

AFTER GRANTS PASS: THE CASE FOR RECENTERING THE
CRIMINAL LEGAL SYSTEM AND ITS CONSTITUTIONAL
CONSTRAINTS

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ABSTRACT

In City of Grants Pass v. Johnson, the Supreme Court held that the Eighth Amendment does not prohibit cities from punishing unhoused people for sleeping outside when they have nowhere else to go. While the holding was legally narrow, the Court's rhetoric framed criminalization as sound policy rather than punishment, obscuring the criminal legal system implications at the heart of the case. Cities responded not to the narrow holding but to the rhetorical message: In the year following the decision, they enacted hundreds of new laws criminalizing homelessness and dramatically intensified enforcement.

This Article argues for the recentering of the criminal legal system and its constitutional constraints in advocacy against antihomeless laws and policies. It demonstrates how the Court's rhetoric obscured the fundamentally punitive nature of these practices and how cities responded by funneling individuals into the criminal legal system rather than investing in opportunity and meaningful care. Situating current practices within the nation's history of using criminal law to control marginalized communities, this Article argues that increased

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criminalization of homelessness creates cascading harms throughout the criminal legal system that violate core constitutional protections: pretextual stops, coerced searches, property seizures, and denial of effective counsel. While numerous constitutional claims survive Grants Pass, confronting antihomeless practices with criminal procedure protections exposes the punitive reality behind claims of compassion and provides essential tools to challenge government abuse of the carceral state.

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INTRODUCTION

In *City of Grants Pass v. Johnson*, the Supreme Court foreclosed an important federal constitutional claim that advocates used to challenge punitive approaches to homelessness.¹ The legal claim at issue—the Eighth Amendment’s Cruel and Unusual Punishments Clause—is a constitutional provision designed to protect individuals from government abuse of the criminal legal system.² Yet the Court’s decision, and the rhetoric employed by the City of Grants Pass and the many amici who filed briefs to support it, framed it as a case about empowering localities to make policy choices on socio-political issues.³ In doing so, they effectively hid the ball, shifting focus away from criminalization and the constitutional norms that constrain it. This shift ignores the way that modern government responses to homelessness fit within a long and shameful legacy of using the criminal legal system to control and exclude those deemed undesirable in the name of “addressing” socioeconomic problems. Despite the rhetoric, the post-*Grants Pass* landscape makes clear that criminalization remains local governments’ tool of choice when it comes to homelessness.

Since *Grants Pass*, laws imposing criminal penalties for life-sustaining behaviors associated with homelessness have proliferated, and criminal enforcement has skyrocketed.⁴ This reality demonstrates how misguided and disingenuous the framing of *Grants Pass* was. The Court’s decision enabled local governments to choose punitive responses over meaningful investment in care and opportunity for a vulnerable population. The choice to criminalize rather than invest is particularly striking given the scale of need: 771,480 people experienced homelessness on a single night in 2024, with over 35 percent unsheltered.⁵ This punitive response also

1. See 144 S. Ct. 2202, 2226 (2024).

2. See *id.* at 2215.

3. *E.g., id.* at 2208-10, 2226.

4. See, e.g., *One Year Since Grants Pass: Tracking the Criminalization of Homelessness*, ACLU (June 23, 2025), <https://www.aclu.org/one-year-since-grants-pass-tracking-the-criminalization-of-homelessness> [https://perma.cc/C4YG-PE3J].

5. TANYA DE SOUSA & MEGHAN HENRY, U.S. DEP’T OF HOUS. & URB. DEV., *THE 2024 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 2* (2024), <https://www>.

creates cascading harms and civil liberties violations within the criminal legal system that advocates can, and should, challenge using core constitutional protections against state abuse of the criminal legal system.

This Article proceeds in four parts. First, it provides an overview of the Supreme Court’s *Grants Pass* decision and the opinion’s obfuscation of the criminalization at the core of the case. Second, it describes the decision’s aftermath, both in terms of how government approaches to homelessness changed as well as how the decision has—and has not—affected litigation challenging mistreatment of unhoused individuals.⁶ Third, it makes the case that the government responses to homelessness that proliferated after *Grants Pass* are not sound policy choices but expansions and abuses of the criminal legal system. This Part describes the scope and harms of laws and policies that criminalize homelessness and situates them within our long history of using the criminal legal system to “address” social woes and exclude those with marginalized identities. Finally, it argues that the increased criminalization that followed *Grants Pass* creates distinctly criminal harms and, in many cases, violates core constitutional rights. Recentering the criminal legal system and its constitutional constraints would protect unhoused individuals against abuse and the expansion of the carceral state. This framing is also critical to understanding and confronting our present moment.

I. THE *GRANTS PASS* DECISION AND THE OBFUSCATION OF CRIMINALIZATION

In *City of Grants Pass v. Johnson*, unhoused plaintiffs challenged the City’s enforcement of ordinances prohibiting sleeping and camping in public spaces.⁷ Under the City’s ordinances, unhoused people

huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part.1.pdf [https://perma.cc/TY78-L4EG].

6. Throughout this Article, the terms “unhoused,” “homeless,” and “experiencing homelessness” denote individuals who meet the federal law definition of homelessness. See 42 U.S.C. § 11302; 24 C.F.R. § 582.5. The term “unsheltered” refers to individuals who are experiencing homelessness and reside in a place that it not intended for human habitation (for example, streets, cars, and the like).

7. Brief for Respondents at 1, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024) (No.

could be punished, with hundreds of dollars in fines and even jail time, for merely sleeping outdoors with as little as a cardboard sheet under their head.⁸ Like many American cities, Grants Pass had a significant housing shortage, leaving hundreds of residents homeless.⁹ And, because the City did not have sufficient shelter space to meet the needs of this population, many unhoused residents had no choice but to sleep in public, making them, in the terms of the Ninth Circuit doctrine, “involuntarily homeless.”¹⁰ Plaintiffs filed suit on behalf of themselves and a class of involuntarily homeless people in Grants Pass, seeking to enjoin the City from punishing them for “‘resting, sleeping[,] or seeking shelter’ outside when [t]hey have no place else to go.”¹¹ The plaintiffs alleged that enforcement of these ordinances punished the status of homelessness, in violation of the Eighth Amendment’s Cruel and Unusual Punishments Clause.¹² The district court, relying on *Martin v. City of Boise*, agreed and issued a permanent injunction barring enforcement of the City’s antisleeping and anticamping ordinances against the involuntarily homeless.¹³

The Ninth Circuit Court of Appeals affirmed in part the district court’s decision, agreeing that *Martin* was “directly on point” but directing the lower court to “craft a narrower injunction’ on remand.”¹⁴ The Ninth Circuit denied the City’s petition for rehearing en banc and the City petitioned the Supreme Court for a writ of certiorari.¹⁵

The Supreme Court reversed, holding that the Eighth Amendment’s prohibition against cruel and unusual punishments did not

23-175).

8. *Id.*

9. *Id.* at 2; John Oliver, *Housing Crisis Persists in Grants Pass amid Shortages and High Costs*, GRANTS PASS TRIB. (Mar. 25, 2025), <https://grantspasstribune.com/housing-crisis-persists-in-grants-pass-amid-shortages-and-high-costs/> [<https://perma.cc/TAG8-EL76>].

10. Brief for Respondents, *supra* note 7, at 25, 25 n.6.

11. *Id.* at 6 (alterations in original).

12. *Id.*

13. See *Blake v. City of Grants Pass*, No. 18-cv-01823, 2020 WL 4209227, at *5-8 (D. Or. July 22, 2020); Brief for Respondents, *supra* note 7, at 8. See generally *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) (en banc) (holding that the Eighth Amendment prohibited criminalizing involuntarily homeless people from sitting, sleeping, or lying outside on public property), *abrogated by*, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024).

14. Brief for Respondents, *supra* note 7, at 10-11.

15. *Id.* at 11.

prevent the City from fining, arresting, and jailing unhoused plaintiffs for sleeping in public, even when they had no alternative place to sleep.¹⁶ In doing so, it reasoned that the laws at issue in *Grants Pass* did not punish the status of being homeless but instead the act of camping on public property.¹⁷

In reaching this decision, the majority opinion emphasized not the criminal enforcement scheme at issue—a logical fit for an Eighth Amendment case—but instead the homelessness crisis in the American West and the various public policy responses to that crisis.¹⁸ Indeed, the first paragraph of the opinion vaunts the City’s “multifaceted approach” to homelessness, listing arguably irrelevant aspects of the City’s policies, such as its creation of a “homeless community liaison,” and crediting its intention to “protect[] the rights, dignity[,] and private property of the homeless.”¹⁹ In contrast, it vaguely described the challenged enforcement scheme as “certain restrictions against encampments on public property.”²⁰ The Court did not mention until several pages into the opinion that these “restrictions” could result in criminal penalties, including jail time.²¹

Justice Gorsuch, writing for the majority, spent the first several pages of the decision opining on the state of homelessness, its causes, harms, and the policy solutions favored by various cities.²² Justice Gorsuch focused on all the ways local governments have made “efforts to address the challenges of homelessness,”²³ parroting the laments of the various amici who wrote in support of the City.²⁴

16. See *Grants Pass*, 144 S. Ct. at 2226.

17. *Id.* at 2218. The Court reasoned that the ordinances were not directed at homeless status but rather the action of “occupy[ing] a campsite” on public property “for the purpose of maintaining a temporary place to live” because, under the laws, “it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest on the lawn of a municipal building.” *Id.* (alteration in original).

18. *Id.* at 2207-08.

19. *Id.* at 2208 (second alteration in original).

20. *Id.*

21. *Id.* at 2213.

22. *Id.* at 2208-11.

23. *Id.* at 2210.

24. See, e.g., Brief of Amicus Curiae Cicero Institute in Support of Petitioner, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175); Brief of Idaho, Montana and 22 Other States as Amici Curiae in Support of Petitioner, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175).

The majority presented the ultimate subject of the litigation—laws that impose criminal penalties for sleeping in public—as part of a “range of policies and programs,” listing it alongside such benign, and notably noncarceral, policies as “expanding shelter and affordable housing” and training “employees in outreach tactics.”²⁵ Despite the fact that neither the Grants Pass ordinances at issue, nor the facts of the case, concerned “encampments,”²⁶ the majority opinion used that term more than twenty times.²⁷

The majority took pains to distance antisleeping and anticamping laws from the criminal legal system. For example, the Court validated the assertion of local government amici that

these public-camping regulations are not usually deployed as a front-line response “to criminalize homelessness.” Instead, they are used to provide city employees with the legal authority to address “encampments that pose significant health and safety risks” and to encourage their inhabitants to accept other alternatives like shelters, drug treatment programs, and mental-health facilities.²⁸

The majority later repeated the same sentiment, this time from the Mayor of San Francisco, who lamented in her amicus brief that an injunction had constrained the City’s use of laws that prohibit sitting, lying, or sleeping, which, the Mayor claimed (and the Court parroted), were used “not to criminalize homelessness, but ‘as one

25. *Grants Pass*, 144 S. Ct. at 2210.

26. *See id.* at 2239 (Sotomayor, J., dissenting) (“Respondents do not challenge the City’s ‘restrictions on the use of tents or other camping gear,’ ‘encampment clearances,’ ‘time and place restrictions on sleeping outside,’ or ‘the imposition of fines or jail time on homeless people who decline accessible shelter options.’”); *see also* LAUREN DUNTON, JILL KHADDURI, KIMBERLY BURNETT, NICHOLE FIORE & WILL YETVIN, U.S. DEPT OF HOUS. & URB. DEV., EXPLORING HOMELESSNESS AMONG PEOPLE LIVING IN ENCAMPMENTS AND ASSOCIATED COST: CITY APPROACHES TO ENCAMPMENTS AND WHAT THEY COST 4 (2022), <https://www.huduser.gov/portal/sites/default/files/pdf/Exploring-Homelessness-Among-People.pdf> [<https://perma.cc/EQR7-84DG>] (observing that “[t]he term *encampment* is widely used ... to describe groups of people living in tents or other temporary structures in public spaces in cities across the country” but that there is no fixed definition, though “several concepts are often included: the presence of structures; the continuity of location; and the permanency of people staying there”).

27. *See Grants Pass*, 144 S. Ct. at 2208-12, 2223, 2224 n.7.

28. *Id.* at 2210 (citing Brief for Local Government Legal Center et al. as Amici Curiae in Support of Petitioner at 11, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175)).

important tool among others to encourage individuals experiencing homelessness to accept services and to help ensure safe and accessible sidewalks and public spaces.”²⁹ Similarly, the majority adopted the language of California Governor Gavin Newsom to describe “these laws” as “‘tools in the policy toolbox’ to ‘tackle the complicated issues of housing and homelessness.’”³⁰ What was at stake, the Court seemed to broadcast, was not criminal punishment, but “commonsense and good-faith efforts at addressing homelessness.”³¹

By the concluding paragraphs of the opinion, the Court firmly committed to its gloss: This case was not about the limits placed by our Constitution on the penal power of the state but rather about whether the Eighth Amendment authorizes federal judges to “dictate this Nation’s homelessness policy.”³²

Justice Sotomayor’s dissent attempted to reorient the reader to the criminal consequences at hand. Its opening paragraph minced no words, declaring that “[s]leep is a biological necessity, not a crime,” and emphasizing the specific state actions at issue in the challenge—jailing, fining, and punishing people for sleeping in public.³³

The Court’s whitewashing—this is about camping not criminalization, policy not punishment—fed neatly into its conclusion that the Eighth Amendment’s Cruel and Unusual Punishments Clause

29. *Id.* at 2212 (quoting Brief for City and County of San Francisco as Amici Curiae Supporting Petitioner at 7-8, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175)).

30. *Id.* at 2211 (quoting Brief for California Governor Gavin Newsom as Amicus Curiae Supporting Neither Party at 16, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175)).

31. *Id.* at 2212.

32. *Id.* at 2226.

33. *Id.* at 2228 (Sotomayor, J., dissenting). The dissent makes a similar critique of the majority’s framing. *Id.* at 2239 (“The majority’s framing of the problem as one involving drugs, diseases, and fires instead of one involving people trying to keep warm outside with a blanket just provides the Court with cover to permit the criminalization of homeless people.”); *id.* at 2240 (“Yet the majority relies on these *amici* to shift the goalposts and focus on policy questions beyond the scope of this case. It first declares that [t]he only question we face is whether one specific provision of the Constitution ... prohibits the enforcement of public-camping laws.’ Yet it quickly shifts gears and claims that ‘the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes [of homelessness] and devising those responses.’ This sleight of hand allows the majority to abdicate its responsibility to answer the first (legal) question by declining to answer the second (policy) one.”) (alterations in original) (citations omitted).

does not apply.³⁴ After all, the Amendment fundamentally concerns how the criminal system can be used, so what role could it play when that system is ignored?

II. THE POST-*GRANTS PASS* LANDSCAPE

The *Grants Pass* decision was legally narrow but rhetorically sweeping. The Court held only that the Eighth Amendment's Cruel and Unusual Punishments Clause does not prohibit cities from punishing people for sleeping outside when they have nowhere else to go. Yet the majority's characterization of criminalization as a "policy choice" rather than punishment sent a broader message: that judicial oversight of how cities treat unhoused people was unwelcome and that criminalization was sound policy. Cities eagerly embraced this message. In the year following the decision, they enacted over 220 new laws criminalizing homelessness, intensified enforcement, and expanded penalties.³⁵ The proliferation of these laws has placed hundreds of thousands of people under threat of arrest and incarceration simply for surviving in public space.

Yet the decision's legal narrowness means that numerous constitutional and statutory claims remain available to challenge these practices, and courts continue to enforce them.

This Part examines both the tools that survived *Grants Pass* and the criminalization that proliferated in its wake. Together, these realities reveal both opportunity and imperative: While one protection was removed, many remain, and the surge in criminalization makes their deployment all the more essential.

A. *Litigation Post-Grants Pass*

While *Grants Pass* removed one constitutional constraint on criminalizing homelessness, it left open numerous other avenues to challenge similar anticamping laws and other practices that violate

34. See *id.* at 2226 (majority opinion).

35. See *infra* Part II.B.

the rights of unhoused people.³⁶ The dissent emphasized this point, detailing the other constitutional provisions that remain in play.³⁷

This is not to say that *Grants Pass* has had no impact on litigation. Unsurprisingly, ongoing cases with Cruel and Unusual Punishments Clause claims have been narrowed.³⁸ But, for many cases, this was only one among many claims. And, despite efforts by city defendants, courts have largely declined to read *Grants Pass* as precluding or narrowing other claims.³⁹

Fund for Empowerment v. City of Phoenix provides one illustrative example. There, plaintiffs challenged Phoenix's regime of conducting raids of unhoused communities and obtained a preliminary injunction on their Eighth Amendment Cruel and Unusual Punishments Clause claim and their Fourth and Fourteenth Amendment property seizure and due process claims.⁴⁰ Within weeks of the Supreme Court's *Grants Pass* ruling, the City of Phoenix moved to dissolve the preliminary injunction in its entirety—including the Fourth and Fourteenth Amendment property-based claims.⁴¹ The Court rejected this effort to use the

36. See *Grants Pass*, 144 S. Ct. at 2224 (“[M]any substantive legal protections and provisions of the Constitution may have important roles to play when States and cities seek to enforce their laws against the homeless.”).

37. See, e.g., *id.* at 2242 (Sotomayor, J., dissenting).

38. See, e.g., *Coal. on Homelessness v. City of San Francisco*, No. 23-15087, 2024 WL 3325655, at *1 (9th Cir. July 8, 2024); Order at 11-12, *Fund for Empowerment v. City of Phoenix*, No. CV-22-02041-PHX, at *5 (D. Ariz. Mar. 31, 2025).

39. See, e.g., *Boyd v. City of San Rafael*, No. 23-CV-04085, 2024 WL 3748334, at *4-5 (N.D. Cal. Aug. 7, 2024) (noting that the court's previously articulated concerns with city enforcement of camping regulations under the Americans with Disabilities Act (ADA), the Fourteenth Amendment's state-created danger doctrine, and Fourteenth Amendment due process rights would remain unaffected by the *Grants Pass* decision); *Coal. on Homelessness*, 2024 WL 3325655, at *1 (vacating portion of preliminary injunction based on cruel and unusual punishment claim but upholding preliminary injunction based on Fourth Amendment property seizure claim); *Hipp v. City of Vallejo*, No. 25-CV-01806, 2025 WL 2099371, at *1 (E.D. Cal. July 24, 2025) (“While the Supreme Court has concluded that jurisdictions such as the City of Vallejo may, consistent with the Eighth Amendment to the United States Constitution, enforce anti-camping ordinances such as the ones at issue in this case, it is incumbent on those entities to fully comply with all other constitutional, statutory, and regulatory obligations. It was the City's apparent failure to comply with its obligations under the Americans with Disabilities Act (‘ADA’) that led the Court to issue a Temporary Restraining Order.”).

40. *Fund for Empowerment v. City of Phoenix*, 646 F. Supp. 3d 1117, 1121-22, 1125, 1128 (D. Ariz. 2022) (granting preliminary injunction), *abrogated by Grants Pass*, 144 S. Ct. 2202.

41. See Defendants' Motion to Dissolve Preliminary Injunction Order at 1-2, *Fund for Empowerment*, No. CV-22-02041-PHX (D. Ariz. July 18, 2024).

Grants Pass decision as an opportunity to free itself of all judicial oversight, ordering that the property-related provisions of the preliminary injunction remain in place.⁴²

Advocates continue to have myriad litigation tools at their disposal to challenge government mistreatment of unhoused residents. Despite the *Grants Pass* majority's rhetorical focus on allowing local governments to experiment with homelessness "solutions" without interference, advocates are still successfully using the courts to ensure that homelessness policies professed in good faith also respect rights.⁴³ Below, I provide a brief overview of some of the many claims that continue to be litigated post-*Grants Pass*. These claims operate differently than the Eighth Amendment prohibition that *Grants Pass* foreclosed, but each provides meaningful constraints on how cities may treat unhoused people.

1. State Constitutional Claims

State constitutions provide one avenue for replicating or exceeding the protection that *Grants Pass* removed at the federal level. In some states, courts have interpreted the state analogues to the Eighth Amendment's prohibition on cruel and unusual punishments

42. *See Order, supra* note 38, at 12 (order dismissing the defendant's motion to dissolve preliminary injunction). While the defendants did not argue that the *Grants Pass* decision itself changed the Fourth and Fourteenth Amendment claims, instead they argued that the court should vacate those sections of the preliminary injunction because of changed facts, none of the supposed changed facts were recent or substantiated, suggesting that the only change prompting the motion was the Supreme Court's "gloves off" message. *See Defendants' Motion to Dissolve Preliminary Injunction Order, supra* note 41, at 2.

43. *Warren v. City of Chico*, No. 21-cv-00640, 2025 WL 974068 (E.D. Cal. Mar. 31, 2025), provides another example of lower courts declining to expand the impact of the *Grants Pass* decision beyond its holding. In *Warren*, plaintiffs filed suit in April 2021 challenging Chico's enforcement of ordinances criminalizing violations of various park regulations, including a city-wide camping prohibition, under the Eighth Amendment's Cruel and Unusual Punishments Clause, and bringing claims under various other causes of action, including Fourteenth Amendment due process and vagueness claims, a Fourth Amendment unlawful seizure claim, and California constitutional and statutory claims. *Id.* at *1. In January 2022, the parties reached a settlement and dismissed the case, but within months of the *Grants Pass* decision, Chico filed a motion asking the district court to relieve it from almost all terms of the settlement agreement, including restrictions on its ability to enforce anticamping laws but also provisions unrelated to anticamping laws, such as notice and storage procedures for personal property. *See id.* at *1-2. The court denied the motion, finding that the City had not met its burden of showing that *Grants Pass* constituted "a significant change in law that renders further enforcement of the Settlement Agreement inequitable." *See id.* at *9.

to provide even greater protections than the Eighth Amendment.⁴⁴ In others, advocates have employed distinct constitutional provisions to protect the rights of unhoused communities.⁴⁵

When the U.S. Supreme Court's *Grants Pass* decision came down, several state constitutional challenges to local enforcement of laws that criminalize homelessness were already underway.

New Mexico provides a successful example. In December 2022 in *Williams v. City of Albuquerque*, unhoused people living in Albuquerque sued to stop the City from unlawfully destroying property and arresting, jailing, and fining people.⁴⁶ The plaintiffs alleged a number of state constitutional claims, including that the enforcement of statutes prohibiting unhoused people from being in public spaces with their belongings violated the state constitution's prohibition on cruel and unusual punishments.⁴⁷ The plaintiffs survived a motion to dismiss and obtained preliminary injunctive relief, but following the Supreme Court's *Grants Pass* ruling, the City of Albuquerque moved for partial judgment on the pleadings, arguing that *Grants Pass* required dismissal of the plaintiffs' state constitutional cruel and unusual punishment claim as well as a state due process claim challenging criminal enforcement.⁴⁸ The court denied the motion, finding the *Grants Pass* majority's reasoning to be "flawed" and refusing to follow it because the New Mexico constitution provides greater protections.⁴⁹ Similar

44. See Bridget Lavender, *States Can Protect Unhoused People When the U.S. Supreme Court Won't*, STATE CT. REP. (Oct. 17, 2024), <https://statecourtreport.org/our-work/analysis-opinion/states-can-protect-unhoused-people-when-us-supreme-court-wont> [https://perma.cc/49A4-W5VT].

45. *Id.*

46. See Class Action Complaint for Violations of Civil Rights and for Declaratory and Injunctive Relief at 12-13, *Williams v. City of Albuquerque*, No. D-202-CV-2022-07562 (N.M. Civ. Ct. Dec. 19, 2022).

47. *Id.* at 37.

48. Memorandum Opinion and Order Granting in Part Plaintiff's Motion for a Preliminary Injunction at 1-2, *Williams*, No. D-202-CV-2022-07562 (N.M. Civ. Ct. Mar. 18, 2025).

49. *Id.* at 7-8.

challenges are ongoing in other states, including Washington,⁵⁰ Alaska,⁵¹ and Colorado.⁵²

50. In *Kitcheon v. City of Seattle*, unhoused plaintiffs sued the City of Seattle, alleging that the City's enforcement of certain administrative rules concerning removal of encampments violated the state constitution. Complaint for Declaratory Relief and Monetary Damages at 3, *Kitcheon v. City of Seattle*, No. 19-2-25729-6 (Wash. Super. Ct. Oct. 1, 2019). In a July 2023 summary judgment decision, the trial court found that administrative rules "designed to stop homeless people from sleeping, sitting, resting, or keeping their belongings on public property" were unconstitutional on their face under the state constitution's privacy protections as well as under its prohibition against "cruel punishment." Order Partially Granting and Partially Denying Defendant's Motion for Summary Judgment at 5, 24, *Kitcheon*, No. 19-2-25729-6 (Wash. Super. Ct. July 17, 2023). The court relied on the Ninth Circuit *Martin* and *Grants Pass* decisions, *id.* at 25, but explicitly treated the Federal Eighth Amendment as interpreted in those cases as the "constitutional floor," not the ceiling, for the protection of rights in the state, *id.* at 24. In December 2024, the Washington Court of Appeals affirmed the lower court's finding that the rules on their face violated the Washington Constitution's privacy provision, but found that, because the rules do not "facially subject violators to criminal penalties and neither individual plaintiff was criminally penalized for violating" the rules, the plaintiffs' facial and as-applied cruel punishment claims failed. *Kitcheon*, No. 85583-2-1, 2024 WL 5040630, at *13 (Wash. Ct. App. Dec. 9, 2024). In doing so, the court acknowledged that after *Grants Pass*, the Federal Eighth Amendment "no longer provide[d] a floor for the plaintiffs' state cruel punishment claims" but reaffirmed that the state provision was more protective. *Id.* at *14. Nevertheless, the court found that the state prohibition on cruel punishment did not apply to ordinances for which there was not a "directly attached criminal penalty." *Id.* In a separate case filed in August 2024, shortly after the Supreme Court's *Grants Pass* ruling, unhoused plaintiffs again used the state cruel punishment clause to challenge laws in Spokane, Washington, that make sitting, lying, sleeping, and camping on public infrastructure a misdemeanor offense. See Complaint at 13, *Currie v. City of Spokane*, No. 24-2-03708 (Wash. Super. Ct. Aug. 1, 2024); *ACLU of Washington Sues City of Spokane over Anti-Camping and Sit-and-Lie Laws, Alleging Cruel Punishment Under State Constitution*, ACLU OF WASH. (Aug. 1, 2024) <https://www.aclu-wa.org/news/aclu-washington-sues-city-spokane-over-anti-camping-and-sit-and-lie-laws-alleging-cruel> [<https://perma.cc/ZG36-RYQV>]. The case also brought a state constitutional due process challenge premised on Spokane's practice of taking, discarding or destroying people's property without adequate notice. See Complaint, *supra*, at 13. In November 2024, the superior court denied Spokane's motion to dismiss, allowing the cruel punishment claim to proceed. Order Denying Defendant's Motion to Dismiss at 2, *Currie*, No. 24-2-03708-32 (Wash. Super. Ct. Nov. 18, 2024).

51. *Aguila v. Municipality of Anchorage* includes challenges to encampment clearings in Anchorage under several provisions of the Alaska Constitution, including its prohibition on cruel and unusual punishments. Complaint for Injunctive and Declaratory Relief at 3, *Aguila v. Municipality of Anchorage*, No. 3AN-25-04570CI (Alaska Super. Ct. Feb. 6, 2025) (planned clearing); see also Appellants' Opening Brief at 10-11, *Banks v. Municipality of Anchorage*, No. 3AN-23-06779-CI (Alaska Super. Ct. Dec. 9, 2024) (past encampment clearing).

52. In Colorado, a nonprofit organization challenged a City of Boulder ordinance criminalizing sleeping outside with a blanket as violating the state constitution's prohibition on cruel and unusual punishments. See Complaint for Declaratory and Injunctive Relief at 22, *Feet Forward v. City of Boulder*, No. 2022CV30341 (Colo. Dist. Ct. May 26, 2022). The plaintiffs initially survived a motion to dismiss, but after *Grants Pass* was decided, the lower court

In addition to cruel and unusual punishments analogues, other state constitutional provisions continue to provide strong protections for unhoused individuals, in some cases stronger than those provided by the Federal Constitution. In *Davis*, the Hawaii Supreme Court held that the Hawaii Constitution's Due Process Clause requires the government to hold a hearing *before* seizing and destroying unhoused people's property during encampment clearings.⁵³ And the plaintiffs in *Kitcheon v. City of Seattle* successfully brought a privacy claim, in addition to a cruel punishment analogue claim.⁵⁴ There, the Washington State Court of Appeals ruled that the ordinance enabling the clearing of encampments facially violated the state constitutional provision that protects people from being "disturbed in [their] private affairs, or [their] home invaded, without authority of law."⁵⁵

Still elsewhere, advocates are considering how to use yet untested state constitutional provisions to challenge punitive responses to homelessness or to expand affirmative rights.⁵⁶

2. Other Federal Claims

Federal constitutional claims beyond the Eighth Amendment continue to provide meaningful constraints on antihomeless laws and policies. While these claims do not replicate the protection against criminal enforcement that *Martin* provided, they address related practices and impose important procedural and substantive limits.

dismissed the case, holding that the blanket ban was not prohibited by either the federal or state constitution. See Order Re Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, *Feet Forward*, No. 2022CV30341 (Colo. Dist. Ct. Dec. 6, 2024). The case is currently being appealed. *Feet Forward, et al. v. City of Boulder, et al.*, ACLU OF COLO. (May 19, 2025), <https://www.aclu-co.org/cases/feet-forward-et-al-v-city-boulder-et-al/#documents> [<https://perma.cc/X7HQ-HYBB>].

53. See 545 P.3d 557 (Haw. 2024); Heather L. Zimmerman, *Using the Maine Constitution to Expand the Civil Rights and Civil Liberties of Unhoused People*, 77 ME. L. REV. 369, 387 (2025).

54. No. 85583-2-I, 2024 WL 5040630, at *2 (Wash. Ct. App. Dec. 9, 2024).

55. *Id.* at *2, *9.

56. See Zimmerman, *supra* note 53, at 397; Helen C. Malley, *Rediscovering Alaska's Right to Housing*, 41 ALASKA L. REV. 425, 427-28 (2025) (describing opportunities to use the Alaska Constitution to provide affirmative solutions to homelessness).

a. Fourth and Fourteenth Amendment Property Claims

Property-related claims under the Fourth and Fourteenth Amendments remain unaffected by *Grants Pass* and address one of the most significant harms associated with anticamping enforcement regimes: the seizure and destruction of unhoused people's belongings.⁵⁷ These claims attack the indiscriminate seizure and destruction of unhoused individuals' property during encampment clearings and inadequate notice of encampment operations.⁵⁸ In addition to violating rights, these practices make it harder for people to obtain stability, including because they lead to the loss or destruction of important documents necessary to navigate social services and obtain housing. These practices also result in the loss of medicine, medical devices, and shelter from the elements, which can harm unhoused people's health.⁵⁹ Emboldened by *Grants Pass*, cities have intensified sweeps, making these claims all the more important.⁶⁰

Since *Grants Pass*, courts have repeatedly reaffirmed these property and due process rights, including in cases that originally included cruel and unusual punishments claims. As discussed above, the court in *Fund for Empowerment v. City of Phoenix* maintained the parts of its pre-*Grants Pass* injunction premised on the Fourth and Fourteenth Amendments.⁶¹ In *Coalition on*

57. See, e.g., *supra* notes 40-41 and accompanying text.

58. See, e.g., *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1024 (9th Cir. 2012); *Kincaid v. City of Fresno*, No. 06-CV-1445, 2006 WL 3542732, at *37 (E.D. Cal. Dec. 8, 2006); *Pottinger v. Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992); *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1116 (9th Cir. 2021); *Proctor v. District of Columbia*, No. 18-CV-00701, 2018 WL 6181739, at *3 (D.D.C. Nov. 27, 2018); *Coal. on Homelessness v. City of San Francisco*, 647 F. Supp. 3d 806, 838-39 (N.D. Cal. 2022); *Fund for Empowerment v. City of Phoenix*, 646 F. Supp. 3d 1117, 1125 (D. Ariz. 2022); see also *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2243 (2024) (Sotomayor, J., dissenting) (addressing the impact of Grants Pass city ordinances that criminalize homelessness on Fourth Amendment property rights (citing *Lavan*, 693 F.3d at 1029)); *supra* notes 38-42 and accompanying text.

59. NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, IMPACT OF ENCAMPMENT SWEEPS ON PEOPLE EXPERIENCING HOMELESSNESS 6 (2022), <https://nhchc.org/wp-content/uploads/2022/12/NHCHC-encampment-sweeps-issue-brief-12-22.pdf> [<https://perma.cc/AG7J-YUH4>]; see also Asia Fields, Nicole Santa Cruz, Ruth Talbot & Maya Miller, *The Toll of Cities' Homeless Sweeps*, PROPUBLICA (Feb. 3, 2025), <https://projects.propublica.org/impact-of-homeless-sweeps-lost-belongings/> [<https://perma.cc/CYB8-7SUS>] (exploring the stories of homeless individuals impacted by encampment sweeps, including those who lost crucial documentation).

60. See *infra* Part II.B.

61. See *supra* text accompanying notes 40-41.

Homelessness v. City of San Francisco, plaintiffs defeated a motion for summary judgment seeking to dismiss similar claims.⁶²

b. First Amendment Free Speech and Fourteenth Amendment Vagueness Claims

Unhoused individuals continue to bring viable First and Fourteenth Amendment challenges to panhandling and loitering laws. These claims target laws that are overbroad, impermissibly vague, or impose impermissible restrictions on speech.

Since *Grants Pass*, in several instances, these challenges have resulted in meaningful relief. In *Wilmington Food Not Bombs v. Jenner*, plaintiffs challenged city and state solicitation and loitering laws as impermissible content-based restrictions under the First Amendment and as unconstitutionally vague under the Fourteenth Amendment.⁶³ In October 2024, in response to the litigation, the Delaware Attorney General committed to cease enforcement of Delaware's loitering and solicitation laws pending legislative revision.⁶⁴ A similar lawsuit was filed in September 2025 challenging New Hampshire's state law against "loitering or prowling."⁶⁵ The lawsuit, *Clark v. Formella*, challenges the loitering statute as unconstitutionally vague under the Fourteenth Amendment's Due Process clause.⁶⁶

And in Glendale, Arizona, in July 2025, plaintiffs challenged the City's panhandling and solicitation laws as impermissible content-based regulations that run afoul of the First Amendment and as impermissibly vague and overbroad under the Fourteenth

62. See generally Order Denying Defendants' Motion for Summary Judgment, *Coal. on Homelessness*, No. 22-cv-05502 (N.D. Cal. June 12, 2025) (preserving plaintiffs' Fourth and Fourteenth Amendment property claims).

63. Complaint for Declaratory and Injunctive Relief Preliminary Statement at 17, *Wilmington Food Not Bombs v. Jennings*, No. 23-cv-00736 (D. Del. July 7, 2023).

64. Letter from Kathleen Jennings, Att'y Gen., Del., to Dwayne J. Bensing, Legal Dir., ACLU of Del. (Oct. 18, 2024), https://www.aclu-de.org/sites/default/files/field_documents/attorney_general_letter_to_aclu_legal_director.pdf [<https://perma.cc/GSZ4-NX2T>].

65. N.H. REV. STAT. ANN. § 644:6 (2025).

66. Class Action Complaint for Declaratory and Injunctive Relief at 17, 55-57, *Clark v. Formella*, No. 25-cv-00379 (D.N.H. Sep. 30, 2025). The lawsuit also challenges the law as violative of the Fourth Amendment because it permits investigatory stops absent reasonable and articulable suspicion of criminal activity. *Id.* at 58.

Amendment.⁶⁷ This lawsuit successfully prompted the City Council to repeal the ordinances in September 2025.⁶⁸

c. Americans with Disabilities Act Claims

Finally, plaintiffs are increasingly using the Americans with Disabilities Act (ADA) to challenge encampment sweeps and other practices targeting unhoused people.⁶⁹ ADA claims can attack a broad range of government conduct beyond the criminal and civil enforcement that was the focus of *Grants Pass*.

The ADA requires governments to provide reasonable disability accommodations in all their programs, services, and activities.⁷⁰ Even when cities can constitutionally enforce anticamping laws or conduct encampment clearings, they must do so in a way that provides reasonable accommodations for people with disabilities.⁷¹ For example, this could include providing additional time for mobility-impaired individuals to move during encampment operations, or assisting someone who cannot physically move all their belongings by themselves. Government entities must also take affirmative steps to avoid unduly burdening unsheltered people with disabilities during encampment operations, including by assessing disability needs and planning in advance to accommodate those needs.⁷²

Advocates have successfully used the ADA to challenge sweep practices. For example, in *Tyson v. City of San Bernadino*, the court granted a preliminary injunction based in part on ADA violations,

67. Complaint for Declaratory and Injunctive Relief at 14, *Hughes v. City of Glendale*, No. 25-cv-02681 (D. Ariz. July 30, 2025) at 28-33; David Baker, *Lawsuit Filed Against Glendale over Its Ban on Panhandling*, ARIZ.'S FAMILY (July 30, 2025), <https://www.azfamily.com/2025/07/30/lawsuit-filed-against-glendale-over-its-ban-panhandling/> [<https://perma.cc/2C4G-6AR5>].

68. Press Release, ACLU Ariz., *Glendale City Council Moves to Repeal Unconstitutional, Harmful Panhandling Bans* (Sep. 16, 2025, at 11:00 ET), <https://www.acluaz.org/press-releases/glendale-city-council-moves-to-repeal-unconstitutional-harmful-panhandling-bans> [<https://perma.cc/PY2L-7Y63>].

69. See, e.g., Erin Neff & EmilyRose Johns, *Fighting the Criminalization of Unhoused People with Disability Rights* (May 24, 2023), https://dredf.org/wp-content/uploads/2023/06/2023.05.24_Fighting_Anti-Homelessness-Accessible.pdf [<https://perma.cc/99WW-5UHU>].

70. 42 U.S.C. § 12131; see *Tyson v. City of San Bernardino*, No. EDCV 23-01539, 2024 WL 3468832, at *5 (C.D. Cal. Jan. 12, 2024).

71. See, e.g., *Tyson*, 2024 WL 3468832, at *6.

72. *Id.* at *7.

finding that the City of San Bernadino had failed to accommodate individuals during sweeps.⁷³ These protections remain robust post-*Grants Pass*.

* * *

The claims described above demonstrate that *Grants Pass* did not eliminate all judicial oversight of practices targeting unhoused people.⁷⁴ Courts continue to enforce property protections, due process requirements, First Amendment guarantees, and disability accommodation laws, among others. At the same time, these claims have limitations when it comes to enforcement of antihomeless laws. Most address practices related to criminalization—such as how sweeps are conducted or how broadly loitering laws may be drafted—rather than whether cities may punish people for sleeping outside. State constitutional claims may provide more direct constraints in some jurisdictions, but their reach is limited and their success in some cases uncertain. The result is a post-*Grants Pass* landscape in which constitutional and statutory protections remain but are not a substitute for the protection *Martin* and *Grants Pass* once provided.

B. The Proliferation of Laws and Policies that Punish Homelessness

Although the Supreme Court's holding was narrow—deciding only that punishing individuals for sleeping outside does not violate the Federal Constitution's Cruel and Unusual Punishments Clause⁷⁵—the message to city and state officials was clear: Punishment is an appropriate policy when it comes to homelessness.

73. *Id.* at *5-7.

74. In addition to the claims described in this Part, numerous other claims challenging antihomeless practices remain viable post-*Grants Pass*. These include excessive fines, due process (under *Morissette v. United States*, 342 U.S. 246, 251-52 (1952)), right to travel, state-created danger, and equal protection claims, among others. See *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2241-44 (2024) (Sotomayor, J., dissenting); Sara K. Rankin & Laura Riley, *The Unavoidable Consequences of Homelessness*, 2025 UTAH L. REV. 1093, 1121.

75. *Grants Pass*, 144 S. Ct. at 2226.

Cities eagerly seized on this invitation.⁷⁶ In the year that followed the Supreme Court's decision, cities across the country introduced over 320 bills criminalizing homelessness, nearly 220 of which passed.⁷⁷ In California alone, at least three counties and fifty cities passed new anticamping laws.⁷⁸ Notably, these laws cropped up not only in cities and states within the Ninth Circuit, but also in areas where the *Martin/Grants Pass* prohibition never had binding effect. In those areas where the *Grants Pass* decision did not change the law, the surge of new antihomeless laws could be the product of the *Grants Pass* majority's rhetorical endorsement of criminalization as the correct policy choice.⁷⁹

Some cities enacted these laws for the first time.⁸⁰ But in many cases, these laws expanded on prohibitions that were already in place. They did so in several ways. First, they removed restrictions related to availability or offers of shelter, allowing enforcement of

76. Not all cities took this approach. Some local officials and lawmakers reiterated a commitment to addressing homelessness through housing, not criminalization. *See, e.g.*, Rankin & Riley, *supra* note 74, at 1121 (noting isolated examples of pushback to *Grants Pass*, but acknowledging that these responses were “not the norm”).

77. ACLU, *supra* note 4.

78. *See* JIUN JEONG, JOHANNA RICHTER, LAURA RILEY, ISABELLE BORCHARDT, KRISTIE CHAMORRO, ALYSSA GERKIN, KELLI NGUYEN, BRADLEY KHANTHAPHIXAY, ZHILING MA, MICAH MORGAN, VICTORIA ORINDAS CORCINO, LILLIAN ROBLES, ZOE ROSENBERG, BRIGHT SHI, ADAM TASLITZ & HYUNJUNG YU, THE STATE OF HOMELESSNESS CRIMINALIZATION IN CALIFORNIA AFTER *GRANTS PASS V. JOHNSON* 4 (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5257640 [<https://perma.cc/AR4C-V9FV>].

79. In a different context, Netta Barak-Corren and Tamir Berkman conducted “a nationwide field experiment, a longitudinal public opinion survey, and litigation-outcome analysis” to explore how the public and courts reacted to *Fulton v. City of Philadelphia*, a case with a narrow holding but a more expansive “bottom-line message,” concluding that “Supreme Court decisions can have substantial behavioral and legal effects beyond a seemingly narrow holding.” Netta Barak-Corren & Tamir Berkman, *Constitutional Consequences*, 99 N.Y.U. L. REV. 785, 785-86 (2024).

80. *See, e.g.*, Press Release, City of Greeley, Greeley Adopts Unauthorized Camping Ordinance to Address Public Health, Safety and Community Concerns (June 4, 2025), https://speakupgreeley.com/proposed-camping-ban/news_feed/greeley-adopts-unauthorized-camping-ordinance-to-address-public-health-safety-and-community-concerns [<https://perma.cc/8DKE-PCNX>]; Joe Murray, *Summit NJ Council Enacts Public Camping Ordinance*, TAPINTO SUMMIT (June 4, 2025, at 13:40 ET), <https://www.tapinto.net/towns/summit/sections/government/articles/summit-nj-council-enacts-public-camping-ordinance> [<https://perma.cc/MLQ5-UN8A>]; An Ordinance to Amend Chapter 18 of the City of Elmira Code of Ordinances by Adding a New Article to Be Titled Article VI “Camping,” No. 2024 - 361 (Nov. 18, 2024) (codified at ELMIRA, N.Y., CODE OF ORDINANCES pt. 2, ch. 18, § 18-111 to -114 (2025)) (punishing illegal camping, which includes sleeping in one’s car, with a ninety-day jail sentence).

antsleeping and anticamping laws regardless of whether shelter was available or first offered.⁸¹ Second, they increased penalties associated with existing prohibitions.⁸² Third, they expanded the definition of prohibited conduct. In Fresno, California, for example, the city adopted all three expansions, removing enforcement restrictions that had required shelter bed availability, increasing penalties from six months to one year imprisonment, and expanding the scope of the law to prohibit “sit[ting], l[ying], sleep[ing] or camp[ing] on a public place at any time.”⁸³ In other cases, cities responded through announcements, memoranda, or resolutions directing increased or expanded enforcement of pre-existing laws.⁸⁴

81. See, e.g., Jeanette Quezada, *Oceanside’s Updated Ordinance Lets Police Remove Camps Even if Beds Unavailable*, NBC SAN DIEGO (Oct. 17, 2024, at 23:14 PT), <https://www.nbcsandiego.com/news/local/oceansides-updated-ordinance-lets-police-remove-camps-even-if-beds-unavailable/3652494/> [<https://perma.cc/CS9Q-9AYJ>]; OCEANSIDE, CAL., ORDINANCE 24-OR0592-1 (2024); Ruben Vives, *Homeless People Will Face Fines, Possible Arrest in Long Beach Crackdown, City Official Says*, L.A. TIMES (Aug. 16, 2024, at 05:00 PT), <https://www.latimes.com/california/story/2024-08-16/long-beach-homeless-fines-possible-arrests> [<https://perma.cc/72EL-CMF5>] (reporting that Long Beach amended ordinance to delete restriction on enforcement requiring shelter bed availability); Cassandra Ballard, *Aurora OKs New Law Allowing Immediate Homeless Camper Evictions*, SENTINEL COLO. (Feb. 11, 2025), <https://sentinelcolorado.com/metro/aurora-lawmakers-poised-monday-to-allow-immediate-homeless-camper-evictions/> [<https://perma.cc/FP39-CHMT>] (reporting on city removing shelter bed and notice requirement); *Encampment Ordinance Updated*, CITY OF L.V. (Nov. 7, 2024), <https://www.lasvegasnevada.gov/News/Blog/Detail/city-council-to-hear-first-reading-of-new-ordinance-designed-to-connect-homeless-with-services-and-off-the-streets> [<https://perma.cc/4Q8W-45PW>] (same); Spencer Pauley, *Burien City Council Passes Emergency Ordinance Expanding Public Camping Ban*, EVERETT POST (Jan. 28, 2025), <https://www.everettpost.com/state-news/burien-city-council-passes-emergency-ordinance-expanding-public-camping-ban> [<https://perma.cc/VM86-TAAV>] (same).

82. See, e.g., Vanessa Rancaño, *Fresno Rolls Out One of California’s Most Aggressive Camping Bans*, KQED (Sep. 30, 2024), <https://www.kqed.org/news/12005898/fresno-rolls-out-one-of-californias-most-aggressive-camping-bans> [<https://perma.cc/UZL2-959D>].

83. FRESNO, CAL., ORDINANCES § 10-2101(a), (e) (2024); see Rancaño, *supra* note 82.

84. See, e.g., Memorandum from Teresa Chandler, Deputy City Manager, to the Mayor and Members of the City Council 4-6 (Aug. 12, 2024), <https://longbeach.gov/globalassets/city-manager/media-library/documents/memos-to-the-mayor-tabbed-file-list-folders/2024/august-12-2024-city-response-to-grants-pass-v-johnson-decision> [<https://perma.cc/C5HF-N76A>]; Taryn Luna, *Newsom Threatens to Take Money from Counties That Don’t Reduce Homelessness*, L.A. TIMES (Aug. 8, 2024, at 19:14 PT), <https://archive.is/z5s9G> [<https://perma.cc/W4VV-Z6V6>]; Mackenzie Clark & Molly Adams, *Lawrence to Ban Camping Effective in Mid-August as Shelter Options Expand; Coalition Forming in Opposition*, LAWRENCE TIMES (May 16, 2025, at 19:25 ET), <https://lawrencekstimes.com/2025/05/16/lawrence-to-ban-camping/> [<https://perma.cc/MUM7-RDUP>] (announcing camping will no longer be allowed anywhere in the city).

Lawmakers also embraced other types of laws targeting the unhoused population. These include prohibitions on panhandling that may invade protected First Amendment rights.⁸⁵ At least one city sought to extend its antihomeless regime to those who provide assistance to the unhoused, passing a law that not only expanded the definition of prohibited “camping” to include merely possessing a tarp, sleeping bag, or other “camp paraphernalia” in public,⁸⁶ but also made it a crime to “caus[e], permit[], aid[], abet[], or conceal[],” violations, in effect threatening criminal penalties for service providers and charitable organizations.⁸⁷ While this aiding and abetting provision was repealed following public outcry, many advocates fear it is a harbinger of what is to come.⁸⁸

In addition to enacting new or harsher laws, cities also began enforcing anticamping and other laws that criminalize homelessness more aggressively. Soon after the *Grants Pass* ruling, London Breed, then-Mayor of San Francisco, announced that the city would launch a “very aggressive” crackdown on homeless encampments, noting that it could include “criminal penalties,” and expressing gratitude for the Supreme Court decision.⁸⁹ In the year following the decision, San Francisco enforced a law making “illegal lodging” a misdemeanor over 1,000 times, a nearly ten-fold increase over the

85. See Sean Coffey, *Panhandling, Loitering on Roads and Medians Prohibited in Raleigh Under New Ordinance*, ABC 11 (July 16, 2025), <https://abc11.com/post/new-raleigh-ordinance-prohibits-loitering-panhandling-roads-medians/17151772/> [<https://perma.cc/2BC4-3PT6>]; Grant McLaughlin, *Anti-Homeless Bills Pass MS House. See What They Would Do*, CLARION LEDGER (Feb. 6, 2025, at 10:39 CT), <https://www.clarionledger.com/story/news/politics/2025/02/06/mississippi-house-passes-anti-homeless-bills-to-prevent-camping-panhandling/78285179007/> [<https://perma.cc/BL3F-65CH>].

86. See FREMONT, CAL., MUN. CODE §§ 8.90.020-.030 (2005).

87. See Letter from Advocacy Groups to Fremont Mayor Raj Salwan and City Council Members 2-3 (Feb. 7, 2025), <https://www.aclunc.org/sites/default/files/2025.02.07%20Advocacy%20Letter%20on%20Fremont%20Anti-Camping%20Ordinance.pdf> [<https://perma.cc/TD27-8VWH>] (urging Fremont public officials to reject the adoption of an anticamping prohibition).

88. Lauren Martinez, *Fremont Takes Out ‘Aiding and Abetting Encampment’ Part out of City’s Homeless Camp Ban*, ABC7 NEWS (Mar. 19, 2025) <https://abc7news.com/post/fremont-takes-aiding-abetting-encampment-part-citys-homeless-camp-ban/16048200/> [<https://perma.cc/KJW4-Q5NY>].

89. See Maggie Angst & Elizabeth Wilson, *Mayor Breed Says ‘Very Aggressive’ Sweep of S.F. Homeless Encampments Will Launch in August*, S.F. CHRONICLE (July 18, 2024), <https://www.sfchronicle.com/sf/article/mayor-breed-says-aggressive-sweep-of-sf-19582134.php> [<https://perma.cc/PYF2-Q2M2>].

previous twelve months.⁹⁰ On the other side of the country, officials in Manchester, New Hampshire, immediately allocated an additional \$500,000 to increase police patrols of public spaces, resulting in 150 citations in just the first two weeks.⁹¹

The floodgates that *Grants Pass* opened go beyond simply enacting more of the type of sleeping and camping bans at issue in that case. The decision emboldened local officials in both rhetoric and action. To take one particularly abhorrent example, the Mayor of Lancaster, California, announced after the decision that he was “warming up the bulldozer,” and, more recently, called for free fentanyl to be handed out in order to “purge” the homeless population.⁹²

90. See Stephen Przybylinski, *San Francisco and Other Cities, Following a Supreme Court Ruling, Are Arresting More Homeless People for Living on the Streets*, THE CONVERSATION (Aug. 12, 2024, at 08:27 ET), <https://theconversation.com/san-francisco-and-other-cities-following-a-supreme-court-ruling-are-arresting-more-homeless-people-for-living-on-the-streets-262664> [<https://perma.cc/GRK4-RN9R>]; *SF Illegal Lodging—Police Reports*, DATASF (Sep. 10, 2025), <https://data.sfgov.org/Public-Safety/SF-Illegal-lodging-Police-Reports/5r3s-63zk> [<https://perma.cc/W3AW-LHHA>]. Enforcement similarly increased in other California cities. Keith Mizuguchi, *How Grants Pass Ruling Affected Homeless Enforcement in California*, KQED (June 27, 2025), <https://www.kqed.org/news/12046259/how-grants-pass-ruling-affected-homeless-enforcement-in-california> [<https://perma.cc/M9B7-49J3>] (describing homelessness-related arrests in Los Angeles increasing by 68 percent in the six months following the *Grants Pass* ruling, and in Sacramento, citations and arrests nearly tripling in the same period); see also Marisa Kendall, Aaron Schrank & Lisa Halverstadt, *They Were Repeatedly Ticketed Because of Their Homelessness. What Did It Change?*, VOICE OF S.D. (June 27, 2025), <https://voiceofsandiego.org/2025/06/27/they-were-repeatedly-ticketed-because-of-their-homelessness-what-did-it-change/> [<https://perma.cc/UU35-DJ68>] (describing increased enforcement across California and repeated enforcement against the same individuals).

91. Imani Fleming, *3 Citations Issued in Manchester So Far Under New Camping Ban*, WMUR9 ABC (July 31, 2024, at 23:38 ET), <https://www.wmur.com/article/citations-manchester-camping-ban-73124/61756554> [<https://perma.cc/G35L-NUBA>]; Paul Feely, *Data Shows New Manchester Ordinance Has Reduced Homeless in and near City Parks*, UNION LEADER (Sep. 9, 2025), https://www.unionleader.com/news/human_interest/data-shows-new-manchester-ordinance-has-reduced-homeless-in-and-near-city-parks/article_38eb03fc-50ea-11ef-bd1e-23abeae53dcb.html [<https://perma.cc/7R7Z-YVA3>]; Dominic Anthony Walsh, *Data: Houston Police Ramp Up Citations of Homeless People*, HOU. PUB. MEDIA (Nov. 13, 2025, at 14:21 ET), <https://www.houstonpublicmedia.org/articles/news/city-of-houston/2025/11/11/535798/homeless-houston-sidewalks-ordinance-police/> [<https://perma.cc/5UBG-72SA>] (describing increased enforcement in Houston); Brooke Stephenson, *‘Everything Is Pink Tags’: Boulder Steps Up Camping Ban Enforcement Along Boulder Creek*, BOULDER REP. LAB (Apr. 27, 2025), <https://boulderreportinglab.org/2025/04/27/everything-is-pink-tags-boulder-steps-up-camping-ban-enforcement-along-boulder-creek/> [<https://perma.cc/GWU6-EL49>] (describing increased enforcement in Boulder).

92. Shawn Hubler & Mike Baker, *After Homelessness Ruling, Cities Weigh Whether to Clear Encampments*, N.Y. TIMES (July 13, 2024), <https://www.nytimes.com/2024/07/13/us/>

States also leaned into punitive approaches. In July 2024, California Governor Gavin Newsom issued an executive order praising the Court's decision and ordering state agencies to start clearing encampments.⁹³ His order also encouraged local governments to do the same and, in accompanying statements, he threatened to withhold money from them if they did not.⁹⁴ Elsewhere, statewide bills were introduced, passed, and enforced. In Kentucky, a statewide law making it a crime to sleep or camp in public, which went into effect shortly before the *Grants Pass* decision came down, resulted in 425 charges filed in its first year.⁹⁵ In 2025, Mississippi

homeless-camps-supreme-court-ruling.html [https://perma.cc/A8X8-L2CF]; Neil Fetherstonhaugh, *California Mayor Calls for Free Fentanyl to Be Given to 'Purge' Homeless Population*, SUNDAYWORLD (Apr. 24, 2025, at 11:28 ET), https://www.sundayworld.com/crime/world-crime/california-mayor-calls-for-free-fentanyl-to-be-given-to-purge-homeless-population/a1168834897.html [https://perma.cc/F6KE-DFWM].

93. See Cal. Exec. Order No. N-1-24 (July 25, 2024); Luna, *supra* note 84.

94. Luna, *supra* note 84. Subsequently, in May 2025, Governor Newsom urged cities to adopt ordinances restricting public camping, providing a model ordinance that would make it illegal to use a sleeping bag, blanket or any other material for the purpose of sleeping, lying or sheltering for more than three days in the same location. OFF. OF THE GOVERNOR OF CAL., MODEL ORDINANCE: ADDRESSING ENCAMPMENTS WITH URGENCY AND DIGNITY (2025), https://www.gov.ca.gov/wp-content/uploads/2025/05/encampment-ordinance-formatted.pdf [https://perma.cc/6w8u-zpha]; Marisa Kendall, *Newsom Wants Cities to Force Homeless Californians to Move Camp Every 3 Days*, CALMATTERS (May 12, 2025), https://calmatters.org/housing/homelessness/2025/05/newsom-encampment-sweep-ordinance/ [https://perma.cc/5QXK-LG29]. Governor Newsom again suggested that cities could face financial consequences if they did not adopt similar ordinances. *Id.* And in August 2025, Newsom created a task force of state agencies dedicated to dismantling encampments, which he quickly began sending into cities across the state. Erin Baldassari, *Newsom's New Statewide Encampment Taskforce Ramps Up Operations in San Francisco*, KQED (Sep. 17, 2025, at 15:51 PT), https://www.kqed.org/news/12056128/newsoms-new-statewide-encampment-taskforce-ramps-up-operations-in-san-francisco [https://perma.cc/C6HR-UTUK].

95. Amber Duke, *Law Targets Homeless Instead of Helping Them*, NEWS-ENTER. (July 22, 2025), https://www.thenewsenterprise.com/opinion/columnists/law-targets-homeless-instead-of-helping-them/article_9c003159-2d00-52cb-94a9-9f39f3dbdd40.html [https://perma.cc/64WK-D49V]; H.B. 5, 2024 Gen. Assemb., Reg. Sess. (Ky. 2024). The Kentucky law is among a handful of statewide laws criminalizing homelessness that are modeled off template legislation from the Cicero Institute. *Compare Reducing Street Homelessness Act Model Bill*, CICERO INST., https://ciceroinstitute.org/wp-content/uploads/2021/11/Reducing-Street-Homelessness-Act-Model-Bill.090821.pdf [https://perma.cc/8J4U-6K8R], with H.B. 1925, 87th Leg. (Tex. 2021) (incorporating a similar legal scheme to the one exemplified in the Cicero Institute's model bill), and S.B. 62, 2023 Reg. Sess. (Ga. 2023) (same), and S.B. 217, 114th Gen. Assemb. (Tenn. 2025) (same). The primary elements of the model legislation include a statewide criminal camping ban; diversion of funding for homeless services from evidence-based Housing First models to short-term, state-run encampments and emergency shelters; and lowering due process protections for involuntary commitment. See CICERO INST., *supra*.

passed statewide laws that criminalize camping and panhandling.⁹⁶ In April 2025, Idaho enacted a law that bans camping and sleeping in public statewide and allows the state's attorney general to sue cities who allow violations to continue.⁹⁷ And in Utah, the State is building a remote camp facility where it will force unhoused individuals to relocate in order to avoid being jailed for sleeping in public and where it will subject many to involuntary treatment.⁹⁸

At the federal level, the Trump administration has also signaled support for carceral approaches to homelessness.⁹⁹ In an executive order dated March 28, 2025, and titled "Making the District of Columbia Safe and Beautiful," President Trump directed "[the] removal and cleanup of all homeless or vagrant encampments and graffiti on Federal land within the District of Columbia."¹⁰⁰ On May 1, 2025, the U.S. Forest Service conducted "the largest federal eviction of a homeless camp in recent history," removing over 100 people who were living in the Deschutes National Forest in Oregon under threat of fines of up to \$5,000 and one year in jail.¹⁰¹ And on July 24, 2025, President Trump issued an executive order titled "Ending Crime and Disorder on America's Streets," which instructs federal agencies to direct funds towards cities that punish people for sleeping outdoors or enforce other laws targeting unhoused people.¹⁰² The executive order also encourages the institutionalization of people with mental health disabilities and substance use

Other states, including Oklahoma and Florida, have passed other, non-Cicero statewide laws that make camping a crime. See H.B. 1365, 2024 Leg., Reg. Sess. (Fla. 2024); S.B. 1854, 59th Leg., Reg. Sess. (Okla. 2024).

96. Pam Dankins, *Jackson Police Chief Speaks Directly to Unhoused People on New Anti-Homeless Laws in MS*, CLARION LEDGER (July 3, 2025, at 15:51 CT), <https://www.clarionledger.com/story/news/local/2025/07/03/jackson-mississippi-police-chief-speaks-to-unhoused-people-on-mississippi-anti-homeless-people-laws/84452921007/> [https://perma.cc/8TK7-A3R4].

97. Sarah Cutler, *New Idaho Law Bans Homeless Encampments. What Happens Now in Boise?*, IDAHO STATESMAN (June 24, 2025), <https://www.idahostatesman.com/news/politics-government/state-politics/article309264235.html> [https://perma.cc/8T78-FW7X].

98. Ellen Barry & Jason DeParle, *In Utah, Trump's Vision for Homelessness Begins to Take Shape*, N.Y. TIMES (Oct. 29, 2025), <https://www.nytimes.com/2025/10/29/us/politics/utah-trump-homeless-campus.html> [https://perma.cc/9LSP-KPA9].

99. See Exec. Order No. 14252, 90 Fed. Reg. 14559 (Mar. 27, 2025).

100. *Id.* at 14561.

101. Rukmini Callimachi, *From One Forest to Another: A Homeless Sweep Changes Little*, N.Y. TIMES (May 3, 2025), <https://www.nytimes.com/2025/05/03/realestate/homeless-encampment-removal-forest-oregon.html> [https://perma.cc/C4EC-BRBU].

102. Exec. Order No. 14321, 90 Fed. Reg. 35817, 35817-18 (July 24, 2025).

disorders as well as those living on the street who “cannot care for themselves.”¹⁰³ In November 2025, in furtherance of this directive, the Department of Housing and Urban Development issued revised funding guidelines that require, among other things, that the grant recipient’s state or city “prohibits public camping or loitering and enforces such prohibition.”¹⁰⁴

The impact of this turn towards criminalization in the wake of *Grants Pass* is significant and devastating. The proliferation of these laws and policies places hundreds of thousands of people under threat of fines, arrests, and jail time simply because they have no indoor place to sleep.¹⁰⁵ A total of 771,480 people—or 23 out of every 10,000 Americans—experienced homelessness on a single night in 2024.¹⁰⁶ Over 35 percent were living outside.¹⁰⁷ Many more Americans are on the brink of becoming homeless due to soaring rents and stagnant wages.¹⁰⁸

These laws also disproportionately affect already marginalized communities. The demographics of the unhoused population are shaped by systemic racial discrimination, including centuries of

103. *Id.*

104. Shortly after, a coalition of states, cities, and nonprofits sued to stop the new conditions on funding. See Katherine Hapgood, *20 States Sue the Trump Administration over Cuts to Homeless Permanent Housing Funding*, POLITICO (Nov. 25, 2025, 17:33 ET), https://www.politico.com/news/2025/11/25/states-trump-administration-hud-housing-cuts-00668178?bhlid=e246bd6f562ef7fcad39bbcdcb16a824ba0f125c&utm_campaign=the-smile-11-26&utm_medium=newsletter&utm_so [https://perma.cc/HJW5-Q38X].

105. See U.S. DEP’T OF HOUS. & URB. DEV., *supra* note 5, at v.

106. *Id.*

107. See *id.* at 2.

108. See Dana Anderson, *More Than 1 in 5 Renters Say Their Entire Paycheck Goes to Rent*, REDFIN NEWS (Nov. 22, 2024), <https://www.redfin.com/news/survey-how-renters-afford-housing/> [https://perma.cc/TR95-RUSS] (stating that 22 percent of renters spend all their income directly on rent, while another 19 percent are working a second job to afford it); NAT’L LOW INCOME HOUS. COAL., *OUT OF REACH: THE HIGH COST OF HOUSING 3-4* (2021), https://nlihc.org/sites/default/files/oor/2021/Out-of-Reach_2021.pdf [https://perma.cc/A5MR-MDTZ]; *How COVID-19 Could Aggravate the Homelessness Crisis?*, U.S. GOV’T ACCOUNTABILITY OFF. (Aug. 25, 2020), <https://www.gao.gov/blog/how-covid-19-could-aggravate-homelessness-crisis> [https://perma.cc/9XAV-WCGL] (finding that for every one-hundred-dollar increase in median rent there is an associated 9 percent increase in the homelessness rate). Recent analysis of homelessness nationwide found that “absolute rent levels and rental vacancy rates are associated with regional rates of homelessness. Many other common explanations—drug use, mental illness, poverty, or local political context—fail to account for regional variation.” GREGG COLBURN & CLAYTON PAGE ALDERN, *HOMELESSNESS IS A HOUSING PROBLEM: HOW STRUCTURAL FACTORS EXPLAIN U.S. PATTERNS*, <https://homelessnesshousingproblem.com/> [https://perma.cc/LYQ7-VMY6].

exclusion of people of color from access to economic opportunity, housing, employment, healthcare, and other essential supports.¹⁰⁹ While Black people make up only 12 percent of the total U.S. population, they represent 32 percent of all people experiencing homelessness.¹¹⁰ Moreover, “[f]or American Indians and Alaska Natives, the ratio may be as high as 5 to 1.”¹¹¹ People with disabilities are also overrepresented among the unhoused population. Nearly a quarter of unhoused people have a disability, compared to just over 13 percent of the general population.¹¹²

III. LOOKING AHEAD: THE IMPORTANCE OF RECENTERING THE CRIMINAL LEGAL SYSTEM AND ITS CONSTITUTIONAL CONSTRAINTS

As demonstrated above, despite the rhetorical inflations of the *Grants Pass* majority and amici localities, state and federal litigation challenging antihomeless laws and policies are ongoing, and both well-trodden and novel claims continue to constrain how cities and states can treat unhoused people. At the same time, *Grants Pass* has ushered in a groundswell of new laws and practices that criminally punish behaviors associated with homelessness. Whatever one thinks about the appropriateness of applying the Cruel and Unusual Punishments Clause to these kinds of laws, once that clause no longer constrains how cities can deploy them, they place us squarely in the world of the criminal legal system.

As advocates, students, and academics alike consider novel legal theories and new fora to fill the doctrinal void left by *Grants Pass*, this Article calls attention to the cascading criminal legal system

109. Teresa Wiltz, ‘A Pileup of Inequities’: Why People of Color Are Hit Hardest by Homelessness, STATELINE (Mar. 29, 2019, at 00:00 ET), <https://stateline.org/2019/03/29/a-pileup-of-inequities-why-people-of-color-are-hit-hardest-by-homelessness/> [<https://perma.cc/5XTQ-2ZLV>].

110. U.S. DEP’T OF HOUS. & URB. DEV., *supra* note 5, at v.

111. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, ALL IN: THE FEDERAL STRATEGIC PLAN TO PREVENT AND END HOMELESSNESS 16 (2022), https://www.usich.gov/sites/default/files/document/All_In.pdf [<https://perma.cc/TQG3-GRAN>].

112. *Who Experiences Homelessness? People with Unaddressed Health Conditions*, NAT’L ALL. TO END HOMELESSNESS, https://endhomelessness.org/people-with-unaddressed-health-conditions/?gad_source=1&gad_campaignid=22378241010 [<https://perma.cc/SA93-6H32>]; *Anniversary of Americans with Disabilities Act: July 26, 2024*, U.S. CENSUS BUREAU (June 12, 2024), <https://www.census.gov/newsroom/facts-for-features/2024/disabilities-act.html> [<https://perma.cc/RCW8-JW4A>].

consequences that flow from the decision and makes the case for confronting them with criminal system-specific claims. In making this case, I do not intend to suggest that a focus on the criminal legal system ramifications of the *Grants Pass* decision should be the exclusive focus of advocates. The criminal legal consequences I focus on here are by no means the exclusive harms unhoused communities face. Nor will litigation challenging abuse of the criminal legal system directly reduce homelessness or address its root causes. Advocates should continue to explore novel claims that could move beyond protecting against abuse and towards requiring affirmative remedies, such as housing.¹¹³ In addition to those claims, however, it is important to expose how the post-*Grants Pass* reaction funnels unhoused individuals into our criminal legal system, abuses and expands the carceral state, and echoes historical uses of criminal law to control and exclude marginalized groups.

This Part begins by providing an overview of the criminalization of homelessness, including a definition of that term and a description of the magnitude of the problem and the harms that flow from it. Part B then situates the current focus on criminalizing homelessness in the nation's long history of using our criminal legal system to address socioeconomic problems and to exclude those deemed undesirable.

A. *The Criminalization of Homelessness*

The term “criminalization of homelessness” is now widely used, but nevertheless worth defining and unpacking. The term is commonly understood to refer to laws that prohibit or regulate behaviors that are associated with homelessness and, in many cases, unavoidable for those who do not have housing.¹¹⁴ It is also at

113. See, e.g., Samuel R. Bagenstos, *The Limits of Negative Rights Claims in Social Change Litigation: A Disability Law Perspective on Grants Pass*, 71 WAYNE L. REV. 71, 74 (2025) (arguing that advocates should consider using the ADA's integration mandate, which the author argues may provide greater traction in obtaining services necessary to address homelessness). See generally Malley, *supra* note 56 (arguing that Alaska's Constitution enshrines an affirmative right to adequate and affordable housing).

114. See, e.g., Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 44-45 (2016) (describing “the criminalization of homeless and visibly poor people” as referring “to measures that restrict life-sustaining activities such as sleeping, camping, eating, sitting, seeking income, asking for help, urinating, defecating, receiving food, storing belongings, or protecting

times used to refer to the policies or practices that surround enforcement of these laws, including move-along orders and encampment sweeps.¹¹⁵ In addition to describing laws that impose criminal penalties, the term “criminalization of homelessness” also commonly embraces laws that are classified as civil but that can easily escalate to criminal penalties. This was the case, for example, with the ordinances at issue in *Grants Pass*, in which penalties escalated from a fine to an order barring repeat violators from city parks for thirty days, and, if those orders were violated, to criminal trespass, punishable by a maximum of thirty days in prison and a \$1,250 fine.¹¹⁶

The line between civil and criminal is often thin when it comes to laws that target the unhoused, and the consequences that flow from their imposition can be similar. As legal scholar Alexandra Natapoff details, when offenses are classified as civil, defendants face lesser formal punishments, but they also may be entitled to fewer protections, such as the right to counsel, and can end up facing similar punishments and consequences.¹¹⁷ For example, in many

oneself from the elements in public spaces—even when a person has no reasonable alternative due to a lack of shelter or private space”).

115. The National Homelessness Law Center (formerly the National Law Center on Homelessness and Poverty) defines the term as

when law enforcement threatens or punishes homeless people for doing things in public that every person has to do. This can include activities such as sleeping, resting, sheltering oneself, asking for donations, or simply existing in public places. It also includes arbitrarily or unfairly enforcing other laws, such as jaywalking or disorderly conduct against homeless individuals, and the practice of “sweeps” or displacing homeless people from outdoor public spaces through harassment, threats, and evictions from living in camps.

NAT’L L. CTR. ON HOMELESSNESS & POVERTY, FACT SHEET: THE TOP FIVE WAYS CRIMINALIZATION OF HOMELESSNESS HARMS COMMUNITIES, <https://homelesslaw.org/wp-content/uploads/2018/10/criminalization-one-pager.pdf> [<https://perma.cc/UXA6-W6C9>]; see also ALLARD K. LOWENSTEIN, INT’L HUM. RTS. CLINIC, “FORCED INTO BREAKING THE LAW”: THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 2 (2016), https://law.yale.edu/system/files/area/center/schell/criminalization_of_homelessness_report_for_web_full_report.pdf [<https://perma.cc/4MQH-FQDV>] (“Laws that restrict behaviors in which people experiencing homelessness must engage to survive, as well as the practices used to enforce these laws, constitute what this report refers to as ‘making homelessness a crime’ or ‘the criminalization of homelessness.’”).

116. *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2213 (2024).

117. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1078 (2015); Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1872 (2018) (“Today, fines are often the sole or primary form of punishment for low-level offenses.”).

jurisdictions, civil infractions may still form the basis for a custodial arrest, and the Supreme Court has held that the Constitution does not prohibit custodial arrests for nonjailable offenses.¹¹⁸ And even when a person could not face incarceration for the underlying offense as a matter of law, failure to pay fines imposed by a civil offense can easily result in arrest and incarceration.¹¹⁹ Defendants who cannot pay fines, court costs, or other fees are routinely held in contempt and jailed.¹²⁰ And the same devastating collateral effects can flow from both civil and criminal penalties.¹²¹ The interlocking nature of civil and criminal penalties thus provides good reason to group laws that punish and regulate homelessness together under the umbrella of criminalization, regardless of whether they are technically criminal or civil.¹²² Because police often administer both civil infractions and criminal penalties, they also fit law professor and homelessness law and policy expert Sara Rankin's identification of the "defining feature of criminalization [as] the use of policing and the criminal justice system as a first resort for responding to the public presence of visibly poor and homeless people."¹²³

Even before the *Grants Pass* decision, laws that criminalize homelessness—including laws that outlaw survival activities such as sleeping, camping, eating, or sitting in public; antippanhandling laws; vague prohibitions on loitering, loafing, or vagrancy; and food-sharing and scavenging bans—have been on the rise.¹²⁴ Of 187 cities surveyed in a 2019 report by the National Homelessness Law

118. Natapoff, *supra* note 117, at 1079 (footnotes omitted) (citing *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); and then citing *Virginia v. Moore*, 553 U.S. 164 (2008)).

119. *Id.* at 1081.

120. See ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 5, 81 (2010), https://www.assets.aclu.org/live/uploads/publications/InForAPenny_web.pdf [<https://perma.cc/2BXC-7TAR>].

121. See generally *id.* (detailing examples of individuals jailed for their inability to pay the fines for their civil infractions).

122. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 613 (2014) ("Since the mid-1990s, police departments across the country have adopted tactics that intentionally increase the volume of citations and arrests for low-level offenses, flooding lower criminal courts with subfelony cases. Misdemeanor justice in the age of mass misdemeanors both upends standard notions of the purposes of criminal procedure and punishment and challenges our understandings about the social role of criminal law.").

123. Rankin, *supra* note 114, at 44-45.

124. See NAT'L HOMELESSNESS L. CTR., HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT 8-13 (2021), <https://homelesslaw.org/wp-content/uploads/2021/11/2021-HNH-State-Crim-Supplement.pdf> [<https://perma.cc/E8ZP-EEKJ>].

Center, 55 percent prohibited sitting or lying in public, 72 percent prohibited camping in public, 51 percent prohibited sleeping in public, 60 percent prohibited “public loitering, loafing, or vagrancy,” 83 percent had laws restricting begging in public, 9 percent outlawed or restricted food sharing, and 76 percent prohibited scavenging or dumpster diving.¹²⁵

Laws that do not target unhoused people on their face are often disproportionately enforced against them and used to push unsheltered homelessness out of sight. Research suggests this is the case, for example, with criminal trespass laws. One study found that 75 percent of criminal trespass defendants in Eugene, Oregon, lacked permanent housing and that the law was regularly enforced, with more criminal trespass charges issued than speeding tickets.¹²⁶

Unhoused people are arrested at extremely high rates. A 2015 Colorado survey of 441 unhoused people found 36 percent had been arrested and 70 percent had been ticketed under laws that criminalize homelessness, including bans on sleeping, sitting, loitering, using shelter, or panhandling.¹²⁷ In Atlanta, a 2022 study found that while unhoused people make up only 0.4 percent of the total city population, they represent 12.5 percent of the city jail population, and most were likely jailed for low-level quality-of-life offenses.¹²⁸ A recent study found that from 2017 to 2020, 50 percent of arrests in Portland, Oregon, 42 percent of arrests in Sacramento, and 24 percent of arrests in Los Angeles were of unhoused people.¹²⁹ In Phoenix, a 2024 Department of Justice investigation report found

125. NAT'L CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 2019 12-14 (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/4QCS-5Q4E>].

126. See *Cities Try to Arrest Their Way Out of Homeless Problems*, PBS NEWS HOUR (Jun. 29, 2020, at 14:47 ET), <https://www.pbs.org/newshour/nation/cities-try-to-arrest-their-way-out-of-homeless-problems> [<https://perma.cc/UQ75-8YTD>].

127. TONY ROBINSON & ALLISON SICKELS, NO RIGHT TO REST: CRIMINALIZING HOMELESSNESS IN COLORADO 7-8 (Apr. 4, 2015), <https://wp-cpr.s3.amazonaws.com/uploads/2019/06/homelessness-study.pdf> [<https://perma.cc/H8VX-7AMU>].

128. Luci Harrell & Brian Nam-Sonenstein, *Unhoused and Under Arrest: How Atlanta Polices Poverty*, PRISON POL'Y INITIATIVE (June 8, 2023), <https://www.prisonpolicy.org/blog/2023/06/08/atlanta-poverty/> [<https://perma.cc/SWT8-2D7C>].

129. Melissa Lewis, *Police Know Arrests Won't Fix Homelessness. They Keep Making Them Anyway.*, REVEAL NEWS (June 23, 2022), <https://revealnews.org/article/homeless-unhoused-police-arrests-west-coast-cities/> [<https://perma.cc/G794-YYRS>].

that 37 percent of all misdemeanor arrests and citations were issued against unhoused people.¹³⁰ And a recent report by the Prison Policy Initiative found that unhoused people are more likely to be booked into jail multiple times and are held in jails for longer than average.¹³¹

Unhoused people with serious mental illness and substance use disorder are especially likely to face criminalization. At least 63 percent of unhoused people with mental illness will be arrested during their lifetimes, and at least 48 percent will be incarcerated.¹³² People with co-occurring mental illness and substance use disorders may be especially vulnerable to criminalization.¹³³

Criminal legal system involvement and homelessness are part of a vicious cycle.¹³⁴ Unhoused people are at increased risk of arrest and incarceration and, in turn, arrests, citations, and jail or prison stays often push people into homelessness.¹³⁵ Unhoused people are up to eleven times more likely to be arrested than housed people.¹³⁶ And existing research shows that spending time in jail or prison often results in homelessness—at least 50,000 people enter shelters directly from correctional facilities each year.¹³⁷ The pervasive

130. Janelle Griffith, *This is Validation: Phoenix Homeless Welcome Justice Department's Findings, Call for Consent Decree*, NBC NEWS (June 18, 2024, at 19:36 ET), <https://www.nbcnews.com/news/us-news/-validation-phoenix-homeless-welcome-justice-departments-findings-call-rcna157626> [<https://perma.cc/F9K7-2BN6>].

131. Leah Wang, *Jailing the Homeless: New Data Shed Light on Unhoused People in Local Jails*, PRISON POL'Y INITIATIVE (Feb. 11, 2025), https://www.prisonpolicy.org/blog/2025/02/11/jail_unhoused_bookings [<https://perma.cc/DF2V-8RAY>].

132. Brian Nam-Sonenstein, *Seeking Shelter from Mass Incarceration: Fighting Criminalization with Housing First*, PRISON POL'Y INITIATIVE (Sep. 11, 2023), <https://www.prisonpolicy.org/blog/2023/09/11/housing-first/> [<https://perma.cc/P8YL-KCU5>].

133. *See More than 1 in 9 Adults with Co-Occurring Mental Illness and Substance Use Disorders Are Arrested Annually*, PEW CHARITABLE TRS. (Sep. 8, 2023), <https://www.pew.org/en/research-and-analysis/issue-briefs/2023/02/over-1-in-9-people-with-co-occurring-mental-illness-and-substance-use-disorders-arrested-annually> [<https://perma.cc/JJ3L-6VL9>] (“More than 1 in 9 adults with co-occurring disorders were arrested annually, 12 times more often than adults with neither a substance use disorder nor a mental illness, and six times more often than those with a mental illness alone.”).

134. *See* Chris Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penalty: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC. PROBS. 131, 132-33 (2020).

135. *See id.* at 133.

136. *See* CTR. ON HOMELESSNESS & POVERTY, *supra* note 125, at 50.

137. *See* MEGHAN HENRY, KORRIN BISHOP, TANYA DE SOUSA, AZIM SHIRJI & RIAN WATT, U.S. DEP'T OF HOUS. & URB. DEV., *THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 2: ESTIMATES OF HOMELESSNESS IN THE UNITED STATES 1-14* (2018), <https://www.huduser.gov/portal/portal/sites/default/files/pdf/2017-AHAR-Part-2.pdf>

nature of these laws makes it almost impossible for people living on the street to avoid violating them.¹³⁸ Even if the penalty is a fine, a person may still be subject to arrest, search, and a warrants check. Failure to pay the fine or to appear in court on the day listed on a summons can lead to an arrest warrant being issued.¹³⁹ It can be extremely difficult for an unsheltered person to make it to court on the assigned date and time.¹⁴⁰ In Atlanta, 86 percent of unhoused people “who had been incarcerated at the city jail also had bench warrants for failure to appear in court.”¹⁴¹

Criminalizing homelessness is also costly.¹⁴² In 2015, Los Angeles

[<https://perma.cc/5X2X-BLY4>].

138. See COAL. ON HOMELESSNESS, S.F., PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 2 (2017), <http://www.cohsf.org/Punishing.pdf> [<https://perma.cc/E9RN-6548>] (stating that 69 percent of unhoused survey respondents had been cited for a “quality of life” citation in the last year, that 90 percent of those “respondents were unable to pay the fine for their last citation,” and that, in San Francisco, the inability to pay a fine results in a three hundred dollar civil assessment fee in addition to “the base fine, an arrest warrant, and suspension of one’s driver’s license”); Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84 AM. SOCIO. REV. 769, 790 (2019) (describing punitive and widespread process of policing unhoused individuals through move-along orders, citations, and threats of arrest and pervasive property confiscation and destruction that almost “always involved either a police presence, the threat of police being called, or leveraging anti-homeless ordinances to provide legal cover for property confiscation”).

139. See Andrew Weber, *Most Tickets for Homelessness Result in Arrest Warrants. That Can Make Finding Housing Hard*, KUT NEWS (June 20, 2019, at 17:00 CT), <https://www.kut.org/austin/2019-06-20/most-tickets-for-homelessness-result-in-arrest-warrants-that-can-make-finding-housing-hard> [<https://perma.cc/Q5AU-M7GK>] (showing that from 2015 to 2018 in Austin, Texas, almost 60 percent of citations issued for “sitting or lying down, camping[,] or panhandling in public” resulted in the issuance of an arrest warrant); Paul Boden, *Criminalizing the Homeless Costs Us All*, STREET ROOTS (Mar. 1, 2012), <https://www.streetroots.org/news/2012/03/01/criminalizing-homeless-costs-us-all> [<https://perma.cc/R9Y5-AAQW>] (in survey of over six hundred unhoused people across eight cities, 57 percent of respondents “reported having bench warrants issued for their arrest as the result of minor ‘quality of life’ offenses”).

140. MADELINE BAILEY, ERICA CREW & MADZ REEVE, VERA INST. OF JUST., NO ACCESS TO JUSTICE: BREAKING THE CYCLE OF HOMELESSNESS AND JAIL 6-7 (2020), <https://vera-institute.files.svcdn.com/production/downloads/publications/no-access-to-justice.pdf?dm=1597169694> [<https://perma.cc/G3M3-AMSK>].

141. Harrell & Nam-Sonenstein, *supra* note 128.

142. Ann Marie Oliva, *SNAPS in Focus: The Case Against Laws that Criminalize Homelessness* (Oct. 6, 2014), <https://www.hudexchange.info/sites/onecpd/assets/File/SNAPS-In-Focus-The-Case-Against-Laws-that-Criminalize-Homelessness.pdf> [<https://perma.cc/V8EH-DXGV>]; Nazish Dholakia, *How the U.S. Criminalizes Homelessness*, VERA INST. OF JUST. (Dec. 17, 2021), <https://www.vera.org/news/how-the-u-s-criminalizes-homelessness> [<https://perma.cc/WCN5-B8TU>] (“Arresting and incarcerating unhoused people under laws

spent over \$100 million annually addressing homelessness, over \$50 million of which was spent on policing criminal and civil anti-homeless laws.¹⁴³ An audit of a Los Angeles anticamping law enacted in 2021 showed that in the first “three years since going into effect, just two unhoused people ha[d] been provided permanent housing while more than \$3 million ha[d] been spent on implementation and enforcement.”¹⁴⁴ A Seattle University study found that enforcing just one of its six quality-of-life laws cost Seattle \$2.3 million over five years.¹⁴⁵ After spending \$20.6 million enforcing so-called “quality of life” laws in 2015, a San Francisco budget analysis found that the “current enforcement measures are too expensive” with “limited results.”¹⁴⁶

The harms that criminalization inflicts on unhoused individuals are well documented.¹⁴⁷ By pushing unhoused people into more secluded locations and isolating people from the safety that living in a group can bring, criminalization also puts unhoused individuals at greater risk of being victims of violent crime.¹⁴⁸ Public health researchers also consistently find that criminalization makes health outcomes worse.¹⁴⁹

that criminalize homelessness costs taxpayers \$83,000 per person per year.”).

143. See Report from Miguel A. Santana, City Admin. Officer, L.A., to City Council, L.A. (Apr. 16, 2015), <https://s3.documentcloud.org/documents/1906452/losangeleshomelessnessreport.pdf> [<https://perma.cc/E6BN-ZWW2>].

144. *Audit of LA's Anti-Camping Law Shows About \$3 Million Spent and Just Two People Given Permanent Housing*, CBS NEWS (May 31, 2024, at 22:12 PT), <https://www.cbsnews.com/losangeles/news/audit-of-las-anti-camping-law-shows-about-3-million-spent-and-just-two-people-given-permanent-housing/> [<https://perma.cc/8EB9-VMWS>].

145. See JOSHUA HOWARD & DAVID TRAN, HOMELESS RTS. ADVOC. PROJECT, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE AND SPOKANE, at iii (Sara Rankin ed., 2015), <https://digitalcommons.law.seattleu.edu/hrap/10> [<https://perma.cc/4S9Z-MJCE>].

146. Policy Analysis Report from the Budget and Legis. Analyst's Off. to Gordon Mar, S.F. Bd. of Supervisors (June 1, 2016), <https://sfbos.org/sites/default/files/FileCenter/Documents/56045-Budget%20and%20Legislative%20Analyst%20Report.Homelessness%20and%20Cost%20of%20Quality%20of%20Life%20Laws.Final.pdf> [<https://perma.cc/GR3P-4GRQ>].

147. See *supra* Part III.A.

148. Andrew I. Lief, *A Prosecutorial Solution to the Criminalization of Homelessness*, 169 U. PA. L. REV. 1971, 1977 (2021).

149. JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, PUBLIC HEALTH IMPACTS OF CRIMINALIZING HOMELESSNESS: HOPKINS JUDICIAL HEALTH NOTE: CITY OF GRANTS PASS V. JOHNSON, https://americanhealth.jhu.edu/sites/default/files/2024-12/JHU_2024_HealthNotes_grantspassvjohanson_FINAL_12.3.pdf [<https://perma.cc/7P63-S6EK>]; AM. PUB. HEALTH ASS'N, PROTECTING THE HEALTH AND WELL-BEING OF PEOPLE LIVING UNSHELTERED BY STOPPING FORCIBLE DISPLACEMENT OF ENCAMPMENTS 1, 9, 19, 21 (Nov. 14, 2023),

Contrary to the message that many local government amici sent to the Court in *Grants Pass*, far from being a “solution,” criminalization serves to make it harder to exit homelessness. To be clear, homelessness is a crisis that we need to urgently address, but fining, arresting, and pushing unhoused people from place to place do not solve homelessness, they exacerbate it.¹⁵⁰ A criminal record can have wide-reaching effects.¹⁵¹ Both conviction and arrest records make it harder to obtain and keep employment, housing, benefits, and education.¹⁵² Fines and fees can also lead to mounting debt, damaged credit, and jail time. In Seattle, legal fines and resulting debt extended homelessness by nearly two years.¹⁵³ The ineffectiveness of arresting unhoused people for low-level offenses that they have no choice but to engage in is both common sense and has been recognized by law enforcement actors.¹⁵⁴

<https://www.apha.org/policy-and-advocacy/public-health-policy-briefs/policy-database/2024/01/16/displacement-of-encampments> [https://perma.cc/94KU-6BEY]; Brief for Public Health Professionals and Organizations as Amici Curiae in Support of Respondents, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024) (No. 23-175).

150. A recent study found no correlation between criminalization policies and a long-term reduction in homelessness. See Hannah Lebovits & Andrew Sullivan, *Do Criminalization Policies Impact Local Homelessness?*, 54 POL’Y STUD. J. (forthcoming 2026) (manuscript at 2, 9, 11), <https://onlinelibrary.wiley.com/doi/10.1111/psj.70056> [https://perma.cc/B2FH-DWEF]; see also Thea Sebastian, Hanna Love & Tahir Duckett, *Criminalizing Homelessness Can Lead to More Crime*, GOVERNING (Oct. 9, 2024), <https://www.governing.com/urban/criminalizing-homelessness-can-lead-to-more-crime> [https://perma.cc/T588-S9BJ] (“Criminalizing homelessness is bad financially and bad for public safety.”).

151. Eisha Jain, *Policing in the Age of Criminal Records*, 103 N.C. L. REV. 1441, 1443 (2025) (“Criminal record history plays a key role in mediating access to housing and work; it can restrict whether people can participate fully as citizens in activities like voting and serving on juries. Criminal record history also affects a host of discretionary decisions—whether to detain someone for longer, offer a noncarceral disposition, or make a future arrest.”).

152. See Cara Suvall, *Certifying Second Chances*, 42 CARDOZO L. REV. 1175, 1182-83 (2021); Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 175 (2019); *What Are Collateral Consequences?*, NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalreentryresourcecenter.org/> [https://perma.cc/H7CH-PETX] (inventorying policies that impose collateral consequences stemming from criminal convictions, including education, government benefits, health care, and more).

153. Jessica Mogk, Valerie Shmigol, Marvin Futrell, Bert Stover & Amy Hagopian, *Court-Imposed Fines as a Feature of the Homelessness-Incarceration Nexus: A Cross-Sectional Study of the Relationship Between Legal Debt and Duration of Homelessness in Seattle, Washington, USA*, 42 J. PUB. HEALTH 1, 6 (2020).

154. See CHUCK WEXLER, *THE POLICE RESPONSE TO HOMELESSNESS: PROBLEM-SOLVING, INNOVATION, AND PARTNERSHIPS*, POLICE EXEC. RSCH. F. 6-7 (2018), <https://www.policeforum.org/assets/PoliceResponseToHomelessness.pdf> [https://perma.cc/B44U-P5QB] (“Pro-

Laws that prohibit and punish behaviors associated with homelessness—even if not criminal on their face—operate as pipelines into the criminal legal system. And the criminal legal system consequences that flow from these laws trap people in a cycle of homelessness and criminalization that is profoundly difficult to escape.

B. Historical Perspective

The current carceral approach to “solving” homelessness is an unsurprising outgrowth of our longstanding predilection for using the criminal legal system to try to address social woes and to exclude those deemed undesirable from public space and civil society.¹⁵⁵ As Risa Goluboff and Richard Schragger point out, “[t]he vulnerable and heavily policed existence of those deemed ‘other’ has been integral to the nonpoliced existence of those deemed respectable or mainstream.”¹⁵⁶

Vagrancy laws in early America branded poor people as “petty criminals,” effectively making “poverty ... a crime.”¹⁵⁷ Vagrancy laws punishing “idleness” and criminalizing those who could not support themselves or who were deemed insufficiently industrious remained in force into the mid-twentieth century.¹⁵⁸

Vagrancy laws were also instruments of white supremacy. Immediately following the Civil War, “broad proscriptions on ‘vagrancy’ and other dubious offenses” were enacted as part of “Black Codes” designed “to subjugate newly freed slaves and maintain the prewar racial hierarchy.”¹⁵⁹ These Black Codes used deliberately broad

viding housing, treatment, counseling, and other services is a far more effective approach for most people who are homeless. That is why Santa Cruz, CA Police Chief Andy Mills stopped enforcing an ‘anti-camping’ ordinance that had officers citing and arresting the same people over and over again, with no impact on homelessness.”).

155. Benjamin Levin, *Prosecuting the Crisis*, 50 *FORDHAM URB. L.J.* 989, 991 (2023) (“[C]riminal law and prosecution have come to operate as primary sites of governance—as the vehicles for the state to respond to social problems.”).

156. Risa Goluboff & Richard Schragger, *Grants Pass and the Vagrancy Revolution Revisited*, 2024 *SUP. CT. REV.* 191, 193.

157. William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 *U. RICH. L. REV.* 111, 160, 164 (1997).

158. RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S*, 15-17, 81-86 (2016).

159. *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019).

language that allowed police to arrest Black people merely for being in public absent any criminal act.¹⁶⁰

Though drafted in ostensibly race-neutral terms, these laws were enforced almost exclusively against Black people. By authorizing the punishment of being “hired out” to work on plantations, these laws functioned to perpetuate pre-emancipation conditions.¹⁶¹ As the Supreme Court later recognized, “vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery.”¹⁶²

By the mid-twentieth century, courts began to invalidate laws that explicitly punished people for experiencing poverty, including traditional vagrancy laws.¹⁶³ While these traditional vagrancy laws largely disappeared, modern iterations have persisted.¹⁶⁴ The same (mis)use of criminal law to target racial minorities can be seen, for example, in the broken windows policing theory that undergirded New York City’s stop-and-frisk policies.¹⁶⁵

In addition to using criminal law to exclude racial minorities from public space, states and cities enacted “ugly laws” targeting people with disabilities.¹⁶⁶ For example, Portland, Oregon, enacted a law in 1881 that made it a crime for “any crippled, maimed or

160. See Bonnie Kristian, *Ahmaud Arbery and the Racist History of Loitering Laws*, THE WEEK (May 7, 2020), <https://theweek.com/articles/912977/ahmaud-arbery-racist-history-loitering-laws> [<https://perma.cc/L7DW-GHWS>]. In addition to explicitly targeting poverty or lack of employment, some codes simply prohibited loitering. See MICHAEL J.Z. MANNHEIMER, THE FOURTH AMENDMENT: ORIGINAL UNDERSTANDINGS AND MODERN POLICING 6-7 (2023).

161. MANNHEIMER, *supra* note 160, at 119-20.

162. *City of Chicago v. Morales*, 527 U.S. 41, 53 n.20 (1999) (plurality opinion).

163. See, e.g., *Edwards v. California*, 314 U.S. 160, 176-77 (1941) (rejecting nineteenth-century formulations of the police power that permitted states to exclude “paupers” and “vagabonds” as a “moral pestilence.”); *Goldman v. Knecht*, 295 F. Supp. 897, 908 (D. Colo. 1969) (invalidating statute punishing “idleness or indigency coupled with being able-bodied”); *Wheeler v. Goodman*, 306 F. Supp. 58, 63 (W.D.N.C. 1969) (“Idleness and poverty should not be treated as a criminal offense.”); *vacated*, 401 U.S. 987 (1971); *Smith v. Hill*, 285 F. Supp. 556, 558 (E.D.N.C. 1968) (invalidating vagrancy statute on multiple constitutional grounds, including that it “creates a crime of the status of indigency”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 165 (1972) (holding that a traditional vagrancy law was void for vagueness insofar as its broad scope and imprecise terms denied proper notice to potential offenders and permitted police officers to exercise unfettered discretion).

164. See Joel S. Johnson, *Vagueness Attacks on Searches and Seizures*, 107 VA. L. REV. 347, 360-61 (2021) (“In fact, the increased Fourth Amendment costs resulting from the loss of vagrancy and loitering laws appear to have spurred new legislation of low-level crimes.”).

165. See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 463-64 (2000).

166. See Susan Schweik, *Kicked to the Curb: Ugly Law Then and Now*, 46 HARV. C.R.-C.L. L. REV. 1, 16 (2011).

deformed person [to beg] upon the streets or in any public place.”¹⁶⁷ San Francisco enacted the first such law in 1867, which prohibited street begging and “certain persons,” namely those who were “diseased, maimed, mutilated or in any way deformed,” from “appearing in streets or public places,” with violators facing a twenty-five dollar fine, twenty-five days in jail, or both.¹⁶⁸

It is important to highlight the current embrace of criminalization for what it is: not another benign “tool[] in the policy toolbox,”¹⁶⁹ but a return to and continuation of America’s legacy of using the criminal legal system to control and disappear its undesirables. It is also imperative to point out the continuity in who is being targeted. While Black Codes and sundown towns explicitly targeted Black people and other racial minorities for exclusion, modern laws criminalizing homelessness target a population that is disproportionately made up of the same racial groups. The same is true for people with disabilities whom “ugly laws” explicitly targeted and who now make up a larger share of the unhoused population. Refocusing on the criminal legal system implications of government policies on homelessness situates modern treatment of unhoused people in this shameful but important history. Fining, arresting, and jailing unhoused people for existing in public is not “care”; it is the same old carceral subjugation and exclusion.

IV. CONFRONTING CRIMINALIZATION WITH CORE CONSTITUTIONAL CLAIMS

While cities and states may cloak their expanding criminal enforcement against unhoused communities in rhetoric of “care” and “services,” many of the downstream effects of these laws and policies are undeniably situated in the criminal legal system. Focusing on the criminal legal system implications of these post-*Grants Pass* policies exposes them for what they are.

167. PORTLAND, OR., GEN. ORDINANCES, no. 2959, § 23 (1881).

168. Katie Dowd, *San Francisco Once Pioneered America’s Cruellest Legislation: Ugly Laws*, SFGATE (Mar. 2, 2020, at 16:08 ET), <https://www.sfgate.com/sfhistory/article/San-Francisco-once-pioneered-ugly-laws-15098902.php> [<https://perma.cc/GF3P-6E2Z>].

169. *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2211 (2024) (quoting Brief for California Governor Gavin Newsom as Amicus Curiae Supporting Neither Party, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175)).

Attacking cascading criminal legal system consequences also provides opportunities for advocates to reaffirm and hearken back to the promise of foundational criminal legal system protections. While such legal challenges will not address the underlying causes of homelessness or even, in most cases, completely invalidate the laws and policies at the center of the current criminalization, they are nonetheless important. They provide an opportunity to highlight the fundamentally punitive nature of these laws and policies. And they draw on constitutional protections against abuse of the state's penal power that are core to our nation's history and democracy.¹⁷⁰

The Cruel and Unusual Punishments Clause was a natural fit to challenge the criminalization of homelessness. The Supreme Court's rejection of that claim risks moving focus away from the criminal implications of our current homelessness policies and from the central importance of criminal procedural protections to our constitutional regime. As the ACLU argued in its *Grants Pass* amicus brief, "[t]he Eighth Amendment was included in the Bill of Rights to address objections that the lack of 'Declaration of Rights' could allow a future tyrannical government to abuse the criminal justice apparatus."¹⁷¹ And since 1910, the Supreme Court has drawn on the Eighth Amendment to protect against the legislature's "great, if not unlimited," power "to give criminal character to the actions of men," becoming a "potent instrument of cruelty."¹⁷² This imperative remains, even if it must be found elsewhere in the Constitution when it comes to criminalizing homelessness.

As Professor Zamir Ben-Dan argues, the Federal Constitution is a fundamentally "pro-defense" document reflecting the framers'

170. As Professor Sara Rankin points out, in the wake of inroads advocates made to challenge criminal punishments, including *Martin*, cities increasingly turned to "civilly criminalizing homelessness," which she defines as "increasingly shifting from criminal charges to non-criminal methods of civil enforcement and invisible persecution" such as "constant harassment, disruption, forced relocation, and interrogation." As she persuasively argues, there is a real need for advocacy to expose and challenge this form of civil criminalization. Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L. L. REV. 367, 370, 375-380, 383 (2021). But, in the wake of *Grants Pass*, we are also seeing a shift back to more squarely criminal methods that demands response.

171. Brief of the American Civil Liberties Union & Nineteen Affiliates as Amici Curiae in Support of Respondents at 7, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 637, 640 (Max Farrand ed., 1911) (statement of George Mason)).

172. *Weems v. United States*, 217 U.S. 349, 372 (1910).

“intent to protect accused persons and prevent government arbitrariness” in the administration of justice.¹⁷³ The inclusion of the many criminal procedural protections found in the Bill of Rights reflects an understanding that a fair and just criminal legal system is inextricably entwined with preserving liberty and freedom.¹⁷⁴ While protections for the accused have been considerably eroded over decades of judicial interpretation, the fundamental design of the Constitution to check government power in criminal proceedings persists and retains doctrinal and rhetorical power.¹⁷⁵

The city amici who supported overturning the Ninth Circuit’s *Martin* doctrine complained that it left them “under threat of federal litigation ... at all times and in all circumstances.”¹⁷⁶ Yet, in the new post-*Grants Pass* world, the practices they have so eagerly adopted may leave them equally vulnerable to challenge. The majority is correct when it notes the “variety of other legal doctrines and constitutional provisions [that] work to protect those in our criminal justice system from a conviction.”¹⁷⁷ Advocates should take the majority up on its invitation to use “the legion protections our society affords a presumptively free individual from a criminal conviction.”¹⁷⁸

This Part provides a few examples of how post-*Grants Pass* practices towards unhoused communities reverberate at every stage of the criminal legal system—from police stops to searches to property seizure to legal representation at trial—and how they fit into the framework of constitutional claims against criminal system abuse. The fit is natural because, despite rhetorical attempts to characterize these practices as compassionate policy choices, they are criminal enforcement practices that implicate criminal constitutional safeguards.

173. Zamir Ben-Dan, *The Pro-Defense Constitution*, 2025 UTAH L. REV. 385, 388-89.

174. *See id.* at 390.

175. *See id.* at 449.

176. Brief of Amici Curiae League of Oregon Cities et al. in Support of Petitioner at 6-7, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175), 2024 WL 1106628, at *6-7.

177. *Grants Pass*, 144 S. Ct. at 2220.

178. *Id.*

A. Warrant-Motivated Pretextual Stops

As enforcement of laws criminalizing homelessness increases, so too will outstanding arrest warrants and related police stops. The majority of laws criminalizing homelessness are violation- or misdemeanor-level offenses, which may be enforced through issuing a written citation and notice to appear in court rather than effectuating a custodial arrest.¹⁷⁹ But most unhoused people are unable to pay even relatively modest fines and fees and are especially likely to face barriers to appearing in court as required by a summons.¹⁸⁰ When a person fails to pay a fine or appear in court, a court may issue a bench warrant for their arrest.¹⁸¹ This practice is extremely common, with surveys indicating that over half of citations issued for violations of laws that criminalize homelessness turn into arrest warrants.¹⁸²

This increase in arrest warrants related to laws that criminalize homelessness implicates Fourth Amendment protections against unlawful police stops. As others have argued, bench warrants create incentives for police officers to engage in unconstitutional stops.¹⁸³ Reasonable belief that a person has an outstanding warrant can justify a stop in and of itself.¹⁸⁴ Police may also conduct a warrant

179. See Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 980 (2020); NAT'L CONF. ST. LEGISLATURES, CITATION IN LIEU OF ARREST (2019), <https://www.ncsl.org/civil-and-criminal-justice/citation-in-lieu-of-arrest> [<https://perma.cc/7KZ2-YXMN>].

180. BAILEY ET AL., *supra* note 140, at 6-7 (noting that barriers to appearing in court include limited access to technology and transportation as well as the difficulty of holding on to sensitive documents while living outside and being subjected to encampment sweeps); see Melissa Hellmann, *For Homeless Seattleites, A Reprieve From the Debilitating Burden of Warrants*, SEATTLE WKLY. (Jan. 10, 2018, at 01:30 ET), <https://www.seattleweekly.com/news/for-homeless-seattleites-a-reprieve-from-the-debilitating-burden-of-warrants/> [<https://perma.cc/ECK2-N8EC>] (citing illness, and mental health as additional factors that reduce homeless attendance at court dates).

181. Patrick C. Brayer, *The Warrant Impact Study: Evaluating the Effects of Bench Warrants on Individuals and Communities*, 29 BERKELEY J. CRIM. L. 162, 167 (2024).

182. See Weber, *supra* note 139 and accompanying text; Boden, *supra* note 139 and accompanying text; Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1533-34 (2021); Jain, *supra* note 151, at 1452 (“[I]n certain jurisdictions, the rate [of warrants] is staggeringly high, particularly among racial minorities, and reflects the criminalization of poverty through petty offenses that trigger warrants for unpaid fines.”).

183. See Nirej Sekhon, *Dangerous Warrants*, 93 WASH. L. REV. 967, 997 (2018); Jain, *supra* note 151, at 1443 (discussing policing and criminal records).

184. See *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Nault*, 41 F.4th

check pursuant to an otherwise lawful stop.¹⁸⁵ Even if an initial stop is unlawful, once police discover an outstanding warrant, they may lawfully arrest the individual and conduct a search incident to arrest.¹⁸⁶ And, as the Supreme Court held in *Utah v. Strieff*, evidence obtained during that search may be admissible, even if the stop that led to discovery of the outstanding warrant was unconstitutional.¹⁸⁷ As a result, police are incentivized to stop people without individualized suspicion that an offense has occurred or that the person has an outstanding warrant because if a warrant is found, a search becomes justified and any evidence is fair game. And, as one legal scholar points out, when “an officer has reason to believe that a substantial number of people likely have outstanding warrants such that the hit rate of doing random warrant checks will be high, we should expect unconstitutional stops to occur.”¹⁸⁸ Under this hypothesis, unhoused individuals are prime targets, and increasingly so given the ubiquity of laws criminalizing homelessness.¹⁸⁹

Despite doctrinal limits, these warrant-motivated stops may be subject to challenge. While *Strieff* limited a criminal defendant’s ability to exclude evidence in his criminal case that the police obtained pursuant to an otherwise unlawful stop during which they found an outstanding warrant, it did not foreclose the possibility of a § 1983 claim challenging the illegal stop itself.¹⁹⁰ And the Court indicated that when a defendant can show that police regularly and

1073, 1079 (9th Cir. 2022) (holding that suspicion that vehicle’s driver is subject of an outstanding warrant would be lawful basis for a stop).

185. See *Rodriguez v. United States*, 575 U.S. 348, 355 (2015) (“An officer ... may conduct certain unrelated checks during an otherwise lawful traffic stop”).

186. See *Utah v. Strieff*, 579 U.S. 232, 235 (2016).

187. *Id.*

188. Sekhon, *supra* note 183, at 997.

189. At least one circuit court has held that “a warrant check during a street stop where the officer has reasonable suspicion of criminal activity is not *per se* unreasonable under the Fourth Amendment.” *Hall v. City of Chicago*, 953 F.3d 945, 953 (7th Cir. 2020). In a post-*Grants Pass* world, in which an unhoused person’s mere presence in public likely violates some antihomeless ordinance, such a holding would seem to give the green light to subject the unhoused population to constant warrant checks. One solution could be to pursue a right to adjudication of the ability to pay or the wilfulness of violating a summons before a bench warrant is issued. See Note, (*Attenuating*) *the Taint of Poverty: How Fourteenth Amendment Jurisprudence and the Attenuation Doctrine Lead to Lesser Fourth Amendment Rights for the Poor*, 138 HARV. L. REV. 1865, 1884 (2025).

190. See *Haliburton v. City of Ferndale*, 653 F. Supp. 3d 377, 396 (E.D. Mich. 2023).

systematically make unconstitutional seizures in order to do warrant checks, evidence suppression may be warranted.¹⁹¹

B. (In)Voluntary Consent Searches

Increased encounters between unhoused people and police generate increased police searches. In addition to warrant-related searches, these searches may arise from coerced consent. Consent provides an exception to the rule that an officer must have a warrant or reasonable suspicion to conduct a search, but is restricted by the requirement that consent must be “voluntarily given.”¹⁹² If compliance with a request to search (or for identification) is not freely given, that can provide the basis for a motion to suppress evidence found during the search.¹⁹³ In a post-*Grants Pass* world of increased police interactions, arguments that center the unique perspectives of overpoliced, unhoused people can show that stops and searches are not the product of voluntary consent.¹⁹⁴

Here, increased policing of unhoused communities intersects with Fourth Amendment doctrine that tethers consent to the unique characteristics and experiences of policed communities. A police encounter is not consensual unless a “reasonable person would feel free ‘to disregard the police and go about his business’” in light of “all the circumstances surrounding the encounter.”¹⁹⁵ This totality of the circumstances test requires consideration of “the characteristics of the accused” and the “psychological impact” of the interaction “on the accused.”¹⁹⁶

191. See *Strieff*, 579 U.S. at 243.

192. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973).

193. See *id.* at 219.

194. Defense attorneys could raise these arguments in motions to suppress evidence obtained through “voluntary” searches. Systemic challenges may also be possible See, e.g., *Shaw v. Jones*, 683 F. Supp. 3d 1205, 1217 (D. Kan. 2023) (challenging practice in which, if they cannot initially get consent to search a vehicle, “troopers are trained to conclude the traffic stop, somehow signal that the driver is free to go, then immediately re-engage the driver in friendly, casual conversation to keep the driver at the scene and enable the trooper to develop reasonable suspicion or take another stab at getting consent—a maneuver colloquially known as the ‘Kansas Two-Step’”).

195. *Florida v. Bostick*, 501 U.S. 429, 434, 439 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)).

196. *Schneckloth*, 412 U.S. at 226.

As social science has demonstrated, when stopped by police, most people do not behave as if they have a choice not to comply with requests.¹⁹⁷ Unhoused individuals may feel especially compelled to comply with police requests.¹⁹⁸ This is, in part, because of the pervasive threat of arrest that unhoused people face because of antihomeless laws, leading to unhoused people being up to eleven times more likely to be arrested than those who are housed¹⁹⁹ and disproportionately likely to be assaulted by police.²⁰⁰ This reality often leads to a unique fear of police encounters and unhoused people's perception that they must comply with police demands or face punishment, or even violence.²⁰¹ When evaluating whether consent was voluntary under the totality of the circumstances, courts should consider unhoused people's distinctive experiences with and fears about law enforcement.²⁰²

C. Pretextual Seizure of Evidence

Laws that criminalize homelessness, such as historical vagrancy laws, are often employed to achieve ends outside conviction for the crimes themselves: most commonly, clearing tents and other signs of homelessness from public view.²⁰³ These laws provide the threat

197. See Janice Nadler & J.D. Trout, *The Language of Consent in Police Encounters*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 326, 332 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (“[W]hen the police use request language, [people] hear this as a command and similarly assume this is backed by force.”); Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1987 (2019) (finding that 97 percent of study participants acceded to a request to hand over their smartphone to be searched).

198. See, e.g., *Cnty. for Creative Non-Violence v. Unknown Agents of U.S. Marshals Serv.*, 797 F. Supp. 7, 16 (D.D.C. 1992) (discussing the “realities of homelessness” that caused unhoused people to feel particular pressure to consent to police requests).

199. NAT'L CTR. ON HOMELESSNESS & POVERTY, *supra* note 125, at 50.

200. See Tanya L. Zakrison, Paul A. Hamel & Stephen W. Hwang, *Homeless People's Trust and Interactions with Police and Paramedics*, 81 J. URB. HEALTH 596, 599 (2004).

201. See, e.g., Forrest Stuart, *Becoming “Copwise”: Policing, Culture, and the Collateral Consequences of Street-Level Criminalization*, 50 LAW & SOC'Y REV. 279, 291 (2016); Megan Welsh & Mounah Abdel-Samad, “You're an Embarrassment”: *Un-housed People's Understandings of Policing in Downtown San Diego*, 19 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 33, 34, 41-42 (2018).

202. See, e.g., *Cnty. for Creative Non-Violence*, 797 F. Supp. at 16 (discussing the “realities of homelessness” that caused unhoused people to feel particular pressure to consent to police requests).

203. See Johnson, *supra* note 164, at 360-61 (“These new low-level order-maintenance

behind move-along orders that push unhoused people out of sight, ensure compliance during encampment clearings, and—increasingly—lead to property seizure.

Unbridled from Eighth Amendment restrictions on enforcement, arrests and citations for camping or lodging in public have soared and so too has seizure of tents or other bedding as evidence of such illegal camping. Take, for example, San Francisco, whose police department has a policy requiring officers to seize tents, tarps, or other evidence of the crime of illegal lodging every time they enforce a state law against “lodging” in a public or private place without permission.²⁰⁴ As enforcement of this law increased exponentially after *Grants Pass*, confiscation of tents, tarps, and related property thus similarly increased, allowing San Francisco to erase one of the most visible reminders of homelessness, and to give the illusion that it is “solving” homelessness.²⁰⁵

crimes do not tend to yield many prosecutions because that is not their goal. In general, they seek ‘not to define conduct that the state wishes to punish,’ but to act as an expedient that gives officers ‘the same kind of authority’ as the ‘old-style vagrancy and loitering laws.’ In short, these laws, coupled with Fourth Amendment precedents such as *Terry v. Ohio*, effectively enable police officers to ‘search and seize whomever they wish.’”) (quoting William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 824, 854-55 (2001)).

204. See CAL. PENAL CODE § 647(e) (West 2020); *Protocol for Processing Property Consistent with DPW’s “Bag & Tag” Policy*, S.F. POLICE DEP’T (Sep. 12, 2024), https://www.sanfranciscopolice.org/sites/default/files/2024-10/SFPD_DepartmentNotice_24_140_20241029.pdf [<https://perma.cc/7JLV-MZ2W>]; see also Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment, *Coal. on Homelessness v. City of San Francisco*, No. 22-cv-05502 (N.D. Cal. April 17, 2025) (discussing the City’s police department’s implementation of the policy). San Francisco’s policy on seizure of tents as evidence of illegal lodging is notable for a few reasons. First, unlike evidence of every other crime on the books, which San Francisco Police Department (SFPD) seizes and maintains custody of according to a separate department policy, SFPD protocol requires officers to immediately hand over custody of “evidence” of illegal lodging to the Department of Public Works (DPW), which may then treat it exactly as that agency would treat any other property collected from the street, including immediately discarding it if, in DPW’s assessment, it presents an “immediate health or safety risk.” See S.F. POLICE DEP’T, *supra*; Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment, *supra*. San Francisco has also admitted that neither the police department nor the district attorney has ever retrieved “evidence” of illegal lodging from the DPW for use in a criminal case and, if the evidence is not immediately discarded as a health or safety risk, it will be discarded after ninety days if not retrieved by the owner. See Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment, *supra*.

205. Xueer Lu, *San Francisco Homeless Tent Tally Hits New Low*, MISSION LOC. (July 4, 2025, at 09:00 ET), <https://missionlocal.org/2025/07/san-francisco-homeless-tent-decrease/> [<https://perma.cc/L9FY-BAYB>]; Przybylinski, *supra* note 90 (in the year following *Grants Pass*,

For San Francisco and other cities that confiscate tents and other survival gear as evidence of the “crime” of sleeping in public,²⁰⁶ criminal enforcement thus serves the goal of reducing the perception of disorder.²⁰⁷ But by using the criminal legal system apparatus to do so, it also may trigger additional constitutionally enshrined criminal protections.

When police seize property in this way, a number of protections in our “pro-defense” constitution kick in. First, the Fourth Amendment protects against unreasonable seizures of property.²⁰⁸ A warrantless seizure of property (which seizure of unsheltered people’s property almost always is) is per se unreasonable, subject only to a few exceptions.²⁰⁹ And, as the Ninth Circuit held in *Lavan v. City of Los Angeles*, that the right to be free from unreasonable seizures of property applies equally to the property of unhoused people found in public, regardless of whether the property is being stored in public in violation of a law or ordinance.²¹⁰ As described above, ongoing litigation continues to successfully challenge cities’ unlawful seizure and destruction of property during encampment sweeps. While these claims are not novel, and should be uncontroversial, some cities are attempting to chip away at unhoused people’s rights in this area, arguing that unhoused people do not

San Francisco enforced illegal lodging over one thousand times, compared to 111 in the year leading up to the decision).

206. See, e.g., *Denver PD Defends Officers Who Confiscated Blankets from Homeless*, ABC NEWS (Dec. 16, 2016, at 16:08 ET), <https://abcnews.go.com/US/denver-pd-defends-officers-confiscated-blankets-homeless/story?id=44236705> [<https://perma.cc/529G-44BT>]; *ACLU Pens Letter to Mayor About Homeless and the Camping Ban*, CBS NEWS (Dec. 10, 2016, at 12:47 MT), <https://www.cbsnews.com/colorado/news/aclu-colorado-denver-homeless-camps-sweeps/> [<https://perma.cc/5BLT-98EJ>].

207. See Goluboff & Schragger, *supra* note 156, at 218-19 (describing flaws in “broken windows” or “order maintenance” policing and noting that “one of the most important indicators of perceived disorder is *race*”).

208. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

209. See *Brewster v. Beck*, 859 F.3d 1194, 1196 (9th Cir. 2017); *Sodal v. Cook County*, 506 U.S. 56, 66 (1992).

210. 693 F.3d 1022, 1029 (9th Cir. 2012); see also *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2224 (2024) (“[M]any substantive legal protections and provisions of the Constitution may have important roles to play when states and cities seek to enforce their laws against the homeless.”); *id.* at 2243 (Sotomayor, J., dissenting)) (*Lavan*’s “holding that a city violate[s] homeless plaintiffs’ Fourth Amendment rights by seizing and destroying property in an encampment, because “[v]iolation of a City ordinance does not vitiate the Fourth Amendment’s protection of one’s property,” was unaffected by the majority’s decision) (alteration in original).

have Fourth Amendment rights in this context or pushing an ever-expanding reasonableness test that tries to sidestep the warrant requirement.²¹¹

Here, again, recentring the foundational principles at the core of Fourth Amendment doctrine is crucial to combatting cities' attempts to carve unhoused people out of settled rights. There is value, particularly as police become more central to homelessness responses in the wake of *Grants Pass*, in reminding courts—and the public—that protecting citizens against law enforcement overreach is at the core of our Constitution. This includes reminding courts that the Fourth Amendment's default requirement is that the government must obtain a warrant prior to seizing property and the burden of showing that a seizure fits within an exception to that requirement falls on the government.²¹²

Even if the initial confiscation were lawful, the property's retention or destruction arguably becomes an unlawful seizure because the government deprives an individual of their property without or beyond any criminal prosecution purpose.²¹³ This draws on the principle that “[a] seizure is justified under the Fourth Amendment only to the extent that the government's justification holds force.”²¹⁴ When the justification for a warrantless seizure is that a tent or other survival gear is evidence of a crime, but it is not treated as evidence, that warrant exception should cease to apply.

A tent seized as evidence could not be legitimately characterized as evidence when it is not treated according to a police department's typical protocols for preserving evidence, including chain of custody.²¹⁵ Similarly, if a tent is seized as evidence and then immediately destroyed, it no longer has any legitimate evidentiary

211. See *Garcia v. City of Los Angeles*, No. CV 19-6182, 2020 WL 6586303, at *3-4 (C.D. Cal. 2020).

212. *Larez v. Holcomb*, 16 F.3d 1513, 1517 (9th Cir. 1994) (citing *Ruggiero v. Krzeminski*, 928 F.2d 558, 563 (2d Cir. 1991)). (“[I]n a § 1983 action alleging illegal search and seizure, [the] burden of producing evidence of consent or other exceptions to warrant requirement may be placed on defendant.”).

213. See Graham Miller, Note, *Right of Return: Lee v. City of Chicago and Continuing Seizure in the Property Context*, 55 DEPAUL L. REV. 745, 746-47 (2006).

214. *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017); *but see Conyers v. City of Chicago*, 10 F.4th 704, 711-12 (7th Cir. 2021).

215. See, e.g., S.F. POLICE DEP'T, *supra* note 204 (explaining that evidence of all crimes *except* illegal lodging should be treated according to the department's general protocol on preservation of evidence).

value.²¹⁶ Finally, property originally classified as evidence should lose that status when criminal charges are never brought.²¹⁷

Laws and policies that define survival gear like tents as contraband or evidence of a crime and encourage or require their seizure also implicate lines of cases that adhere “to the basic premise that the application of evidentiary rules is controlled by the Constitution.”²¹⁸

One such line of cases involves due process protections intended to ensure fairness in the use of evidence against a criminal defendant. The most famous among these is undoubtedly *Brady v. Maryland*, which prohibits prosecutors from withholding material evidence favorable to the accused.²¹⁹ *Brady* and its progeny make up “what might loosely be called the area of constitutionally guaranteed access to evidence.”²²⁰ But due process evidence fairness cases also encompass *Mooney v. Holohan*, decided in 1935, which announced that due process was violated if a prosecutor presented trial testimony “known to be perjured,” and *Napue v. Illinois*, which held that a prosecutor offends due process by failing to correct false evidence. And, while doctrinally circumscribed, still others provide that state destruction of evidence offends due process.²²¹

Seizure of tents as evidence of illegal camping also implicates Fourteenth Amendment procedural due process requirements for a city’s system for preservation of evidence in criminal cases. Here, too, the touchstone is the Constitution’s recognition of the importance of the “principle of ‘fundamental fairness’ in operation” of the

216. See *id.* (handing custody of tents seized as evidence over to another agency, and providing that agency may immediately discard the tent according to its own policies).

217. See Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 33-36 (2000) (discussing the statistics of cases in which criminal charges are not brought). There must be “a nexus ... between the item to be seized and criminal behavior.” *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967). “[P]robable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.” *Id.*

218. See Janet C. Hoeffel, *The Sixth Amendment’s Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1277.

219. 373 U.S. 83, 87 (1963).

220. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

221. See *California v. Trombetta* 467 U.S. 479, 488-89 (1984) (holding that due process is violated when the state destroys or fails to preserve apparently exculpatory evidence when the defendant cannot obtain comparable evidence); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (clarifying that when evidence that is only potentially exculpatory is not preserved, due process is offended only when the state acted in bad faith).

criminal legal system.²²² The Second Circuit recognized the validity of such a challenge in *Newton v. City of New York*, in which the court found that the City's evidence management system failed to provide adequate procedures to safeguard the liberty interest, recognized by New York law, in proving a prisoner's innocence with DNA evidence.²²³ The same claim could be applied to city procedures that make it difficult for unhoused individuals to find or retrieve seized "evidence" of antihomeless law violations.

D. Sixth Amendment Implications

As cities embrace increased criminalization of homelessness and impose harsher penalties carrying longer potential terms of imprisonment, there are also real downstream consequences for capacity and quality of the criminal defense system. This, in turn, implicates the Sixth Amendment right to counsel.

Since *Grants Pass*, enforcement of laws criminalizing homelessness has exploded and, in combination with harsher penalties that often carry a potential term of imprisonment that triggers the right to counsel,²²⁴ have increased the load on already overburdened public defense systems.²²⁵ In May 2025, for example, San Francisco's public defender office announced that it would have to stop taking

222. *Medina v. California*, 505 U.S. 437, 445, 448 (1992).

223. 779 F.3d 140, 157 (2d Cir. 2015).

224. *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972) (holding that the right to counsel applies to misdemeanors that may result in incarceration); *see also* *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (holding that the right to counsel applies even if the defendant's term of imprisonment is immediately suspended); Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon's Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 *FORDHAM L. REV.* 2299, 2325-27 (2017) ("As of 2013, five states (California, Delaware, Indiana, New York, and Oklahoma) recognized the right to counsel in all misdemeanor cases, four states (Alaska, Minnesota, North Carolina, and Vermont) recognized the right to counsel if the potential fine is sufficiently high, twenty-seven states and the District of Columbia recognized the right to counsel in misdemeanor cases if incarceration is possible, three states (Missouri, North Carolina, and Pennsylvania) recognized the right to counsel in misdemeanor cases if incarceration is probable, and two states (Nevada and South Dakota) recognized a right to counsel in misdemeanor cases where incarceration for more than six months is possible (i.e., where a defendant also has a federal right to a jury).") (citations omitted)).

225. *See* NICHOLAS M. PACE, MALIA N. BRINK, CYNTHIA G. LEE, STEPHEN F. HANLON, RAND CORP., NATIONAL PUBLIC DEFENSE WORKLOAD STUDY at xv-xvi, 107 (2023) [<https://perma.cc/L8Y8-GTRU>] (comprehensive report detailing the extent to which public defenders across the nation are overburdened).

new cases because it was so overloaded.²²⁶ The district attorney and public defender confirmed that the untenable caseload was the result of increased arrests, including significantly more arrests and charges filed for illegal lodging after *Grants Pass*.²²⁷

The trickledown effect of increased criminalization post-*Grants Pass* may leave states vulnerable to systemic challenges to the adequacy of indigent defense systems. While these challenges are difficult to bring, advocates have had success over the last several decades in leveraging litigation to improve public defense systems.²²⁸ At the core of these challenges is the Sixth Amendment's

226. Danielle Echeverria, *The S.F. Public Defender Is So Overwhelmed with Cases It Had to Stop Taking Them. Here's What's Going On*, S.F. CHRONICLE (May 16, 2025), <https://www.sfchronicle.com/crime/article/sf-public-defender-caseload-20329216.php> [<https://perma.cc/GKSS-79FA>].

227. *Id.* (“But since the city started sweeping encampments more aggressively last summer after a court decision allowed it, the arrest numbers started increasing. Since November of last year, the DA has been filing charges for unlawful lodging every month - a departure from before, when months would go by without any at all. The cases are most often categorized as ‘disorderly conduct,’ leading to the jump in such cases so far this year.”).

228. The ACLU has litigated these claims across the country and continues to do so, often in state court. *See, e.g.*, Warren, et al. v. Commonwealth, et al., ACLU PA., <https://www.aclupa.org/cases/defenders/> [<https://perma.cc/SS9J-NDAZ>]; Luckey v. Harris, 860 F.2d 1012, 1018 (11th Cir. 1988) (allegations “that systemic delays in the appointment of counsel deny them their sixth amendment right to the representation of counsel at critical stages in the criminal process, hamper the ability of their counsel to defend them, and effectively deny them their eighth and fourteenth amendment right to bail, that their attorneys are denied investigative and expert resources necessary to defend them effectively, that their attorneys are pressured by courts to hurry their case to trial or to enter a guilty plea, and that they are denied equal protection of the laws” are sufficient to state a viable claim); Tucker v. State, 484 P.3d 851, 853-54 (Idaho 2021) (describing other state challenges); *see also* Betschart v. Garrett, 700 F. Supp. 3d 965, 980 (D. Or. 2023), *amended*, No. 23-CV-01097-CL, 2023 WL 7621969 (D. Or. Nov. 14, 2023), *appeal dismissed sub nom.*, Betschart v. Oregon, No. 23-2270, 2024 WL 2801587 (9th Cir. May 31, 2024), *aff'd*, Betschart v. Oregon, 103 F.4th 607 (9th Cir. 2024) (granting preliminary injunction requiring counsel be provided within seven days of initial appearance, finding likelihood of success on the merits of claims that indefinite delay in the appointment of counsel to in-custody defendants constitutes a violation of the Sixth Amendment and due process); Margaret A. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1972 (2014) (discussing dismissed case that functioned as a “catalyst for reform”); Abigail Hollinger, Note, *Funding Indigent Defense: A Judicial Solution to a Legislative Failure*, 88 GEO. WASH. L. REV. ARGUENDO 195, 203-04 (2020) (explaining how litigation strategies brought “systematic issues of chronic underfunding to light”). *See generally* Kuren v. Luzerne County, 146 A.3d 715, 751 (Pa. 2016) (recognizing a cause of action for “indigent criminal defendants to prove that the level of funding provided by a county to operate a public defender’s office has left that office incapable of complying with Gideon”); Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010) (similarly recognizing underfunded public defenders offices risk denying constitutionally

guarantee of “the fundamental right of the accused to the aid of counsel in a criminal prosecution.”²²⁹

Highlighting the Sixth Amendment implications of increased criminalization of homelessness also serves to remind governments and courts of the gravity of increased criminalization, both for individual defendants and for our democracy. After all, as the Supreme Court explained, the right to counsel “is one of the safeguards of the Sixth Amendment deemed necessary to [e]nsure fundamental human rights of life and liberty,” and serves as an “essential barrier[] against arbitrary or unjust deprivation of human rights.”²³⁰ Turning to criminalization as a misguided “solution” to homelessness has the effect of undermining this fundamental right, not just for unhoused individuals, but for all defendants who rely on an already burdened public defense system to safeguard this crucial right.

CONCLUSION

The Supreme Court’s decision in *Grants Pass* was, in legal terms, narrow, but its rhetorical force has been broad, emboldening cities and states across the country to embrace criminalization as a primary response to homelessness. Unhoused individuals now face mounting harms within the criminal legal system—from the proliferation of warrants that incentivize unconstitutional stops, to coerced consent searches, to pretextual seizure and destruction of their survival gear, to an overburdened public defense system that can no longer adequately represent them. Advocates should continue to use the many litigation tools that remain available and unaffected by *Grants Pass* to challenge practices that criminalize homelessness. But we must also resist the conceptual erasure that *Grants Pass* facilitates. When governments treat survival itself as a criminal offense, we must name these practices for what they are.

mandated counsel in violation of the Sixth Amendment); *Duncan v. State*, 774 N.W.2d 89, 99 (Mich. Ct. App. 2009) (denying defendants’ motion for summary judgment on plaintiff’s claims that “underfunded, poorly administered” public defense systems violated their Sixth Amendment rights to adequate representation).

229. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936)).

230. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

Recentring the criminal legal system in our advocacy draws on constitutional protections against abuse of the penal power that are fundamental to our democracy and exposes the punitive reality behind claims of compassion. It also situates current practices within our nation's long history of using criminal law to control and exclude marginalized communities.

Our Constitution, at least on its face, promises robust protections for the accused and forceful checks on the state's penal power. As government actors at all levels target unhoused people as criminals and seek to sweep them out of sight and into jails and institutions, advocates can use these criminal justice tools to tear away the façade of compassion and reorient the conversation to the carceral reality at hand.