at least one serious mental illness in 2020,¹²⁷ compared to the estimated 25% of the state's homeless population with a serious mental illness in 2023.¹²⁸

Described as an “experiment . . . [of] coercive compassion,”¹²⁹ Governor Gavin Newsom signed the California Community Assistance, Recovery and Empowerment (“CARE”) Act in 2022 to invoke civil courts' authority in mandating involuntary commitments.¹³⁰ The CARE Act incorporates the LPS Act and existing statutory provisions regarding Assisted Outpatient Treatment programs (“Laura's Law”).¹³¹ However, it signals an expansion of state power and the unchecked pseudo-legislative function of courts, while also enabling practically *anyone*, including law enforcement, to petition for a commitment process.¹³² Rather than codifying the strict legal standards for involuntary commitments borne out of *O'Connor* and its progeny, the CARE Act requires an initial showing that an individual's serious mental illness is “substantially deteriorating” or that such deterioration “would be likely to result in grave disability or serious harm to the person or others.”¹³³ Moreover, this showing may be conducted *in absentia* of the individual at issue, thus implicating a lack

126. Margot Kushel & Tiana Moore, *Toward a New Understanding: The California Statewide Study of People Experiencing Homelessness* UCSF 1, 43 (June 2023), https://homelessness.ucsf.edu/sites/default/files/2023-06/CASPEH_Report_62023.pdf [<https://perma.cc/KJA6-XHZK>].

127. *See Greater Los Angeles Homeless Count Suggests Pandemic-era Policies Prevented Surge in Homelessness*, CTY. L.A. HOMELESS INITIATIVE (Sept. 8, 2022), <https://homeless.lacounty.gov/news/2022-homeless-count-results/> [<https://perma.cc/A4VB-YXZ9>].

128. Scott Wilson, “California shifts to an experiment in coercion to treat the homeless,” WASH. POST (Apr. 27, 2023, 12:22PM EST), <https://www.washingtonpost.com/nation/023/04/27/california-homeless-mental-illness-newsom/> [<https://perma.cc/8FWJ-PZV3>].

129. *Id.*

130. *See generally* S.B. 1338, 2021-2022 Reg. Sess. (Cal. 2022) (authorizing adults to petition a civil court to create a voluntary or court-ordered CARE plan and implement services to “provide behavioral health care . . . to adults who are experiencing a severe mental illness . . . and who meet other specified criteria”) [hereinafter CARE Act].

131. *See generally* A.B. 1421, 2001-2002 Reg. Sess. (Cal. 2002) (establishing an assisted outpatient treatment program for anyone suffering from a mental disorder so long as they meet certain criteria) (amended by S.B. 507, 2021-2022 Reg. Sess. (Cal. 2021)) [hereinafter Laura's Law]; *see also* *Assisted Outpatient Treatment*, DHCS (accessed Dec. 13, 2023), <https://www.dhcs.ca.gov/formsandpubs/Pages/Assisted-Outpatient-Treatment-Program.aspx> [<https://perma.cc/3LUM-S8AU>].

132. *See* CARE Act, *supra* note 130, § 5974(f).

133. *See* CARE Act, *supra* note 130, § 5972(d).

of procedural due process that would otherwise afford them the right to rebut the “likely to” standard.

The standard is vague, inviting arbitrary court speculation with the risk of basing itself on biased conceptions of an individual’s poverty. The CARE program is also inherently coercive. If an individual qualifies for it after a clinical assessment, they risk jail time or conservatorship if they do not participate or try to exit the program.¹³⁴ Noncompliance might also subject an individual to a more permanent conservatorship, “which can include locked placements and forcible psychotropic medication for an extended—and potentially unlimited—duration.”¹³⁵

It is troubling how CARE program participation is statutorily considered “the least restrictive alternative necessary” for ensuring the individual’s recovery and stability.¹³⁶ For example, while one measurable outcome for assessing its effectiveness includes “reductions in law enforcement encounters and incarceration,”¹³⁷ law enforcement and others who may not serve in the individual’s best interest can still subject them to a court process in violation of their due process rights. As was discussed in the context of New York City’s Directive, law enforcement’s role as first responders for people experiencing homelessness often escalates times of crisis. Their coercive authority over people with mental disabilities “only nods to the deeper problems causing homelessness, mental health crises, and violence.”¹³⁸ And, in the absence of supportive housing and other humane treatment plans intended to safeguard the liberties of people with mental disabilities who experience homelessness, the path to recovery and stability is bleak.

Disability rights advocates have challenged the CARE Act’s legal validity,¹³⁹ while the UN Human Rights Committee has called for the “redirecting [of] funding from criminal justice responses towards adequate housing and shelter programmes.”¹⁴⁰ The Committee recognizes that enhanced police budgeting at the cost of State-funded homelessness programs destabilizes

134. “Disability Rights California & Advocates Urge Assembly Health Committee to Vote No on SB1338: Joint Letter in Opposition to CARE Court,” DISABILITY RTS. CALI. (June 22, 2022), <https://www.disabilityrightsca.org/latest-news/disability-rights-california-advocates-urge-assembly-health-committee-to-vote-no-on-sb> [<https://perma.cc/Z47G-83D9>] (noting, also, that conservatorships deprive people of “the right to choose where to reside, to make medical decisions, to vote, [etc.]” and, thus, perpetuate institutional racism and health disparities).

135. ICCPR SHADOW REPORT, *supra* note 121, ¶ 33.

136. CARE Act, *supra* note 130, § 5972(e).

137. CARE Act, *supra* note 130, § 5985(e)(17).

138. Beth Haroules & Simon McCormack, *We Can’t Police Our Way Out of Homelessness and Mental Health Crises*, NYCLU (Mar. 24, 2022, 12:15PM), <https://rightsandrecovery.org/e-news-bulletins/2022/3/24/nyclu-we-cant-police-or-coerce-our-way-out-of-homelessness-and-mental-health-crises/> [<https://perma.cc/VNY5-NPEZ>].

139. DISABILITY RIGHTS CALIFORNIA, *Disability Rights Advocates File Petition Challenging the Constitutional Validity of the Care Act*, Press Release (Jan. 26, 2023), <https://www.disabilityrightsca.org/press-release/disability-rights-advocates-file-petition-challenging-the-constitutional-validity-of> [<https://perma.cc/M5NC-3N5J>].

140. 2023 ICCPR Concluding Observations, *supra* note 122, ¶ 41.

the lives of people experiencing homelessness and criminalizes them in violation of international human rights standards. Accordingly, as the court-sanctioned process and CARE Act mechanism is inarguably coercive, it is no extension of compassion. Despite what CARE stands for, this legislation removes people from their community, disempowers them, fails to assist them, and is unlikely to lead to recovery.

IV. POLICY RECOMMENDATIONS: RE-IMAGINING JUSTICE

While “justice” was inscribed in the Preamble of our federal Constitution, the framers (arguably) did not contemplate how America’s colonialist legacies and conditions of poverty, inequitable wealth distribution, and racial capitalism would impede its actualization. In the 200th anniversary of the document’s founding, then-Supreme Court Justice Thurgood Marshall voiced that the framers’ vision was “defective from the start” and that while there were “eloquent objections” to slavery raised by several of them, the document “laid a foundation for the tragic events that were to follow.”¹⁴¹ Justice Marshall was right. The experiences of many members of today’s judiciary, confined within elite social establishments, guard them from the realities of oppression and marginalization. The same can be said of the mostly white men in Congressional halls, governors’ mansions, City Halls, and City Council chambers. This, among other reasons, is how and why systems of law and policy were built for maintaining power for few, rather than administering justice for all, and why society must re-imagine each system if it wants to decriminalize homelessness and mental health and enforce universal human rights like the right to adequate housing.

A. Adopting an International Human Rights Framework

The UN Special Rapporteur on adequate housing condemned homelessness as “perhaps the most visible and most severe symptom of the lack of respect for adequate housing.”¹⁴² According to the UN Committee on Economic, Social and Cultural Rights, adequate housing is the right to live in “security, peace, and dignity.”¹⁴³ Adequate housing demands more than just four walls and a roof. At

141. David G. Savage, *Marshall on Constitution: ‘Defective From Start’*, L.A. TIMES, May 7, 1987, <https://www.latimes.com/archives/la-xpm-1987-05-07-mn-4540-story.html> [<https://perma.cc/9YNT-R3Z2>].

142. U.N. OFF. HIGH COMM’R FOR HUM. RTS., THE HUMAN RIGHT TO ADEQUATE HOUSING: FACT SHEET NO. 21/REV.1 21 (2009), https://www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf [<https://perma.cc/WU88-GJAP>].

143. *Id.*, at 3.

least seven key dimensions¹⁴⁴ must be met before housing can be considered “adequate” under the international human rights framework: security of tenure, availability of services, materials, facilities and infrastructure, affordability,¹⁴⁵ habitability,¹⁴⁶ accessibility,¹⁴⁷ location,¹⁴⁸ and cultural adequacy.

“In the [international] human rights framework, every right creates a corresponding duty on the part of the government to respect, protect, and fulfill the right.”¹⁴⁹ Contrary to the propaganda of its opponents, the right to adequate housing does not require the government to build free houses for every person. It does, however, ascribe ultimate responsibility to the government to act in utility of its “maximum available resources.”¹⁵⁰ Accordingly, it creates an affirmative governmental obligation to expeditiously implement a plan for housing people without a home.¹⁵¹

Most importantly, we must transform our views of housing as a privatized commodity, primarily accessible to the wealthy, and adopt the core central belief that housing is a universal human right, not a privilege. This requires honoring the principles enshrined in our international human rights commitments, ensuring that they are appropriately and effectively utilized as a tool of governance and accountability.

144. See U.N. Off. High Comm’r for Hum. Rts., *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter General Comment No. 4].

145. See Jennifer Ludden, *Housing is Now Unaffordable for a Record half of all U.S. Renters*, NPR (Jan. 25, 2024), <https://www.npr.org/2024/01/25/1225957874/housing-unaffordable-for-record-half-all-u-s-renters-study-finds> [<https://perma.cc/3MF6-L9DV>] (quoting Jeff Olivet, Executive Director of the U.S. Interagency Council on Homelessness: “We simply don’t have enough homes people can afford.”).

146. See General Comment No. 4, *supra* note 144, § 8(d) (explaining how habitable housing guarantees physical safety, adequate space, and protection against cold, damp, heat, rain, wind, other health and structural hazards threats); see, e.g., Anita Snow, *Sweltering streets: hundreds of homeless die in extreme heat*, AP (June 24, 2022, 1:35PM EST), <https://apnews.com/article/climate-science-health-and-environment-4f23d928ea637d239147c0e4adbad6dc> [<https://perma.cc/C7ZT-FBVD>] (discussing how Phoenix, Arizona’s excessive heat wave and uninhabitable conditions caused 130 people experiencing homelessness to die in 2021).

147. See General Comment No. 4, *supra* note 144, § 8(e) (discussing how accessible housing must consider and meet the specific needs of disadvantaged and marginalized groups—especially those with physical and mental health disabilities).

148. See General Comment No. 4, *supra* note 144, § 8(f) (discussing how housing should be close to employment opportunities, health-care amenities, schools, childcare centers, and other social establishments, and in a clean environment without pollution and other dangers in the area).

149. See Eric Tars, *Housing as a Human Right*, NAT’L LOW INCOME HOUS. COAL. 2018 ADVOCATES’ GUIDE 1-13 (2018).

150. *Id.*

151. See *ALL IN: The Federal Strategic Plan to Prevent and End Homelessness*, U.S. INTERAGENCY COUNCIL HOMELESSNESS (USICH), (2022), https://www.usich.gov/sites/default/files/document/All_In.pdf (expressing the need to expand housing stock availability, but neither defining nor providing criteria for what constitutes adequate housing).

B. Adopting a Poverty Abolitionist Framework

We often think about abolitionism as tearing down systems of power, creating and envisioning a world without harm. But abolitionism, at its core, is about healing, restorative transformation, and love—the kind of love that views others as an extension of self. Practicing it requires completely shifting our conceptions of systemic reform.

To decriminalize homelessness and mental health, we must first intentionally center disability justice and dismantle ableism because “carceral systems medicalize, pathologize, criminalize, and commodify survival, divergence, and resistance.”¹⁵² People with disabilities comprise 26% of the country’s population, yet are over-represented across all carceral populations and across all civil commitment “treatment” facilities, nursing facilities, and “hospitals.”¹⁵³ Many of these facilities operate under the false pretense of providing care and wrap-around support services. The rise of civil involuntary commitment schemes are explicit examples of how the judicial system and police forces are deliberately evaluating an individual’s “qualifications” for treatment based on perceived, subjective divergences. They also perpetuate ableism, “a systemic oppression that allows social systems, and individuals to assign value to people based on their appearance and their ability to re/produce, excel, and behave” among other things.¹⁵⁴

Second, we must acknowledge our society’s reliance on the criminal legal system by way of surveillance tactics, the policing of people experiencing homelessness, the denial of their civil liberties, and their further economic deprivation. This reliance completely disregards the extent of how mental, emotional, and psychological trauma often worsen because of oppressive carceral conditions. As Eleanor Bumpers’ tragedy demonstrates, their contact may even result in a killing.¹⁵⁵ This overtly biased and racist policing serves the opposite purpose of compassionate crisis intervention.

Accordingly, creating a world that decriminalizes homelessness and mental health, among other conditions of poverty, must attack the various tiers of oppression and demand a transformation shift, abolition of court structures, and shrinkage of the carceral state’s footprint. This includes pressuring our elected officials to divest funding from carceral responses toward homelessness, and repeal punitive, criminalization laws and policies that expand police authority.

152. Talila Lewis, *Disability Justice Is an Essential Part of Abolishing Police & Ending Incarceration*, ABOLITION FOR THE PEOPLE: THE MOVEMENT FOR A FUTURE WITHOUT POLICING & PRISONS 60, 62 (Colin Kaepernick ed., 2021).

153. *Id.*

154. *Id.* at 61.

155. *See supra*. Sec. III.B.i.; *see also Advancing An Alternative to Police: Community-Based Services for Black People with Mental Illness*, LEGAL DEFENSE FUND & BAZELON CTR. MENTAL HEALTH L. 1-9 (2022) (narrating the tragic accounts of Natasha McKenna, Saheed Vassell, and Daniel Prude to demonstrate how the racially biased and discriminatory treatment of Black people with mental disabilities have resulted in countless senseless killings by law enforcement).

These officials—i.e., governors, mayors, and judges—can (and should) “take the lead from organizers [and persons with lived expertise] as ‘fellow advocates,’ pushing legal doctrine in an abolitionist direction”.¹⁵⁶

However, even if this advocacy produced harm-reducing outcomes in the short-term, abolitionism demands a longer-term shift of hearts and minds. Ultimately, all institutional legacies predicated on racial capitalism, settler colonialism, militarism, and white supremacy—the same legacies that have disproportionately criminalized and disempowered poor people of color, and those experiencing homelessness and health disparities—must be replaced by institutions anchored in fairness and justice. Dismantling these social ills and their root causes is an essential step towards preserving and honoring the humanity of *all* individuals.

V. CONCLUSION

In most cases, statistical findings interpreting decades of epidemiological and sociological research do not capture the multitude of civil consequences and systemic institutional barriers that criminalize rather than humanize people experiencing homelessness. Many of these individuals, particularly those with health conditions, are victim-blamed for their own circumstances of poverty. Society has stigmatized their mental health disabilities as the drivers of homelessness, labeled them as dangerous violent criminals who make communities less safe, and treated them as pariahs who are less worthy and less deserving of the most basic and essential human needs.

Imagine a world where the U.S. adopted a human rights framework as the model for building affordable, adequate housing. Would homelessness still be on the rise?¹⁵⁷ Imagine if Jha’asryel-Akquil Bishop was met with a plan to be housed and healed, rather than handcuffed and forcibly hospitalized. Imagine if instead of the “coercive compassion” of California’s CARE Act or New York City’s Mental Health Involuntary Removals, there was a directive that criminalize people experiencing homelessness, our executives, legislators, and other policymakers exercised true compassion by fully embracing policies prioritizing permanent supportive housing over handcuffs.

Ending homelessness is not just about curbing street homelessness. Nor is it about providing just any physical structure or shelter to ensure protection from the elements. Rather, ending homelessness demands deliberately addressing its root causes and legacies—the historical structural racism, gender and sex-based discrimination, and ableism that not only affect one’s housing conditions, but the health of one’s body and mind. It demands a restructuring of the legal system that has failed to remedy structural inequalities, and funding vital health and

156. *Id.*

157. See Steff Danielle Thomas, *Homelessness in US Surges to Highest-Recorded Level*, THE HILL (Dec. 15, 2023, 7:55 PM), <https://thehill.com/homenews/administration/4363103-homelessness-sours-highest-recorded-level/> [https://perma.cc/J9R5-66N4].

community-based services¹⁵⁸ and expanding the availability of affordable housing.

All of this requires accountability from our elected officials and those equipped with enforcing the law to ensure that everyone has a fundamental human right to adequate housing. Getting there requires courage. Courage to view our neighbors who experience homelessness as an extension of ourselves. Courage to reject the loud and dehumanizing calls to sweep those neighbors from public view and into a concrete cell, a dangerous and uninhabitable congregate shelter, or on the fringes of town for “someone else” to deal with. And lastly, courage to expand our vision and reimagine a society where this is all possible. The strong will of the people can make it so.

158. *See, e.g.*, Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS 128, 130 (2019) (“But are state civil courts the appropriate institution to address individual socioeconomic needs like untreated substance abuse and mental illness, domestic violence, and unstable housing that manifest in a society with stagnant wages and rising inequality?”).