



# CRIMINALIZING HOMELESSNESS VIOLATES THE CONSTITUTION

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# INTRODUCTION

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Even before the pandemic, the United States was in the midst of a homelessness crisis that ensnares more than a million people every year. This year, with a coronavirus-induced economic crisis, that number will likely grow as unemployment hits record levels and people living paycheck-to-paycheck, already in a state of housing insecurity, can no longer afford their rent and mortgages. The current crisis is both exposing and accelerating a deeply systemic problem that requires systemic policy solutions—policies to increase affordable housing, raise wages, provide healthcare, and create a social safety net that provides stability against the disruption of emergencies like job loss, illness, or a pandemic that shuts down the economy.

Yet, instead of investing in resources to help unhoused people, most jurisdictions criminalize them. Local governments have increasingly targeted unhoused populations with laws that ban activities like sleeping in public or in cars and with routine “sweeps” of encampments where people are not only subject to citations, arrest, and fines; they also lose their personal belongings when law enforcement destroy or confiscate them—things like food, medication, and even identification. In effect, homelessness itself becomes a crime.

Enforcement is both expensive and ineffective. A growing body of research shows that, over the long run, it is far more efficient to provide housing and services instead of burdening people with fines they cannot pay and arrest records that hamper their ability to receive benefits and employment. And the pandemic has made it even more dangerous to arrest and jail people.

In addition to the collateral consequences, treating homelessness like a crime is, under many circumstances, unconstitutional. In recent years, lower federal courts have made clear that unhoused people retain fundamental constitutional protections. Local officials are not necessarily free to displace people or destroy their property without due process, and they cannot selectively enforce broadly-written ordinances against unhoused people. Indeed, courts have held that punishing the condition of being homeless, as well as the necessary associated activities like sleeping in public, is cruel and unusual and violates the Eighth Amendment.

The Ninth Circuit Court of Appeals, which has jurisdiction over most of the western United States, has been a leader on this jurisprudence, in part because of the high rates of homelessness in California and Hawaii and the punitive laws passed in those jurisdictions. But other federal courts around the country have followed suit. Local leaders and law enforcement that persist in criminalizing unhoused people risk litigation that will add to the cost of enforcement.

# BACKGROUND

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## The Homelessness Crisis in the United States

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On any given night in the United States, well over a half million people—an estimated 568,000—are houseless, and more than 1.4 million people will experience homelessness over the course of a year. While some are able to temporarily stay in shelters or with family and friends, many cannot. Last year, according to federal data, 37% of houseless people were unsheltered, which means they spent their nights in places not intended or typically used for sleeping accommodations—parks, sidewalks, abandoned buildings, under bridges, and in cars. In some places, the percentage of unsheltered people is even higher. California has both the largest unhoused population in the country and the highest rate of unhoused people living without shelter, 71%.

Homelessness in the United States has been driven by a lack of affordable housing. Rents continue to climb while wages remain stagnant, and the lack of a social safety net—including a lack of resources for people re-entering their communities after incarceration—put an increasing number of people at risk of homelessness. Millions live with unstable housing that could vanish in the event of illness, job loss, or some other unexpected emergency. Nearly half of all people who rent are “cost burdened,” meaning they spend more than 30% of their income on housing and “may have difficulty affording necessities such as food, clothing, transportation, and medical care,” according to the Department of Housing and Urban Development. About a quarter of renters are “severely cost burdened” and spend 50% or more of their income on housing.

But the burdens of this housing crisis are not shared equally. Not surprisingly, homelessness and housing insecurity hit historically marginalized groups the hardest. America’s long history of racist housing policies and segregation, along with racism in rental and lending practices, have caused disproportionate rates of homelessness among people of color, even when controlling for poverty. Black people make up about 13% of the entire U.S. population but 40% of people experiencing homelessness. Overall, people of color comprise over 60% of the nation’s unhoused population but only a third of the U.S. general population. In addition, people who have been incarcerated—another group in which Black Americans are overrepresented—are ten times more likely to be unhoused, as housing providers freely discriminate against people with convictions and there are too few resources to help people leaving prison find jobs and housing.

People also get pushed into poverty and homelessness because of mental illness, addiction, or behavioral health problems for which there is a lack of treatment options and community support. According to 2019 data from HUD, every night more than 100,000 unhoused people—or about one fifth of the total estimated unhoused population in the United States—suffer from “severe” mental illness.

Now the coronavirus-induced economic crisis could spark a massive surge in homelessness, as unemployment spikes and experts predict an “avalanche of evictions.” According to the Bureau of Labor Statistics, the unemployment rate in April reached 14.7%—higher than at any time since the Great Depression. Since mid-March more than 40 million people have applied for unemployment benefits, with more job losses expected through June. And far from being “the great equalizer,” the pandemic has exacerbated existing racial disparities, with Black workers enduring the brunt of the coronavirus’s economic impact.

As a result, homelessness could grow by as much as 45% over the next year, [according to a report](#) by Columbia University professor Dan O’Flaherty. That would mean an additional 250,000 unhoused people. At the same time, emergency shelters, already overburdened, have become dangerous vectors for the coronavirus and must reduce capacity even further to minimize the spread of disease.

The only way to reduce homelessness is to address its underlying causes: poverty, rising housing costs alongside stagnant wages, race discrimination—not just in housing but throughout the American economy—untreated mental illness and addiction, and, now, staggering levels of unemployment. Policies like [cash](#) and [rental assistance](#) can help people keep their homes. Investments in affordable housing, jobs training, and necessary services—including accessible healthcare—can help people break free of homelessness. But instead of real, evidence-based solutions to America’s housing crisis, cities too often turn to punitive measures that only make the problem worse.

## The Criminalization of Homelessness

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While being houseless is not a crime, American cities have effectively criminalized homelessness through laws that prohibit camping in public, sleeping in cars, and sitting in public spaces. The National Center on Homelessness & Poverty documented this trend in its annually-updated report, [Housing Not Handcuffs](#). According to the 2019 update:

- ▶ 57% of cities have one or more laws prohibiting camping in public places, and citywide camping bans have increased by 92% since 2006;

- ▶ 51% of cities have at least one law restricting sleeping in public, and 21% of cities have a citywide ban on sleeping in public;
- ▶ 55% of cities have one or more laws prohibiting sitting and/or lying down in public, a 78% increase since 2006;
- ▶ 83% of cities restrict or ban begging in some or all public places, including 38% that prohibit begging citywide—a 103% increase since 2006;
- ▶ 50% of cities restrict or prohibit living in vehicles, a 213% increase since 2006.

To enforce these measures, police often clear or “sweep” encampments, displacing people and confiscating or destroying personal property. In recent lawsuits, people have reported the destruction of food stamps, clothing, medicine, identification, birth certificates, and family heirlooms. These sweeps force people to scatter, disrupting community bonds that are critical to survival. Police also use sweeps to issue citations and run names for outstanding bench warrants to make arrests.

These are the sort of punitive, self-defeating tactics that arise when jurisdictions fail to provide the resources people need to avoid or exit homelessness. Instead of community health services that help people with mental illness find treatment, law enforcement pushes people from one place to the next, issuing citations that put jobs and housing further out of reach. Instead of providing resources to help formerly incarcerated people find housing, cities pass criminal ordinances and invest in enforcement that perpetuates a cycle of homelessness and incarceration from which it can be nearly impossible to escape.

In San Francisco, a city where the waiting list for a shelter bed often has about 1,000 people, the Chief of Police recently confirmed to The New Yorker that “it’s not a crime to be homeless.” Yet while a program to provide mental health treatment to unhoused and uninsured people is still being rolled out, the city’s mayor has ordered encampment sweeps and unhoused people have reported police confiscation of personal items including HIV medications, family photographs, and the ashes of a relative.

With the pandemic throwing millions more into housing insecurity, punitive measures are even more futile and draconian. Indeed, the Centers for Disease Control & Prevention (CDC) has issued guidance to suspend encampment sweeps during the pandemic, noting that “clearing encampments can cause people to disperse throughout the community” which “increases the potential for infectious disease spread.”

Yet in many places enforcement has continued. In Honolulu, for example, law enforcement has flouted the CDC guidance with daily encampment sweeps. The city council is also poised to expand the city’s criminal ban on sitting or lying in public places. Since 2014, the ban has already grown from one commercial area of Waikiki to cover 15 geographic zones. Now the city council is considering a bill to cast the net even wider. Honolulu has one of the highest rates of homelessness in the country, without nearly enough shelter capacity, even before the pandemic, to house the 2,400 unsheltered houseless people on Oahu. In these circumstances, expanding a ban on sleeping in public means that more people will face the prospect of fines and citations.

But while cities have relied more heavily on criminalization and punitive enforcement tactics, the courts have increasingly stepped in to protect the constitutional rights of unhoused people.

## CRIMINALIZING HOMELESSNESS IS UNCONSTITUTIONAL

Local governments are not free to trample the rights of people just because they are experiencing poverty or living without housing. The Supreme Court has held that it is cruel and unusual punishment to criminalize homelessness based on long-standing legal principles that people cannot be punished for their status.<sup>1</sup> Likewise, people without shelter retain fundamental constitutional protections. Like everyone else, they have the Fourteenth Amendment right to due process before property is taken, the Fourth Amendment rights to be free from unreasonable searches and seizures, and the First Amendment rights to speak, protest, and assemble.

As the Supreme Court explained in 1972, when it struck down a “vagrancy” law in Jacksonville, Florida, the Constitution does not permit criminal laws used to “roundup ... so-called undesirables” that result “in a regime in which the poor and the unpopular are permitted to stand on a public sidewalk ... only at the whim of any police officer.”<sup>2</sup> That means constitutional protections and legal rights apply evenly, without regard to one’s wealth or political power or popularity.

1. *Robinson v. California*, 370 U.S. 660, 667 (1962) (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”); see also *Powell v. Texas*, 392 U.S. 514 (1968).
2. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

Case law also prohibits targeting homelessness with criminal laws that appear neutral on their face but apply only to people without access to shelter. Laws that criminalize the “unavoidable consequences” of homelessness are no different from laws that criminalize homelessness itself. It isn’t enough, that is, that “the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”<sup>3</sup> Crimes that inevitably follow from the condition of living without shelter are also unconstitutional.

With these principles, recent cases have upheld the legal rights of houseless persons to perform various life-sustaining behaviors in public places, with courts protecting people from encampment evictions, the seizure and destruction of personal property, and prosecutions for camping, sleeping outside, and soliciting.

## Laws Prohibiting Sitting, Lying, or Sleeping in Public

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Numerous federal courts and the U.S. Department of Justice have recognized that criminal bans on sleeping, lying, or sitting in public are “cruel and unusual,” and therefore unconstitutional, when enforced against people who have no access to shelter or alternative housing. And at least one court has found that if people are arrested for sleeping in public, those arrests have the effect of preventing unhoused people from moving within or traveling to a city, thereby infringing upon their right to travel.<sup>4</sup>

In *Powell v. Texas*,<sup>5</sup> decided in 1968, the Supreme Court upheld a Texas law that made public drunkenness a criminal offense, reasoning that being intoxicated in public amounts to conduct distinct from one’s status. But a majority of the Court—four dissenters and Justice Byron White concurring in the result—agreed on the principle “that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being.”<sup>6</sup>

Since then, the Ninth Circuit has twice applied these principles to bar the enforcement of city ordinances that prohibit sitting, lying, or sleeping in public—first in Los Angeles in 2006 and then in Boise, Idaho in 2018.

In both cases, the court explained that “any ‘conduct at issue here is involuntary and inseparable from status—they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping.’ As a result, just as the state may not criminalize the state of being ‘homeless in public places,’ the state may not ‘criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets.’”<sup>7</sup>

The Department of Justice took the same position. In 2015, as part of the Boise litigation, the DOJ [filed a statement of interest](#) arguing that “[i]t should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment. Sleeping is a life-sustaining activity—i.e., it must

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3. Anatole France, *The Red Lily* (1894); see also *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).

4. See *Pottinger v. City of Miami*, 76 F.3d 1154 (11th Cir. 1996).

5. 392 U.S. 514 (1968).

6. See *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018); *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006), vacated 505 F.3d 1006 (9th Cir. 2007).

7. *City of Boise*, 902 F.3d at 1048 (quoting *Jones* 444 F.3d at 1136-37).

occur at some time in some place. If a person literally has nowhere else to go, then enforcement of the anti-camping ordinance against that person criminalizes her for being homeless.”<sup>8</sup>

In both the L.A. and the Boise cases, the plaintiffs showed that the number of unhoused people exceeded the beds available through emergency shelters or other temporary housing, forcing people to sit, lie, or sleep outside, and, by letter of the law, commit a crime. With this evidence, the Ninth Circuit concluded that, “so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],” the jurisdiction cannot prosecute homeless individuals for “involuntarily sitting, lying, and sleeping in public.”<sup>9</sup>

Other federal courts around the country—including district courts within the Fifth and Eleventh Circuits—have reached the same conclusion.<sup>10</sup>

## Encampment Evictions and Seizing or Destroying Property

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Law enforcement sweeps of encampments have been successfully challenged on Fourth and Fourteenth Amendment grounds, with courts explaining that such tactics often deprive people of their property without due process and involve

unreasonable searches and seizures. Litigation has also led to settlements that require jurisdictions to, among other things, provide adequate notice and shelter options before clearing an encampment, store and inventory any property taken, and seize only property that poses a legitimate public health risk.<sup>11</sup>

In its 2012 decision *Lavan v. City of Los Angeles*, the Ninth Circuit squarely held that unhoused people retain an “interest in the continued ownership of their personal possessions,” within the meaning of both the Fourth Amendment and Fourteenth Amendments.<sup>12</sup> In that case, nine people living in the Skid Row district of Los Angeles alleged that city officials would confiscate and immediately destroy property that was left temporarily unattended while they ate, showered, and used restrooms. The Ninth Circuit upheld an injunction barring the practice.

“As we have repeatedly made clear,” the court wrote, “[t]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking.’ This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart.”<sup>13</sup> The court rejected the city’s argument that “the attended property of homeless persons is uniquely beyond the reach of the Constitution, so that the government may seize and destroy

8. *Bell v. Boise*, 993 F. Supp. 2d 1237 (D. Idaho 2014); U.S. Statement of Interest available at <https://www.justice.gov/crt/file/761211/download>.

9. *City of Boise*, 902 F.3d at 1048 (internal quotation marks omitted).

10. See *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1565 (S.D. Fla. 1992) (“As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment — sleeping, eating and other innocent conduct.”); see also *Johnson v. City of Dallas*, 860 F.Supp. 344, 350 (N.D. Tex. 1994) (holding that a “sleeping in public ordinance as applied against the homeless is unconstitutional”), rev’d on other grounds, 61 F.3d 442 (5th Cir. 1995).

11. See, e.g., *Allen v. City of Pomona*, No. 16-cv-1859 (C.D. Cal. Mar. 18, 2016); *Martin v. City and County of Honolulu*, 15-cv-00363 (D. Haw. Aug. 15, 2016).

12. *Lavan*, 693 F.3d at 1031.

13. *Lavan*, 693 F.3d at 1032 (quoting *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008)); see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993) (“Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.”).

with impunity the worldly possessions of a vulnerable group in our society,” explaining that “even the most basic reading of our Constitution prohibits such a result[.]”<sup>14</sup>

Since the Ninth Circuit’s decision in *Lavan*, a number of district courts have applied its reasoning to find that unhoused people have a property interest in possessions such as tents, tarps, blankets, and medications, even when these possessions are kept in a public space.<sup>15</sup>

## Prohibitions on Solicitation & Panhandling

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People without jobs, government assistance, or other income may depend on panhandling to survive. Yet, according to the National Law Center on Homelessness & Poverty, 83% of cities restrict or ban begging in some or all public places. While these laws have proliferated over the last decade, it has also become increasingly clear that, in many cases, they are unconstitutional.

The Supreme Court has long recognized that soliciting contributions is expressive activity protected by the First Amendment.<sup>16</sup> But in 2015 the Court made an important clarification: In a case called *Reed v. The Town of Gilbert*,<sup>17</sup> the Court

explained that government censorship of all speech on a particular *topic*—even if it does not discriminate between different *viewpoints*—is a “content-based” restriction and presumed invalid under the First Amendment.

The implications for anti-panhandling ordinances were clear. After this decision, federal courts around the country began to hold not only that restrictions on soliciting donations—including bans on begging and panhandling—implicate the First Amendment, but that they can survive only if they pass “strict scrutiny,” the most exacting level of constitutional review. That means the government must “prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest”—a high bar that is rarely met.<sup>18</sup>

Applying *Reed* that same year, the Seventh Circuit reversed an earlier ruling and enjoined Springfield, Illinois’ law restricting vocal pleas for immediate donations of cash as a content-based speech restriction that regulates “because of the topic discussed.”<sup>19</sup> Similarly, in *Homeless Helping Homeless, Inc. v. City of Tampa*,<sup>20</sup> a federal district court in Florida permanently enjoined the city of Tampa from enforcing its ordinance banning the solicitation of “donations or payment” in certain downtown areas.

14. *Lavan*, 693 F.3d at 1033.

15. See, e.g., *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1103 (E.D. Cal. 2012) (“If there has ever been any doubt in this Circuit that a homeless person’s unabandoned possessions are ‘property’ within the meaning of the Fourteenth Amendment, that doubt was put to rest by the Ninth Circuit’s September 2012 decision in *Lavan v. City of Los Angeles*”); *Carr v. Oregon Dep’t of Transp.*, 2014 WL 3741934, at \*4 (D. Or. July 29, 2014) (“Within this most basic scope of the due process guarantee is a homeless person’s ownership interest in property that she has left unattended but not abandoned.”); *Mitchell v. City of Los Angeles*, 2016 WL 11519288, at \*4 (C.D. Cal. Apr. 13, 2016) (concluding, in a challenge to L.A.’s practice of seizing and destroying homeless persons’ property during arrests and street cleanings, “that some of Defendants’ seizures of property are unreasonable under the Fourth Amendment, particularly the seizure of essential medication and medical equipment.”).

16. See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (striking down an ordinance that prohibited solicitations by charitable organizations that did not use at least seventy-five per cent of their revenues for charitable purposes).

17. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015).

18. *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

19. *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015).

20. 2016 WL 4162882 (M.D. Fla. Aug. 5, 2016).

## Prohibiting Loitering and Sleeping in Vehicles

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Municipalities have used broadly-worded ordinances that ban loitering or sleeping in cars to target unhoused people in public spaces. The Supreme Court has held that such ordinances are unconstitutionally vague when they do not give clear notice of the prohibited conduct or would allow for arbitrary or discriminatory enforcement—which, in most cases, is precisely their design.<sup>21</sup> If a statute provides “no standards governing the exercise of ... discretion,” the Supreme Court has said, it becomes “a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.”<sup>22</sup>

In *Desertrain v. City of Los Angeles*,<sup>23</sup> for example, a group of unhoused people challenged a Los Angeles ordinance that prohibited the use of vehicles “as living quarters.” In finding the law unconstitutionally vague, the Ninth Circuit explained that it “is broad enough to cover any driver in Los Angeles who eats food or transports personal belongings in his or her vehicle. Yet it appears to be applied only to the homeless.”<sup>24</sup> The doctrine of unconstitutional vagueness, the court said, “is designed specifically to prevent this type of selective enforcement,” in which a “net [can] be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of the police and prosecution, although not chargeable in any particular offense.”<sup>25</sup>

The court added that selective enforcement against unhoused populations only makes it harder to escape homelessness, and exacerbates the very problem these laws are supposed to address: “For many homeless persons, their automobile may be their last major possession—the means by which they can look for work and seek social services. The City of Los Angeles has many options at its disposal to alleviate the plight and suffering of its homeless citizens. Selectively preventing the homeless and the poor from using their vehicles for activities many other citizens also conduct in their cars should not be one of those options.”<sup>26</sup>

## CONCLUSION

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Federal courts at all levels across the country have made clear that the national trend of criminalizing homelessness runs headlong into the Constitution. That will only become more true as the current economic crisis pushes more people into housing instability and homelessness, and more people are forced to survive, without shelter, in public spaces. As the crisis worsens, local officials may find it politically expedient to blame and punish the already vulnerable people who are victims of it, but in many cases doing so will be not only ineffective but unlawful.

21. See *Chicago v. Morales*, 527 U.S. 41 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

22. *Papachristou*, 504 U.S. at 170 (internal quotation marks omitted).

23. 754 F.3d 1147 (9th Cir. 2014).

24. *Id.* at 1156.

25. *Id.*

26. *Id.* at 1157-58.