Minnesota Journal of Law & Inequality

Volume 42 | Issue 2 Article 4

September 2024

Challenging the Criminalization of Homelessness Under Fair Housing Law

Tom Stanley-Becker
Georgetown University Law Center

Recommended Citation
Tom Stanley-Becker, *Challenging the Criminalization of Homelessness Under Fair Housing Law*, 42(2) LAW & INEQ. 109 (2024), DOI: https://doi.org/10.24926/25730037.698.

Challenging the Criminalization of Homelessness Under Fair Housing Law

Tom Stanley-Becker†

Abstract

This Article advances a novel argument that private plaintiffs and federal agencies should use federal fair housing laws to challenge state and local legislation that criminalizes homelessness. Blue and red jurisdictions alike have adopted such punitive legislation primarily in the last two decades. This Article focuses on camping bans and their enforcement by sweeps of homelessness encampments. It contends that such measures are susceptible to fair housing challenges, as evidence of their disparate impact on people of color and people with disabilities is overwhelming, reflecting the ongoing legacy of systemic racism. This Article diverges from existing scholarship and litigation that center on constitutional challenges to such laws, including a challenge based on the Eighth Amendment's prohibition of cruel and unusual punishment that the Supreme Court rejected in June 2024. Specifically, this Article proposes that private plaintiffs and federal agencies should bring suits and take other actions to challenge the anti-camping legislation by relying on two federal antidiscrimination laws: the Fair Housing Act (FHA), with the duty it imposes on federal agencies to affirmatively further fair housing, and Title VI of the 1964 Civil Rights Act. Unlike the constitutional challenges, claims based on fair housing guarantees strike at the heart of what is wrong with the criminalization of camping—it denies people experiencing homelessness, who are disproportionately people of color and people with disabilities, a place to live.

†. Tom Stanley-Becker is an evening law student at Georgetown University Law Center and an Executive Editor on the *Georgetown Journal on Poverty Law & Policy*. He would like to thank Professor Nicole Summers for her thoughts and comments on this project.

Introduction

A tide of new legislation criminalizing homelessness is sweeping the United States.[1] Roscoe Billy Ray Bradley, Jr., a Black man experiencing homelessness in Culver City, California, lives in a tent under the 405 Freeway bridge.[2] "They can't take my tent. That's my personal property," says Bradley, who has camped in the spot for more than a decade. "I'm not going anywhere."[3] But Bradley's use of his tent as a home is now illegal under an anti-camping ordinance adopted by the Culver City Council in 2023.[4] The ordinance is aimed at razing homeless encampments.[5]

Bradley's experience parallels that of many people who are adversely affected by the criminalization of homelessness in cities across the country. The criminalization of homelessness is particularly pernicious because it disproportionately harms people of color like Bradley due to the well-documented fact that people of color are over-represented among people experiencing homelessness.[6] Cities and states across the country have recently adopted legislation similar to that in Culver City, addressing the homelessness crisis by cracking down on camping.[7] Reportedly, even elected leaders in blue cities have been "pushed to their wits' end by massive encampments and irate voters" and are "taking steps to ban camps," accelerating the spread of the punitive initiatives nationwide.[8] A 2024 Stateline study of policy trends finds

1. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/4433-ASVU].

2. Alicia Victoria Lozano, *California City Bans People from Living in Tents Amid Homeless Crisis*, NBC NEWS (Feb. 18, 2023), https://www.nbcnews.com/news/us-news/california-city-bans-people-living-tents-homeless-crisis-rcna70852 [https://perma.cc/HL3D-C4K6].

3. *Id.*

4. *Id.*

5. *Id.*

6. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 32.

7. *Id.* at 75–79.

8. Marisa Kendall, *California Cities Are Cracking Down on Homeless Camps. Will the State Get Tougher Too?,* CALMATTERS (May 22, 2023), https://calmatters.org/housing/2023/04/california-homeless-city-laws/ [https://perma.cc/VXW8-SMG7]. Several other cities and counties throughout California, including Sacramento, Elk Grove, Oakland, Santa Cruz, and Milpitas, have adopted anti-camping ordinances in the past three years. *See* KCAL-News Staff, *LA City Council Votes to Expand Anti-Camping Law in Woodland Hills*, CBS L.A. (May 10, 2023), https://www.cbsnews.com/losangeles/news/la-city-council-votes-to-expand-anti-camping-law-in-woodland-hills/ [https://perma.cc/2UA6-57CQ]; *see also* Staff and News Service Reports, *LA City Council Expands Anti-Camping Law Aimed at Homeless in Woodland Hills*, L.A. DAILY NEWS (May 11, 2023),

that "[m]any jurisdictions have shifted toward supporting the rights of local residents and businesses that must contend with encampments and other problems, rather the rights of homeless people."[9]

This Article argues that anti-camping criminal legislation and its enforcement violate fair housing laws. It proposes a novel approach under fair housing law to challenge the anti-camping legislation, potentially providing redress for people experiencing homelessness. It focuses on the protections provided by two critical federal antidiscrimination laws: the Fair Housing Act (FHA), with the duty it imposes on federal agencies to affirmatively further fair housing, and Title VI of the 1964 Civil Rights Act.[10] It contends that private plaintiffs and federal agencies should invoke fair housing law guarantees to mount challenges to state and local legislation that criminalizes homelessness encampments and disproportionately harms people of color and people with disabilities.

Camping bans are among a set of laws criminalizing homelessness.[11] The legislation restricts or prohibits diverse categories of life-sustaining conduct performed by people experiencing homelessness, including sleeping, sitting or lying down, and living in vehicles on public property.[12] Taken together, the policies and their enforcement constitute what is termed the "criminalization of homelessness," even though some of the measures are initially enforced only with civil sanctions.[13]

The anti-camping legislation has a disparate racial impact because the population of people experiencing homelessness is disproportionately made up of people of color, reflecting broader structures of inequality in the United States.[14] As the tax scholar Dorothy Brown writes of "the disproportionate percentage of black Americans in poverty"—the persistence of "separate and unequal worlds" due to racial disparities in access to housing, education, jobs, income and health care—"in so many areas of life, being black

---

https://www.dailynews.com/2023/05/10/la-city-council-expands-anti-camping-law-aimed-at-homeless-in-woodland-hills/ [https://perma.cc/2T3A-GF8L].

9. Robbie Sequeira, *More Cities and States Crack Down on Homeless Individuals*, GOVERNING (Jan. 4, 2024), https://www.governing.com/urban/more-cities-and-states-crack-down-on-homeless-individuals [https://perma.cc/A2DT-M26L].

10. Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2011); 42 U.S.C § 2000d (1964).

11. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 12.

12. *Id.* at 12–14.

13. *Id.* at 15.

14. *Id.* at 12.

is more likely to hurt."[15] Nationwide, Black people represent 13% of the total population but 37% of people experiencing homelessness, according to data collected by the U.S. Department of Housing and Urban Development (HUD) in the 2023 point-in-time homelessness count.[16] The same racial disparity is true of the nation's unsheltered population: people who experience homelessness outside the formal shelter system—who by necessity often live by camping on public property—26% of whom are Black.[17] Therefore, the enforcement of camping bans has a profoundly disparate impact.

Consider, for example, the case of Los Angeles, one of the country's bluest of cities, where the unsheltered population of people experiencing homelessness is among the largest nationwide.[18] According to criminal justice data, Black Angelenos have been disproportionately represented among those arrested for violating the city's anti-camping ordinance.[19] From January 2012 to

15. DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT 11, 20 (2021); U.S. CENSUS BUREAU, BLACK INDIVIDUALS HAD RECORD LOW OFFICIAL POVERTY RATE IN 2022 (Sept. 12, 2023), https://www.census.gov/library/stories/2023/09/black-poverty-rate.html [https://perma.cc/3V38-SN8X] (highlighting the distribution of total population and poverty by race in 2022 in Figure 3); U.S. BUREAU OF LAB. STAT., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (Jan. 5, 2024), https://www.bls.gov/web/empsit/cpsee_e16.htm [https://perma.cc/B4ZG-7ZTU] (highlighting unemployment rates at the end of 2023; the Black unemployment rate was at 5.4%, and the white unemployment rate was at 3.2%); CTRS. FOR DISEASE CONTROL & PREVENTION, IMPACT OF RACISM ON OUR NATION'S HEALTH, https://www.cdc.gov/minority-health/racism-health/index-1.html [https://perma.cc/X2MH-MEK3] (discussing the effect of racism on health inequities and disparities among communities of color); *see* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); *see also* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2018).

16. U.S. DEP'T OF HOUS. & URB. DEV., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 4 (Dec. 2023), https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf [https://perma.cc/8Z68-UMXE].

17. U.S. DEP'T OF HOUS. & URB. DEV., HUD 2023 CONTINUUM OF CARE HOMELESSNESS ASSISTANCE PROGRAMS POPULATIONS AND SUBPOPULATIONS, FULL SUMMARY REPORT (ALL STATES, TERRITORIES, PUERTO RICO AND DISTRICT OF COLUMBIA) 2 (Nov. 19, 2023), https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2023.pdf [https://perma.cc/T8GG-TF6Q].

18. Hanna Love & Tracy Hadden Loh, *Homelessness in US Cities and Downtowns: The Perception, the Reality, and How to Address Both*, BROOKINGS (Dec. 7, 2003), https://www.brookings.edu/articles/homelessness-in-us-cities-and-downtowns/ [https://perma.cc/RC7D-QV6B] (listing major U.S. cities with the highest prevalence of homelessness in Table 1). Los Angeles has the fifth-largest population of people experiencing homelessness proportional to the overall population nationwide, after San Francisco, New York City, Long Beach, and Boston, but a higher percentage of unsheltered people than the other four. *Id.*

19. Travis Schlepp, *Black People Disproportionately Arrested for Violating L.A.*

May 2023, city authorities arrested 36,807 people for violating the ordinance; almost 50% of the arrests were of Black people, who make up less than 10% of the city's population.[20]

Such stark disparities are hardly exceptional. To the contrary, the anti-camping legislation adopted in hundreds of cities across the country reinforces a pervasive regime of "unequal worlds."[21] As a remedy, this Article suggests that private plaintiffs and federal agencies should make use of the guarantees of federal fair housing law to challenge the legislation and its enforcement. In focusing on fair housing law, the approach differs from scholarship addressing constitutional challenges to the criminalization of homelessness.[22] One vein of that scholarship finds that measures prohibiting life-sustaining behavior such as sleeping and camping in public criminalize a status and thus are unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause.[23] Another finds that the legislation simply criminalizes the actions of people experiencing homelessness, not the status of being homeless, and therefore is constitutional.[24] And another considers the limited remedies available to people experiencing homelessness who pursue constitutional challenges to the criminal legislation.[25] Studies have also been directed to the pernicious effect of civil laws targeting

---

Homeless Ordinance, Controller Report Shows, KTLA5 (June 22, 2023), https://ktla.com/news/local-news/black-people-disproportionately-arrested-for-violating-l-a-homeless-ordinance-controller-report-shows/ [https://perma.cc/WM6T-HF5W].

20. *Id.* (citing L.A. CONTROLLER KENNETH MEJIA, INTERACTIVE MAP CITY OF LA, 41.18 ARRESTS MAP JANUARY 2012 – MAY 2023, https://controller.lacity.gov/landings/4118 [https://perma.cc/7FDV-TH5X]; and U.S. CENSUS BUREAU, QUICK FACTS: LOS ANGELES, CALIFORNIA (July 1, 2022), https://www.census.gov/quickfacts/fact/table/losangelescitycalifornia/PST045222 [https://perma.cc/6SGF-BXBZ]).

21. BROWN, *supra* note 15, at 11.

22. Hannah Kieschnick, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569 (2018) (arguing that the status crimes doctrine and the protections of the Eighth Amendment ought to extend to the criminalization of people experiencing homelessness); Ryan P. Isola, *Homelessness: The Status of the Status Doctrine*, 54 U.C. DAVIS L. REV. 1725 (2021) (discussing conflict among lower courts about the constitutionality of anti-homeless ordinances); Andrew I. Lief, *A Prosecutorial Solution to the Criminalization of Homelessness*, 169 U. PA. L. REV. 1971 (2021) (arguing that prosecutors are better suited than courts to mitigate harms arising from anti-homeless laws); Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L. L. REV. 367 (2021) (highlighting the detrimental impacts of cities enforcing anti-homeless statutes with civil penalties).

23. *See* Kieschnick, *supra* note 22; *see also* Isola, *supra* note 22.

24. *See* Lief, *supra* note 22.

25. Eric S. Tars, Heather M. Johnson, Tristia Bauman & Maria Foscarinis, *Can I Get Some Remedy?: Criminalization of Homelessness and the Obligation to Provide an Effective Remedy*, 45 COLUM. HUM. RTS. L. REV. 738 (2014).

people experiencing homelessness, tracing how cities have shifted from criminal to civil measures in order to deprive plaintiffs of "constitutional and procedural tools to fight criminalization."[26]

This Article argues that fair housing law offers a potent means of challenging the criminalization of homelessness. It breaks new ground by proposing reliance on the anti-discrimination guarantees of federal housing law as a basis for challenges to camping bans.[27] In suggesting this approach, the Article proceeds in three parts. Part I examines the historical backdrop of the criminalization legislation and the diversity of its current forms. Part II analyzes the limits of existing constitutional challenges to the camping bans, focusing on the cruel and unusual punishment challenge under the Eighth Amendment currently pending in the Supreme Court. Part III lays out the novel challenge to the anti-camping legislation possible under federal fair housing law and argues for both private and public enforcement of fair housing laws to combat the bans.

I. Criminalization of Homelessness: Precursors and Present-Day Legislation

A. Historical Antecedents

The origins of the legislation criminalizing homelessness can be traced back to statutes from the early modern era that punished vagrancy.[28] The measures took root in the American colonies and became entrenched in the state law of the early republic.[29] The use of anti-vagrancy law became more draconian in the Black Codes and other Jim Crow legislation imposed to enforce racial subordination after the Civil War.[30] A century later, the laws criminalizing

26. Rankin, *supra* note 22, at 370.

27. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, WELCOME HOME: THE RISE OF TENT CITIES IN THE U.S. 64 (Mar. 2014), https://homelesslaw.org/wp-content/uploads/2018/10/WelcomeHome_TentCities.pdf [https://perma.cc/8DVL-EPBX]. A single report, in less than a page, suggests a fair housing theory, but concludes, "Since no one has litigated on behalf of encampments under this theory, further discussion of the merits of these claims would be premature." *Id.*

28. RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 341 (2016).

29. *See* Papachristou v. Jacksonville, 405 U.S. 156, 161 (1972) ("Jacksonville's ordinance and Florida's statute were 'derived from early English law' . . . and employ 'archaic language' in their definitions of vagrants . . . . The history is an often-told tale. The break-up of feudal estates in England led to labor shortages which in turn resulted in the Statutes of Laborers . . . ." (quoting Johnson v. State, 202 So.2d 852, 854 (Fla. 1967))).

30. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 198 (1988); GOLUBOFF, *supra* note 28, at 116; Anna Trevorrow & Victoria Pelletier, *Sweeping Homeless Encampments is Antiquated and Inhumane*,

vagrancy took on new force, resurrected and expanded as state and local governments pursued "broken windows" policing during the 1980s and 1990s.[31] Introduced by the criminologist James Q. Wilson, the infamous broken windows policing theory holds, in the words of one legal critic, "[t]hat seemingly minor instances of social and physical disorder in urban spaces can contribute to an atmosphere of lawlessness that encourages more serious crimes."[32]

Today, the acute crisis of homelessness has led to the rapid expansion of legislation criminalizing or otherwise punishing homelessness. In jurisdictions nationwide, residents and business owners have pressured lawmakers to remove people experiencing homelessness from public property near their homes and establishments. The National Law Center on Homelessness & Poverty (NLCHP) has found that across 187 cities,[33] there has been a dramatic increase in diverse forms of anti-homelessness legislation: from 2006 to 2019, "city-wide bans on camping have increased by 92%; on sitting or lying [on public property] by 78%; on loitering by 103%; on panhandling by 103%; and on living in vehicles by 213%."[34] States have also enacted laws that criminalize homelessness.[35] During the years of the Trump Administration, the

---

PORTLAND PRESS HERALD (Dec. 27, 2023), https://www.pressherald.com/2023/12/27/opinion-sweeping-encampments-is-antiquated-inhumane/ [https://perma.cc/U5YF-9UG9].

31. Press Release, Columbia Law School, Shattering Broken Windows: Professor Bernard E. Harcourt Dismantles the Data and Assumptions Behind an Influential But Controversial Theory of Criminal Justice (Apr. 8, 2015) (on file with the Columbia Law School Online Archive).

32. *Id.*; *see also* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN-WINDOWS POLICING (2001).

33. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUS. NOT HANDCUFFS 2019, *supra* note 1, at 10, 27 n. 13 (stating that "187 cities are only a sampling; criminalization ordinances exist in many more municipalities than just the ones covered [in the report]" and that "[t]he 187 cities . . . were chosen in 2006 based on their geographic diversity (e.g., they include urban and rural communities in all regions of the country), and the availability of the cities' municipal codes online."). The National Law Center on Homelessness & Poverty released a State Law Supplement in November 2021. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT (2021), https://homelesslaw.org/wp-content/uploads/2021/11/2021-HNH-State-Crim-Supplement.pdf [https://perma.cc/8RBZ-KH7S].

34. ERIC S. TARS, NAT'L HOMELESSNESS LAW CTR., CRIMINALIZATION OF HOMELESSNESS 6 (2021).

35. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, STATE LAW SUPPLEMENT, *supra* note 33, at 9. For an example, *see* MO. REV. STAT. § 67.2300.5 (2023), a Missouri law making it unlawful to camp or sleep on state land took effect at the beginning of 2023. *See also* Rebecca Rivas, *New Missouri Law Makes Sleeping on State Land a Crime for People Experiencing Homelessness*, MO. INDEP. (June 29, 2022), https://missouriindependent.com/2022/06/29/new-missouri-law-makes-sleeping-on-state-land-a-crime-for-people-experiencing-homelessness/ [https://perma.cc/S4BK-

punitive approach was exemplified by the threat to use federal law enforcement agents to relocate people experiencing homelessness in cities like Los Angeles to large camps on federal land.[36]

The criminalization of homelessness forms part of a broader set of punitive laws and practices directed against people living in poverty.[37] Those measures include money bail; work requirements for receipt of public benefits; biased school discipline leading to the school-to-prison pipeline, and crime-free housing ordinances—all of which shape the experience of people caught in the cycle of homelessness and incarceration, disproportionately affecting people of color.[38]

B. Laws Criminalizing Homelessness and Their Enforcement

People experiencing homelessness use diverse strategies in order to survive: camping in public parks, sleeping in their cars, kindling fires to stay warm, and urinating and defecating on public property.[39] The laws criminalizing homelessness define such actions as crimes.[40] Notably, as the Ninth Circuit Court of Appeals states, anti-camping laws "punish as a criminal offense the life-sustaining act of sleeping in public with bedding when a person has nowhere else to go."[41] Camping bans are among the most widespread measures criminalizing homelessness, and their

---

H9MJ]. The Missouri Supreme Court on December 19, 2023, struck down the statute, holding that it violated the single subject requirement of the state Constitution, which bars state law from having too many unrelated subjects. Byrd v. State of Missouri, 679 S.W.3d 492, 496 (Mo. 2023) (en banc). It is unclear if the ordinance will be redrafted by the state legislature. *See* Tara Suter, *Law Against Homelessness Struck Down in Missouri*, THE HILL (Dec. 20, 2023), https://thehill.com/regulation/court-battles/4370230-law-against-homelessness-struck-down-in-missouri/ [https://perma.cc/8JLY-6WC4].

36. Jeff Stein, *As Trump Prepares Big Push on Homelessness, White House Floats New Role for Police*, WASH. POST (Sept. 16, 2019), https://www.washingtonpost.com/business/2019/09/16/trump-prepares-big-push-homelessness-white-house-floats-new-role-police/ [https://perma.cc/WR24-LDWX].

37. *See generally* PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2017) (describing how the "criminalization of poverty" emerged during the Reagan era and has continued through a series of laws and policies that disproportionately affect marginalized groups).

38. *Id*.

39. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 37–50 (describing the various ways that people experiencing homelessness engage in "life-sustaining conduct in public space" as well as statutes criminalizing these actions).

40. *Id.*

41. Johnson v. City of Grants Pass, 72 F.4th 868, 924 (9th Cir. 2023), *cert. granted sub nom.* City of Grants Pass v. Johnson, 144 S. Ct. 679 (2024).

enforcement through police sweeps of homeless encampments makes brutally apparent the punishment of life-sustaining activity.[42]

i. Types of Anti-Homelessness Criminal Legislation

People experiencing homelessness confront a range of local and state laws that penalize their strategies for survival. The most comprehensive catalogue of laws criminalizing homelessness is a 2019 study by the NLCHP examining codes from 187 cities.[43] The codes prohibit using camping paraphernalia; sleeping in public; sitting or lying down in public; loitering, loafing, and vagrancy; begging; storing property in public; scavenging and dumpster diving; sharing food; living in vehicles; and public urination and defecation.[44] In focusing on laws that ban camping on public property,[45] this Article also addresses enforcement through evictions from homeless encampments,[46] known as sweeps, because such measures are most susceptible to fair housing challenges.

The NLCHP found that 72% of the cities in its sample had at least one law restricting camping on public property.[47] The Los Angeles ordinance exemplifies prohibitions adopted across the country. It begins by declaring "the homelessness crisis has reached epic proportions," and then bans the obstruction of streets, sidewalks, and public rights-of-way, including areas proximate to tunnels, bridges, overpasses, and underpasses, "by sitting, lying, or sleeping, or by storing, using, maintaining, or placing personal property . . . ."[48] Other city ordinances specify in still greater detail the actions outlawed by the camping bans. For example, the Columbia, South Carolina, criminal code defines camping as using or residing in "a public street, sidewalk, or park for private living accommodations, such as erecting tents or other temporary structures or objects providing shelter; sleeping in a single place for any substantial prolonged period of time; regularly cooking or preparing meals; or other similar activities."[49] And many anti-camping ordinances expressly criminalize the use of tents or other structures as dwelling places. For example, the Minneapolis code

42. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 38.
43. *Id.* at 9–10.
44. *Id.* at 12–14.
45. *Id.* at 38.
46. *Id.* at 40.
47. *Id.* at 38.
48. L.A., CAL., MUN. CODE § 41.18(a)(1) (2021).
49. COLUMBIA, S.C., CODE OF ORDINANCES § 14-105(a)(1) (2023).

bans placing a "tent or other temporary structure . . . upon any public street or on any public or private premises or street in the city . . . as a shelter or enclosure of persons and their effects for the purpose of living therein."[50]

The spread of the anti-camping measures nationwide reflects not only grassroots pressures, but the aims of a well-funded lobbying campaign that has shaped the legislation. A Texas-based conservative advocacy group called the Cicero Institute has spearheaded the initiatives, promoting the camping bans as "entrepreneurial solutions to public problems."[51] The Institute has drafted a model bill titled the Reducing Street Homelessness Act, versions of which have been introduced in six states: Arizona, Georgia, Missouri, Oklahoma, Texas, and Wisconsin.[52] The model bill makes sleeping on public property a misdemeanor punishable by a fine of up to $5,000 and a month in jail and bars cities that fail to enforce such camping bans from receiving state funds.[53] Texas enacted a version of the bill in 2021, prohibiting camping, defined to mean "resid[ing] temporarily in a place with shelter," including "a tent, tarpaulin, lean-to, sleeping bag, bedroll, blankets, or any form of temporary, semipermanent, or permanent shelter, other than clothing or any handheld device . . . ."[54] In 2022, Tennessee became the first state to make unauthorized camping on public property a felony.[55]

ii. Enforcement of the Anti-Camping Legislation

According to the National Coalition for the Homeless, local governments have increasingly enforced anti-camping laws by authorizing sweeps of homelessness encampments: "a rapid growth in the number of encampments in cities, suburbs, and rural areas across the country," the coalition finds, "has led to massive encampments sweeps (closing 'tent cities'), encouraged by the complaints of housed neighbors as well as by local ordinances that

50. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 244.60(a).

51. Kristian Hernández, *Homeless Camping Bans Are Spreading. This Group Shaped the Bills*, STATELINE (Apr. 8, 2022), https://stateline.org/2022/04/08/homeless-camping-bans-are-spreading-this-group-shaped-the-bills/ [https://perma.cc/QK6L-K7BB].

52. *Id*.

53. *Id*.

54. TEX. PENAL CODE § 48.05.

55. Ashley Hoak, *Public Camping in Tennessee Becomes a Felony, Homeless Seek Refuge*, WCYB NEWS 5 (July 1, 2022), https://wcyb.com/news/local/public-camping-in-tennessee-becomes-a-felony-homeless-seek-refuge [https://perma.cc/7RQC-TBW4].

prohibit camping on public land."[56] Reasons for the sweeps also include "alleged environmental damage to local ecosystems" as well as "encroachment on private property and construction sites" and "reports of violence within individual camps."[57] Homeless encampments have generated more adverse public scrutiny and pressure on public officials than has the presence of individuals surviving homelessness alone, outside of camps. As the NLCHP notes, public officials "frequently cite concerns for public health as reason to . . . evict homeless encampments . . . ."[58] A 2023 Associated Press investigation of the crackdown on homeless encampments found that "attempts to clear encampments increased in cities from Los Angeles to New York as public pressure grew to address what some residents say are dangerous and unsanitary living conditions."[59] For example, in Phoenix, the number of sweeps increased from 1,200 in 2019 to 3,000 in 2022, while Las Vegas swept about 2,500 encampments from January to September of 2022, up from 1,600 in 2021.[60] A recent statement from the California State Association of Counties and the League of California Cities finds that enforcing anti-camping measures "is a critical component to the overall well-being of the community."[61]

In addition to sweeps of homeless encampments, enforcement of the criminalization legislation can lead to arrest as well as criminal and civil fines and incarceration. Criminal penalties include court-imposed costs and fees, jail time, and probation.[62] Civil penalties include tickets and fines.[63] Civil penalties have received less attention in academic scholarship[64] but have serious

56. NAT'L COAL. FOR HOMELESS, SWEPT AWAY: REPORTING ON THE ENCAMPMENT CLOSURE CRISES 5 (2016).

57. *Id*.

58. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 15. Along with displacing people from public space, the sweeps often cause people to lose their belongings. *Id.* at 40. For example, as part of "Operation Clean Sweep," the Boston Police Department in 2019 destroyed the wheelchairs of people experiencing homelessness. *Id.* People saw the officers seize "three wheelchairs and [crush] them in the back of a garbage truck before ordering the homeless owners away from the Boston Medical Center." *Id*.

59. Claire Rush, Janie Har & Michael Casey, *Cities Crack Down on Homeless Encampments. Advocates Say That's Not the Answer*, AP NEWS (Nov. 28, 2023), https://apnews.com/article/homelessness-encampment-sweeps-cities-08ff74489ba00cfa927fe1cf54c0d401 [https://perma.cc/K348-K32K].

60. *Id.*

61. Sequeira, *supra* note 9.

62. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 50.

63. For example, a person experiencing homelessness is up to eleven times more likely to be arrested than a housed person; in Los Angeles in 2016, one in six arrest bookings were for people experiencing homelessness. *Id.*

64. Rankin, *supra* note 22, at 368.

collateral consequences for people experiencing homelessness, including credit damage; driver's license suspension; and, as a consequence of failure to pay fines, arrest and criminal liability.[65] For non-compliance with civil sanctions "due to sickness, lack of transportation, behavioral health crises, or the panoply of challenges associated with poverty and homelessness," writes the homeless rights advocate Sara K. Rankin, "civil infraction can then mutate into a misdemeanor through contempt provisions."[66] Moreover, the accumulation of a criminal record increases the difficulty of exiting the ranks of the homeless, particularly for people of color.[67]

Notably, too, the punitive force of the criminalization of homelessness is fully captured neither by the express provisions of the legislation nor by arrest and conviction statistics. Rather, there exists the threat of "invisible persecution," explain homeless rights advocates.[68] During the enforcement process, the broad and vague provisions of the legislation invite disparate and possibly discriminatory enforcement.[69] And criminalization may take place at the sub-statutory and sub-arrest level as the police use their discretion to compel people experiencing homelessness to leave encampments and other areas, as well as otherwise threatening them for engaging in conduct needed to survive. The danger of the abuse of police discretion is acute not only during formal police sweeps.[70]

II. Existing Constitutional Challenges to the Criminalization Statutes

Both the legislation criminalizing homelessness and its enforcement have been challenged on constitutional grounds, with a measure of success. The challenges rely on the Eighth, First, Fourth, and Fourteenth Amendments, and have been litigated largely in the federal courts mainly since the 1990s.[71] The litigation

65. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 50.

66. Rankin, *supra* note 22, at 379.

67. *See* Tom Stanley-Becker, *Breaking the Cycle of Homelessness and Incarceration: Prisoner Reentry, Racial Justice, and Fair Chance Housing Policy*, 7 U. PA. J. L. & PUB. AFF. 257 (2022).

68. Rankin, *supra* note 22, at 369.

69. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 38–39.

70. *Id.* at 39.

71. Tars et al., *supra* note 25, at 742–43 (examining constitutional challenges to criminalization of homelessness statutes and arguing that the provision of "narrow injunctive relief or small monetary damage awards" is insufficient to "protect homeless people against the egregious and widespread nature of criminalization.").

has achieved only a patchwork of protections, which limit the criminalization measures only in certain jurisdictions. The most fundamental challenges rested on the Eighth Amendment prohibition of cruel and unusual punishment, but they were rejected by the Supreme Court in its June 2024 decision in *City of Grants Pass v. Johnson*.[72] Thus, it is critical to pursue alternative legal protections for the rights of people experiencing homelessness under the guarantees of fair housing law.

A. Eighth Amendment

The Ninth Circuit was the source of the most far-reaching constitutional holdings striking down anti-camping legislation as cruel and unusual punishment. In 2018, in *Martin v. Boise*, in response to a challenge to a Boise, Idaho, ordinance criminalizing camping, the Ninth Circuit held that people experiencing homelessness cannot be punished for sleeping outdoors, on public property, when other shelter is unavailable.[73] The challenge was brought by plaintiffs who had been convicted of violating the ban, some of whom served jail time.[74] In *Martin*, the Court held:

> [T]he Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter . . . . [A]s long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter. [75]

In 2023, the Ninth Circuit reaffirmed that holding in *Johnson v. City of Grants Pass*.[76] Here, the Court struck down camping bans adopted by the city of Grants Pass, Oregon, that subjected people who were experiencing homelessness to civil fines and ultimately criminal prosecution for "using a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within the City's limits."[77] Because the city provided insufficient shelter, the Court

---

72. 144 S. Ct. 2202 (2024). Much of this litigation is summarized in the NLCHP's *Housing Not Handcuffs: A Litigation Manual*. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL 6–8, 10–14, 21–75 (2018), https://homelesslaw.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs-Litigation-Manual.pdf [https://perma.cc/3CLK-3F35].

73. 920 F.3d 1031, 1048 (9th Cir. 2018), *cert. denied*, 140 S.Ct. 674 (2019) (citing U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.") (emphasis added)).

74. *Id.* at 1037.

75. *Id*. at 1048.

76. 72 F.4th 868 (9th Cir. 2023), *cert. granted*, 2024 WL 133820 (2024).

77. *Id.* at 874–75.

held that the bans "prohibit Plaintiffs from engaging in activity they cannot avoid"—specifically, "conduct that was 'involuntary and inseparable from status'"—and thus violate the Eighth Amendment.[78]

Both decisions provoked vituperative and extended dissents. In *Martin,* it was objected that the nullification of the camping ban "shackles the hands of public officials trying to redress the serious societal concern of homelessness."[79] In *Grants Pass*, the many dissents included a bitter indictment of the Eighth Amendment's application as unfounded in the text of the Constitution:

> [O]n top of everything that our localities must now contend with, our court has injected itself into the mix by deploying the Eighth Amendment to impose sharp limits on what local governments can do about the pressing problem of homelessness . . . . With no mooring in the text of the Constitution, our history and traditions, or the precedent of the Supreme Court, we have taken our national founding document and used it to enact judge-made rules governing who can sit and sleep where, rules whose ill effects are felt not merely by the States, and not merely by our cities, but block by block, building by building, doorway by doorway.[80]

The Ninth Circuit denied rehearing by a vote of 14 to 13.[81]

The City of Grants Pass filed a petition for certiorari in the Supreme Court.[82] The City's petition was supported by amicus briefs from jurisdictions nationwide as well as law enforcement organizations.[83] The Court granted cert in *Grants Pass* and for the first time assessed the criminalization of homelessness.

The Court reversed the Ninth Circuit, holding that the legislation does not violate the Eighth Amendment as it criminalizes the action of camping rather than the status of being

---

78. *Id.* at 890, 899. *See also* Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 565 (2021) (arguing that cities in response to *Martin v. Boise* have become "more creative and bolder in their efforts to hide homelessness rather than solve it. In particular, *Martin* may have sparked at least three unintended and decidedly negative developments for unsheltered homeless people: (1) more frequent and less regulated encampment sweeps as a pipeline to confinement; (2) renewed interest in involuntary commitment, conservatorships, and forced treatment; and (3) efforts to round up unsheltered people into congregate FEMA-style tents or camps.").

79. *Martin*, 920 F.3d at 590 (Smith, J., dissenting from the denial of rehearing *en banc*).

80. *Grants Pass*, 74 F.4th at 945 (Bress, J., dissenting from denial of rehearing *en banc*).

81. Johnson v. City of Grants Pass, 50 F.4th 787 (9th Cir. 2022).

82. City of Grants Pass v. Johnson, 144 S. Ct. 679 (2024).

83. Docket, City of Grants Pass v. Johnson, No. 23-175, 2024 WL 133820 (U.S. Jan. 12, 2024).

homeless.[84] The Court distinguishes its 1962 decision in *Robinson v. California*, the foundation of the lower court's decision. In *Robinson*, the Court reviewed a challenge to a criminal conviction under a California statute prohibiting addiction to narcotics. The Court held that the law violated the Cruel and Unusual Punishments Clause of the Eighth Amendment by criminalizing the status of narcotic addiction.[85] The Court in *Grants Pass* reasons that public camping ordinances "like those before [them] are nothing like the law at issue in *Robinson*" because instead of criminalizing "mere status" they criminalize actions like "'occupy[ing] a campsite' on public property 'for the purpose of maintaining a temporary place to live.'"[86]

Further, the Court reasons that the punishments Grants Pass imposes for violating its anti-camping legislation are not cruel and unusual in light of the 18th century meaning of the terms.[87] Justice Gorsuch, writing for the majority, explains that in the 18th century English law "still 'formally tolerated' certain barbaric punishments like 'disemboweling, quartering, public dissection, and burning alive,' even though those practices had by then 'fallen into disuse.'"[88] "The Cruel and Unusual Punishments Clause," Gorsuch finds, "was adopted to ensure that the new Nation would never resort to any of those punishments or others like them."[89]

The Court suggests that state and local legislatures are more appropriate bodies to address homelessness questions. Local legislators, the Court posits, must have latitude to assess the causes of homelessness and develop responses to it.[90] The Court holds that the Eighth Amendment does not provide federal judges with the authority to dictate homelessness policy.[91] Responses to the problem of homelessness are best left to the American people and their elected representatives.[92]

The Supreme Court has thus now foreclosed the most sweeping constitutional challenge to anti-camping legislation to date.

---

84. *Grants Pass*, 144 S. Ct. at 2216–18.
85. *Id.* at 2218.
86. *Id.*
87. *Id.* at 2215–16.
88. *Id.* at 2215 (2024) (quoting Bucklew v. Precythe, 587 U.S. 119, 130 (2019)).
89. *Id.* at 2216.
90. *Id.* at 2220–24.
91. *Id.* at 2224.
92. *Id.*

B. First Amendment

Two forms of challenges under the First Amendment have been mounted to legislation punishing people experiencing homelessness and prohibiting activity supporting their life-sustaining efforts. First, prohibitions on begging have been successfully challenged under the free speech clause of the Amendment.[93] In *Norton v. Springfield*, the Seventh Circuit struck down an ordinance barring panhandling in a historic district of downtown Springfield, Illinois, comprising less than 2% of the city's area but containing its principal shopping, entertainment, and government zones, including the State Capitol and many state government buildings.[94] The ordinance defined panhandling as an oral request for an immediate donation of money.[95] Signs requesting money were allowed.[96] The Court reasoned that the ordinance discriminated among types of speech based on its content and was thus inconsistent with the recent First Amendment jurisprudence of the Supreme Court.[97]

Similarly, in *Rodgers v. Bryant*, the Eighth Circuit upheld an injunction against the enforcement of an Arkansas anti-loitering statute, reminiscent of anti-vagrancy codes, which makes it a crime to loiter if a person "[l]ingers or remains on a sidewalk, roadway, or public right-of-way, in a public parking lot or public transportation vehicle or facility, or on private property, for the purpose of asking for anything as charity or a gift: (A) In a harassing or threatening manner; (B) In a way likely to cause alarm to the other person; or (C) Under circumstances that create a traffic hazard or impediment."[98] As in *Norton*, the *Rodgers* Court found that the law discriminated against speech based on its content and was thus subject to strict scrutiny.[99]

---

93. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

94. Norton v. Springfield, 806 F.3d 411 (7th Cir. 2015).

95. *Id.* at 412.

96. *Id.*

97. The Supreme Court has held that "regulation of speech is content based [and thus subject to strict scrutiny] if a law applies to a particular speech because of the topic discussed *or* the idea or message expressed." Reed v. Gilbert, Ariz., 135 U.S. 2218, 2227 (2015) (emphasis added).

98. 942 F.3d 451, 454 (8th Cir. 2019).

99. *Id. See also* McCraw v. Oklahoma City, 973 F.3d 1057 (10th Cir. 2020); Cutting v. Portland, 802 F.3d 79 (1st Cir. 2015); Brown v. District of Columbia, 390 F. Supp. 3d 114 (D.D.C. 2019); Blitch v. Slidell, 260 F. Supp. 3d 656 (E.D. La. 2017); Petrello v. Manchester, 2017 WL 3972477 (D.N.H. Sept. 7, 2017); Champion v. Commonwealth, 520 S.W.3d 331 (Ky. 2017).

In addition to the free speech clause, the free exercise clause[100] has been successfully invoked to challenge city efforts to bar churches and other religious organizations from giving sanctuary to people experiencing homelessness on the property of the organization.[101] Likewise, claims that restrictions on sharing food in public violate the free exercise clause or restrict expressive conduct have also had some success in federal courts.[102]

C. Fourth Amendment

Sweeps of homeless encampments often involve both searches and seizures implicating Fourth Amendment protections.[103] Fourth Amendment protection depends on whether a search infringes on a reasonable expectation of privacy, and people experiencing homelessness have been found to have a reasonable expectation of privacy in their dwelling places, even though the dwelling is a tent or shack or makeshift structure on public property.[104] While noting that the question of trespass under anti-camping legislation is relevant to considerations of reasonable expectation of privacy protected by the Fourth Amendment, courts have nevertheless sustained challenges to seizures during sweeps, reasoning that "the property of homeless individuals is often located in the parks or under the overpasses that they consider their homes."[105]

Challenges have also been upheld against seizure of the property of people experiencing homelessness. The Ninth Circuit let stand an injunction against the seizure of belongings left temporarily on city sidewalks by people experiencing homelessness.

---

100. "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise* thereof . . . ." U.S. CONST. amend. I (emphasis added).

101. *See, e.g.*, Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir. 2002) (affirming preliminary injunction) ("Church's provision of sleeping space to homeless people was the manifestation of a sincerely held religious belief deserving of protection under the free exercise clause"); *see also* Fifth Ave. Presbyterian Church v. City of New York, 177 Fed. Appx. 198 (2d Cir. 2006), *cert. denied*, 127 U.S. 387 (2006) (affirming summary judgment in favor of the Plaintiff).

102. *See, e.g.*, Big Hart Ministries v. City of Dallas, 2013 WL 12304552 (N.D. Tex. 2013) (finding violation of Texas Religious Freedom Restoration Act); Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 11 F.4th 1266 (11th Cir. 2021) (finding violation of right to engage in expressive conduct).

103. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches and seizures*, shall not be violated . . . ." U.S. CONST. amend. IV (emphasis added).

104. *See, e.g.*, State v. Pippin, 200 Wash. App. 826, 841, 403 P.3d 907, 915 (2017) (warrantless search of a tent of a person experiencing homelessness found to be unconstitutional); State v. Wyatt, 187 Wash. App. 1004 (2015) (same).

105. *See, e.g.*, Pottinger v. Miami, 810 F. Supp. 1551, 1571 (S.D. Fla. 1992) (stating that "whether the person occupying the property is a trespasser" is highly relevant to whether the person enjoys a reasonable expectation of privacy).

In *Lavan v. Los Angeles,* the Court found, "by seizing and destroying Appellees' unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees' possessory interests in that property. No more is necessary to trigger the Fourth Amendment's reasonableness requirement."[106] Upholding the injunction, the Court concluded, "The district court was correct in concluding that even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable."[107]

D. Fourteenth Amendment Due Process

Challenges to the criminalization of homelessness under the Fourteenth Amendment advance two types of due process claims: that the legislation is unconstitutionally vague, and that it permits the taking of property without due process. Landmark precedents exist for void for vagueness claims, from a line of cases challenging anti-vagrancy and anti-loitering ordinances on due process grounds. In both *Papachristou v. City of Jacksonville*[108] and *City of Chicago v. Morales*,[109] the Supreme Court sustained such challenges. In *Papachristou*, the Court struck down a Jacksonville, Florida, ordinance that subjected vagrants to arrest and imprisonment for up to ninety days. In terms enduring from the colonial era, the ordinance defined vagrants as "[r]ogues and vagabonds . . . common drunkards . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons . . . ."[110] In *Morales*, the Court relied on *Papachristou* to strike down a Chicago loitering ordinance that prohibited alleged gang members from disobeying police commands to disperse from public places and defined loitering as "remain[ing] in any one place with no apparent purpose."[111] The Court held that the ordinance was unconstitutionally vague because it "fail[ed] to give the ordinary citizen adequate notice of what is forbidden and what is permitted."[112]

106. 693 F.3d 1022 (9th Cir. 2012).
107. *Id*. at 1030.
108. 405 U.S. 156 (1972).
109. 527 U.S. 41 (1999).
110. *Papachristou*, 405 U.S. at 156 n.1.
111. *Morales*, 527 U.S. at 47.
112. *Id.* at 60.

These void for vagueness precedents undergird recent decisions sustaining challenges to city ordinances criminalizing homelessness. In *Desertrain v. City of Los Angeles*,[113] the Ninth Circuit held unconstitutional a Los Angeles ordinance that prohibited using a vehicle on public property "as living quarters either overnight, day-by-day, or otherwise."[114] Finding the scope of the prohibited conduct unconstitutionally vague, the Court reasoned, "Plaintiffs are left guessing as to what behavior would subject them to citation and arrest by an officer."[115] In particular, it asked about activity otherwise lawful:

> Is it impermissible to eat food in a vehicle? Is it illegal to keep a sleeping bag? Canned food? Books? What about speaking on a cell phone? Or staying in the car to get out of the rain? These are all actions Plaintiffs were taking when arrested for violation of the ordinance, all of which are otherwise perfectly legal.[116]

The next important decision in the circuit following *Desertrain* was *Bloom v. City of San Diego*, which enjoined a similar San Diego ordinance on vagueness grounds.[117]

Seizure of the possessions of persons experiencing homelessness has also been successfully challenged under the Fourteenth Amendment as a taking of property that requires due process, even if the property is unattended. In *Lavan v. City of Los Angeles*,[118] plaintiffs experiencing homelessness prevailed not only under the Fourth Amendment,[119] but also in alleging that the City of Los Angeles took their belongings without due process in violation of the Fourteenth Amendment by "seizing and immediately destroying their unabandoned personal possessions, temporarily left on public sidewalks while [they] attended to necessary tasks such as eating, showering, and using restrooms."[120] Finding that the unabandoned belongings of people experiencing homelessness was "property" within the meaning of the Fourteenth Amendment, the Ninth Circuit held that the city must follow due process requirements, namely that "individuals must receive notice

113. 754 F.3d 1147 (9th Cir. 2014).

114. *Id*. at 1149.

115. *Id*. at 1155.

116. *Id*. at 1155–56.

117. Bloom v. City of San Diego, No. 3:17-cv-02324, 2018 WL 9539239 (S.D. Cal. Aug. 21, 2018). The enjoined ordinance criminalized use of a vehicle "while it is parked or standing on any street as either temporary or permanent living quarters, abode or place of habitation either overnight or day by day." SAN DIEGO, CAL., MUN. CODE § 86.0137(f) (2018).

118. 693 F.3d 1022 (9th Cir. 2012).

119. *Id*. at 1027–31.

120. *Id*. at 1024.

and an opportunity to be heard before the Government deprives them of property."[121]

This body of constitutional jurisprudence has produced a patchwork of restrictions on measures that criminalize aspects of homelessness. However, anti-camping prohibitions remain in place. The Supreme Court overturned the Ninth Circuit's decision in *Grants Pass,* holding that the prohibition on camping on public property is not cruel and unusual punishment, expanding the exercise of police power and restricting Eighth Amendment protections.[122] In light of the Court's *Grants Pass* decision, this Article proceeds to offer an alternative legal theory under fair housing laws. Fair housing litigation is critical because, unlike constitutional cases, it highlights and directly addresses the disparate impact that the criminalization of homelessness has on people of color and people with disabilities.

III. Challenges Should Be Mounted Under Fair Housing Laws

Private plaintiffs and federal agencies should challenge legislation criminalizing homelessness and its enforcement under fair housing statutes. In particular, challenges to camping bans should be mounted under the FHA and Title VI of the 1964 Civil Rights Act, and the federal government should also use regulations promulgated pursuant to its duty to affirmatively further fair housing (AFFH) to obtain information and secure commitments from state and local governments to reduce the criminalization of homelessness.[123]

In tandem, fair housing statutes afford a cause of action to people experiencing homelessness who confront punitive camping bans, and serve as a basis for the exercise of antidiscrimination oversight and enforcement by government agencies. Each route—private and public—has certain advantages and disadvantages in advancing challenges to the anti-camping legislation. Private plaintiffs can effectively pursue litigation seeking to establish new

121. *Id.* at 1032 (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993)).

122. City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

123. The Fair Housing Act imposes a duty on "[a]ll executive departments and agencies" to administer programs in a manner that affirmatively furthers the FHA's purpose of fair housing. 42 U.S.C. § 3608(d); *see also* U.S. DEP'T OF HOUS. & URB. DEV., HUD FACT SHEET AND FREQUENTLY ASKED QUESTIONS: AFFIRMATIVELY FURTHERING FAIR HOUSING, NOTICE OF PROPOSED RULEMAKING, https://www.hud.gov/sites/dfiles/FHEO/documents/AFFH%20Fact%20Sheet.pdf [https://perma.cc/K6MS-6EB7].

legal protections, whereas government agencies may be constrained by political or bureaucratic considerations. On the other hand, government agencies can enlist significantly more resources than private firms, and private advocacy organizations may be constrained by the interests of donors or other special interests.[124] Finally, the breadth of federal authority allows government agencies to bring challenges under all the fair housing laws, whereas people experiencing homelessness have no private right of action under key statutes, notably Title VI, whose antidiscrimination protections are enforceable only by government agencies.[125]

A. Private Enforcement

i. FHA

Plaintiffs experiencing homelessness should challenge the anti-camping statutes and their enforcement under the FHA. The discriminatory denial of a dwelling place is prohibited by the FHA, which makes it unlawful:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.[126]

Of course, anti-homelessness legislation does not regulate the sale or rental of a dwelling. Arguably, however, camping bans "make unavailable or deny" a dwelling to people experiencing homelessness by making it a crime for them to occupy their dwellings and by sweeping them out of those dwellings.

The first task, then, is to address the preliminary question of whether the structures inhabited by people experiencing homelessness are "dwelling[s]" within the meaning of the FHA. The next task is to examine both the disparate impact and disparate treatment claims that could be brought under the FHA.

---

124. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing the tensions that civil rights litigators faced in the context of school desegregation litigation).

125. Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that no private right of action exists to enforce agency regulations issued pursuant to Title VI § 602).

126. 42 U.S.C. § 3604(a). The 1988 amendments to the FHA extended protection to people with disabilities. *See* 42 U.S.C. § 3604(f)(1).

Applicability of the FHA: Definition of Dwelling

A threshold question that must be addressed before applying FHA theories of liability is whether the structures within which people experiencing homelessness find shelter in parks and on other public property are "dwellings" under the FHA. Section 3602(b) of the FHA provides a definition: "'Dwelling' means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families . . . ."[127] If the laws criminalizing camping are understood to force people experiencing homelessness out of any form of a "structure"—e.g., a tent or shack—which they are occupying as a "residence," it is possible to argue that those laws violate the FHA.

A fair housing case involving a homeless encampment will thus raise two definitional questions: whether a building or structure is at issue and whether it is "occupied as, or designed or intended for occupancy as, a residence" within the meaning of the FHA.[128]

The use of both words "building" and "structure" in the definition suggests that Congress intended to cover a broader category of dwelling than just traditional houses and apartments. Adopting a narrow definition would render the word "structure" superfluous, contrary to accepted canons of statutory construction.[129] Moreover, the plain meaning of the term "structure" encompasses the makeshift shelters and tents that people experiencing homeless build or place on public property. The common use of the word structure to encompass the shelters used in homeless encampments is evidenced in a study commissioned by HUD's Office of Policy Development and Research of homeless encampments that states: "A common element of all definitions of encampments is that they must have some type of built structures."[130] Emphasizing the broad meaning of the word "structures," the study continues: "These structures can take many forms, including tents, small structures on pallets, and shanties or lean-to shacks."[131]

---

127. 42 U.S.C. § 3602(b).

128. *Id*.

129. The "canon against superfluity" applies "where a competing interpretation gives effect 'to every clause and word of a statute.'" Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 106 (2011) (quoting *Duncan v. Walker,* 533 U.S. 167, 174 (2001)).

130. U.S. DEP'T OF HOUS. & URB. DEV., EXPLORING HOMELESSNESS AMONG PEOPLE LIVING IN ENCAMPMENTS AND ASSOCIATED COST 10 (2020), https://www.huduser.gov/portal/sites/default/files/pdf/Exploring-Homelessness-Among-People.pdf [https://perma.cc/F2RQ-CPZ7].

131. *Id.*

To date, no case law directly addresses the question of whether a tent, shack or similar structure would be considered a dwelling under Section 3604(a). A single brief comment makes that claim, citing only an intermediate California Court of Appeals decision holding that a tent is a building for purposes of applying the state burglary statute.[132] However, it is important to note that some of the anti-camping criminalization provisions use the same terms as the FHA. For example, Charlotte, North Carolina, defines temporary shelter as "tents, tarps, or *any type of structure* or cover that provides partial shelter from the elements"[133] in prohibiting camping by "placing any tents or a temporary shelter on city property for living accommodation purposes."[134] Likewise, Minneapolis makes it unlawful to place a "tent *or other temporary structure* . . . upon any public street or on any public or private premises or street in the city and used as a shelter or enclosure of persons and their effects for the purpose of living therein"[135]—while the meaning of "structure," used alongside the term "building," as part of the definition of a covered dwelling in the FHA, encompasses tents and other shelters within a homeless encampment.

That leaves the question of whether such a structure is "occupied as, or designed or intended for occupancy as, a residence . . . ."[136] There is a debate among legal scholars about whether formal homeless shelters are covered dwellings under the FHA.[137] But the majority of courts that have considered the question have concluded that homeless shelters are covered

132. Ariella Aboulafia, *Washington, D.C.: The Capital of Fair Hous. Act Violations*, 25 HUM. RTS. BRIEF 93, 96 (2022); People v. Wilson, No. A055665 (Cal. App. Dec. 29, 1992).

133. CHARLOTTE, N.C., CODE § 15-26(a) (emphasis added).

134. *Id.*

135. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 244.60(a) (emphasis added).

136. 42 U.S.C. § 3602(b).

137. *See* Karen Wong, *Narrowing the Definition of "Dwelling" Under the Fair Housing Act*, 56 UCLA L. REV. 1867 (2009) (arguing that the FHA's definition of dwelling should not apply to shelters and proposing a more holistic definition); *see also* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 27; WELCOME HOME: THE RISE OF TENT CITIES IN THE UNITED STATES 64 (Mar. 2014), https://homelesslaw.org/wp-content/uploads/2018/10/WelcomeHome_TentCities.pdf [https://perma.cc/3MDQ-HUYP] (asserting that encampments "may be" dwellings under the FHA); Renee Williams, *Shelters and the Definition of "Dwelling" Under the Fair Housing Act*, 43 HOUS. L. BULL. 230 (2013), https://www.nhlp.org/wp-content/uploads/Shelters-and-the-Definition-of-Dwelling-43-Hous.-L.-Bull.-225-230-31-Nov-Dec-2013.pdf [https://perma.cc/QPD3-DC6E] (analyzing the lack of consensus among courts about whether shelters are dwellings under the FHA").

dwellings.[138] HUD has also promulgated a regulation that explicitly identifies "sleeping accommodations in shelters intended for occupancy as a residence for homeless persons"[139] as an example of a "dwelling unit"[140] and "has consistently taken the position that homeless shelters are covered by the FHA . . . ."[141] HUD has identified the question of "whether the resident has anywhere else to which to return"[142] as key to determining whether a formal shelter is a covered dwelling for purposes of the FHA.[143] This framing weighs in favor of finding tents and other makeshift structures to be covered.

The primary question in the formal homeless shelter cases is whether the shelter is occupied "as a residence."[144] Most of the relevant decisions rely on the definition from *United States v. Hughes Memorial Home* that centers on the intent to return—"a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit."[145] Informal shelters in

138. *See* Hunter v. District of Columbia, 64 F. Supp. 3d 158, 173–76 (D.D.C. 2014) (concluding that a homeless parent experienced discrimination as defined by the FHA because the shelter was a "dwelling"); Defiore v. City Rescue Mission of New Castle, 995 F. Supp. 2d 413, 418–20 (W.D. Pa. 2013) (deciding that the defendant religious organization did not provide sufficient evidence that the term "dwelling" under the FHA did not cover emergency overnight shelters); Boykin v. Gray, 895 F. Supp. 2d 199, 207 (D.D.C. 2012) ("[T]he Court does not find the FHA categorically inapplicable based on its definition of the word 'dwelling.'"); Jenkins v. New York City Dep't of Homeless Servs., 643 F. Supp. 2d 507, 517–18 (S.D.N.Y. 2009) ("[P]rior to the development of any factual record, the homeless shelter to which Jenkins [Plaintiff in the case] was denied entry could well fall within the definition of dwelling under the FHA."); Woods v. Foster, 884 F. Supp. 1169, 1173–74 (N.D. Ill. 1995) (finding that a homeless shelter is a dwelling under the FHA and thus former residents could bring suit for sexual harassment in violation of the Act); *but see* Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 717 F. Supp. 2d 1101 (D. Idaho 2010) (holding that a shelter was not a "dwelling" when the shelter's guests were generally allowed to stay for a maximum of seventeen consecutive nights, were not guaranteed the same bed each night, and were not allowed to stay in the shelter during the day), *aff'd on other grounds*, 657 F.3d 988 (9th Cir. 2011).

139. 24 C.F.R. § 100.201.

140. *Id.*

141. Statement of Interest of the United States of America at 7, Defiore v. City Rescue Mission of New Castle, No. 2:12-cv-01590-CB, 995 F. Supp. 2d 413 (W.D. Pa. 2013).

142. HUD, *Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs*, 81 Fed. Reg. 64763, 64771 (Sept. 21, 2016) (citing HUD, *Final Report of HUD Review of Model Building Codes*, 65 Fed. Reg. 15740, 15746 (Mar. 23, 2000)).

143. *Id.*

144. 42 U.S.C. § 3602(b).

145. U.S. v. Hughes Memorial Home, 396 F. Supp. 544, 549 (W.D. Va. 1975) (citing WEBSTER'S THIRD NEW INT'L DICTIONARY).

homeless encampments—such as tents, no less than formal homeless shelters—meet this definition.

As with the question of whether a shelter in a homeless encampment is a "structure," there do not appear to be any decisions under the FHA addressing the issue of whether such encampment shelters are occupied as "a residence." Again, however, the plain meaning of the statutory terms strongly supports coverage. People experiencing homelessness intend to occupy such structures as residences; critically, they have nowhere "else to which to return."[146] While there is no data on the length of time people experiencing homelessness occupy such structures, the data on the lengthy duration of their experience of "unsheltered homelessness" (meaning homelessness without formal shelter), strongly suggests their residence in informal structures for extended periods of time.[147] Much like the definition of dwelling, some state and local provisions use the same phrasing as the FHA when defining "residence." For example, Corvallis, Oregon, prohibits camping on any public property and defines camping as "To set up or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary or permanent place as a *residence* to the exclusion of others."[148]

Finally, the conclusion that tents and makeshift structures occupied by people experiencing homelessness count as residences, or dwelling places, within the meaning of the FHA finds support in Fourth Amendment cases in which courts have held that individuals experiencing homelessness have a reasonable expectation of privacy in such structures. In so holding, the Washington Court of Appeals noted that a "tent allowed . . . sleeping under the comfort of a roof and enclosure."[149] The Court reasoned that "the realities of homelessness dictate that

146. Civ. Rts. Div., U.S. Dep't of Just. & U.S. Dep't of Hous. & Urb. Dev., Joint Statement of the U.S. Dep't of Hous. & Urb. Dev. and the Dep't of Just., Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings under the Fair Housing Act 4 (2013), https://www.hud.gov/sites/documents/JOINTSTATEMENT.PDF [https://perma.cc/J5M8-FQ68].

147. *See* SAMANTHA BATKO, ALYSE D. ONETO & AARON SHROYER, UNSHELTERED HOMELESSNESS: TRENDS, CHARACTERISTICS, AND HOMELESS HISTORIES, URB INST. (Dec. 2020), https://www.urban.org/sites/default/files/publication/103301/unsheltered-homelessness.pdf [https://perma.cc/T6A2-PA4E] (finding that the average length of time for people experiencing unsheltered homelessness in 2019 was seven years).

148. CORVALLIS, OR. CODE § 5.01.020(1) (emphasis added).

149. State v. Pippin, 403 P.3d 907, 915 (Wash. Ct. App. 2017)

dwelling places are often transient and precarious."[150] "The temporary nature of [the individual's] tent," the Court held, "does not undermine any privacy interest."[151] Nor should the fact that tents of people experiencing homeless are not as permanent as brick and mortar residences undermine the conclusion that such structures are dwellings under the FHA. Courts should hold that tents and other structures in homeless encampments fall within the definition of "dwelling" under the FHA.

FHA Theories of Liability

There are two possible theories of liability under the FHA: discriminatory effects and disparate treatment. Application of the discriminatory effects theory under the FHA was approved by the Supreme Court in 2015 in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*[152] and its framework was codified by HUD in May 2023.[153] Under the HUD rule, plaintiffs can challenge "policies that unnecessarily cause systemic inequality in housing, regardless of whether they were adopted with discriminatory intent."[154] Liability under the disparate treatment theory requires plaintiffs to prove intentional housing discrimination against members of a protected class.[155] Because people of color and people with disabilities are disproportionately represented among the populations living in homeless encampments, the theory of discriminatory effects offers plaintiffs strong support for challenging the anti-camping statutes under the guarantees of the FHA. Furthermore, the discretionary and complaint-driven process of disbanding homeless encampments may yield evidence supporting disparate treatment claims as well.

150. *Id*. at 915.

151. *Id*.

152. 576 U.S. 519 (2015).

153. *Id*.

154. Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD Restores "Discriminatory Effects" Rule (Mar. 17, 2023), https://www.hud.gov/press/press_releases_media_advisories/hud_no_23_054 [https://perma.cc/JDQ3-BCMP].

155. Disparate treatment by state and local governments and officials may also give rise to a claim under the Equal Protection Clause, but disparate impact claims are not possible under the Clause because the Supreme Court held that disparities in the treatment of people based on race are subject to heightened scrutiny under the Equal Protection Clause only if they are "intentional." *See* Washington v. Davis, 426 U.S. 229 (1976). Possible claims under the Equal Protection Clause are outside the scope of this Article.

Discriminatory Effects

Challenges involving discriminatory effects proceed in three phases, the burden of proof shifting between the plaintiff and the defendant. First a plaintiff must show that the "practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[156] Second, the defendant may provide a "legally sufficient justification" for the practice; as HUD's rule provides:

> (1) A legally sufficient justification exists where the challenged practice:
>
> > (i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and
> >
> > (ii) Those interests could not be served by another practice that has a less discriminatory effect.[157]

The HUD rule further provides that a legally sufficient justification "must be supported by evidence and may not be hypothetical or speculative."[158] Third, the plaintiff may demonstrate that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could "be served by another practice that has a less discriminatory effect."[159] Each prong is addressed below.

PRONG ONE: DISCRIMINATORY EFFECTS

It is possible for plaintiffs to make out a prima facie case that camping bans have a disparate impact by alleging facts at the pleading stage and producing statistical evidence thereafter demonstrating that the bans disproportionately affect people of color and people with disabilities — both of whom are protected classes under the FHA. The racial composition of people experiencing homelessness is reflected in HUD's 2023 point-in-time count:

> People who identify as Black, African American, or African, as well as Indigenous people (including Native Americans and Pacific Islanders), continue to be overrepresented among the population experiencing homelessness. People who identify as

156. 24 C.F.R. § 100.500(a).
157. 24 C.F.R. § 100.500(b).
158. *Id.*
159. 24 C.F.R. § 100.500(b)(1)(ii).

> Black made up just 13 percent of the total U.S. population and 21 percent of the U.S. population living in poverty but comprised 37 percent of all people experiencing homelessness and 50 percent of people experiencing homelessness as members of families with children.[160]

In particular, Black people are overrepresented among people experiencing unsheltered homelessness, and the number of Latinx people sleeping in public places increased from 2020 to 2022.[161]

People with disabilities are also overrepresented among the population of people experiencing homelessness. According to the Interagency Council on Homelessness, people experiencing homelessness are significantly more likely to have disabilities compared to both the U.S. population and all people living in poverty in the U.S. [162] Nearly half the people experiencing homelessness report having a disability.[163] In 2016, the percentage of people experiencing homelessness who have disabilities was significantly higher among individuals (47.3%) than among adults in families with children (21.9%), but those percentages are far higher than those for the general population (19.6% for individuals and 8.4% for adults in families with children) and for those living in poverty (30.5% for individuals and 15% for adults in families with children).[164] Disability rates are also 8% higher among children and youth experiencing homelessness compared to their peers.[165] A study commissioned by HUD in 2020 found that 96% of the residents of one Houston encampment and 98% of the residents in another had at least one disability, and that in Chicago, San Jose, and Tacoma, Washington, outreach workers reported that

160. U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF CMTY. PLANNING & DEV., 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONG., PART 1: POINT-IN TIME ESTIMATES OF HOMELESSNESS 2 (2023), https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf [https://perma.cc/L8M5-NA7X]; *see also Racial Inequalities in Homelessness, by the Numbers*, NAT'L ALL. TO END HOMELESSNESS (June 1, 2020), https://endhomelessness.org/resource/racial-inequalities-homelessness-numbers/ [https://perma.cc/YR5Q-445X].

161. Melissa Chinchilla, Joy Moses & Alex Visotzky, *Increasing Latino Homelessness: What's Happening, Why and What to Do About It*, NAT'L ALL. TO END HOMELESSNESS (Jan. 24 2023), https://endhomelessness.org/resource/increasing-latino-homelessness-whats-happening-why-and-what-to-do-about-it/ [https://perma.cc/J7Q2-UTFZ]; BATKO, *supra* note 147, at vi.

162. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, HOMELESSNESS IN AMERICA: FOCUS ON INDIVIDUAL ADULTS 6 (2018).

163. *Id*.

164. *Id*.

165. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 33.

encampment residents exhibited high rates of both mental health challenges and substance use disorders.[166]

The disparate impact on people of color and people with disabilities are linked. The myriad of factors that constitute structural racism have caused people of color to have substandard health outcomes, and a disproportionate share of people with disabilities are people of color.[167] As these linked characteristics pervade the population experiencing homelessness nationwide, the anti-camping legislation thus has a disparate impact on these two protected classes. Proof of a prima facie case in the first phase shifts the burden to the defendants.

Prong Two: Legally Sufficient Justification

If a court finds plaintiffs challenging camping bans satisfy prong one of the discriminatory effects doctrine, it then becomes possible for defendant jurisdictions to argue that the anti-camping legislation is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[168] In construing FHA protections, the Supreme Court in *Inclusive Communities Project* clarified that an "important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies."[169] This phase of the analysis "provides a defense against disparate-impact liability."[170] Here the likely justification for banning camping on public property is that the ban is necessary not only to protect the aesthetic beauty of the city's streets and parks but also to protect public health, on the grounds that people who camp in parks allegedly are unsanitary and may also urinate or defecate in public. Additionally, in claiming a valid interest in the policy, defendants may argue the bans are necessary to prevent crime.

166. U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 130, at 12.

167. *Adults with Disabilities: Ethnicity and Race*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 16, 2020), https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html [https://perma.cc/CM36-6BW3].

168. 24 C.F.R. § 100.500(b)(1) (2023). *See* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, 576 U.S. 519, 527 (2015) ("HUD has clarified that this step of the analysis 'is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related.'").

169. *Texas Dep't of Hous. & Cmty. Affairs*, 576 U.S. at 541. The Court explains that this "step of the analysis is analogous to the business necessity standard until Title VII . . . ." *Id.*

170. *Id.*

Such justifications for criminalizing camping will almost certainly be found "substantial" and "legitimate."[171] But a question of whether the anti-camping law is "necessary" to achieve the asserted purposes will remain.[172] Here, the HUD rule imposes the burden of proof on defendant jurisdictions.[173] The weight of that burden has not yet been clearly established by the Supreme Court.[174] A recent district court decision suggests that a defendant must "evaluate" and "analyze" whether the contested policy is "necessary to further" the asserted legitimate interest.[175] Conceivably, plaintiffs punished for camping on public property will have a stronger counter to empirical claims concerning crime and public health than to aesthetic justifications less susceptible to rigorous evaluation or analysis. In either case, it is likely defendant cities would succeed at this stage, where their evidentiary burden is simply to show that anti-homelessness camping laws are necessary to advance a legitimate interest. Therefore, the burden of proof returns to plaintiffs in the last stage of disparate impact analysis.

Prong Three: Less Discriminatory Means

Finally, even if a government defendant proffers a legally sufficient justification for a camping ban, people experiencing homeless swept out of an encampment would have a strong challenge based on available evidence of a less discriminatory and less expensive alternative to criminalization – provision of temporary shelter. Under HUD's codification of disparate impact standards, plaintiffs are entitled to offer proof that the

171. 24 C.F.R. § 100.500(b)(1)(i).

172. *Id.*

173. 24 C.F.R. § 100.500(c)(2).

174. Scholars are debating this point both under the FHA and under Title VII, which is the source of the three-prong test. *See* David Lurie, *Rental Home Sweet Home: The Disparate Impact Solution for Renters Evicted from Residential Foreclosures*, 111 NW. U. L. REV. 239, 266–67 (2016); Susan S. Glover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 388, 399 (1996) (advocating for an "absolute necessity" requirement and providing a four-prong test); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination,* 73 VA. L. REV. 1297, 1312–16 (1987) (calling for an intermediate standard, higher than a "legitimate nondiscriminatory reason" but short of "scientific standards of validity" (quoting McDonnell Douglas Corp. v. Green, 441 U.S. 792, 802 (1973)).

175. Fair Hous. Just. Ctr. v. Pelican Mgmt., 2023 WL 6390159 at *13–*14 (S.D.N.Y. 2023) (holding that the defendant "did not evaluate, let alone determine, that subsidy tenants contributed to those high arrears, and did not analyze the frequency with which subsidy holders did or did not pay their portion of the rent, despite having the data within the company's business records to conduct such an analysis.")

government's legitimate interests "could not be served by another practice that has a less discriminatory effect."[176] That rule also provides that the proposed alternative "must be 'equally effective' as the defendant's chosen policy at serving the defendant's interest(s), taking into account '[f]actors such as the cost or other burdens' that alternative policies would impose."[177] In *Watson v. Fort Worth Bank and Trust*, the Supreme Court held that the plaintiff's burden at the third phase of the disparate impact analysis is "not only to present potential alternatives, but to provide evidence that equally effective and less discriminatory alternatives exist."[178]

Here, in bearing that burden of proof, plaintiffs have empirical evidence that there exists a less discriminatory, alternative practice to camping bans and their enforcement—placing people experiencing homelessness into shelters or other subsidized housing instead of simply sweeping them out of encampments. Sweeps are expensive, whether resulting in incarceration of the camp's residents or not. Where sweeps do not lead to jail time, people experiencing homelessness without other forms of shelter are likely to move their encampments elsewhere, requiring another sweep, and another, and others thereafter, in a cycle without resolution of the problem of homelessness. [179] And if encampment residents are arrested, convicted, and jailed, the cost of incarceration exceeds that of providing formal shelter; moreover, the burden of a criminal record increases the likelihood of homelessness after release from incarceration.[180] It is well established that providing temporary housing—and, when necessary, mental health and substance abuse treatment—is less expensive than enforcing the criminalization measures.[181] As the

176. 24 C.F.R. § 100.500(b)(1)(ii). *See* Huntington Branch, N.A.A.C.P. v. Huntington, 844 F.2d 926, 936 (2d Cir. 1988).

177. Southwest Fair Hous. Council v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 970 (9th Cir. 2021) (internal citations omitted).

178. *Id*. at 970–71 (citing Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 997–98 (1988)).

179. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 71.

180. Stanley-Becker, *supra* note 67.

181. For surveys of the literature, s*ee* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 71–74; Lavena Staten, *Penny Wise But Pound Foolish: How Permanent Supportive Housing Can Prevent a World of Hurt* i–ii, 25–27 (Sara K. Rankin, ed., 2019); Andrew Fraieli, *The Cost to Criminalize Homelessness,* HOMELESS VOICE (May 10, 2021), https://homelessvoice.org/the-cost-to-criminalize-homelessness/ [https://perma.cc/8H59-K623]; Sara Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99 (2019). For studies of particular jurisdictions, *see, e.g.*, JOSHUA HOWARD & DAVID TRAN, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE AND SPOKANE iii (Sara K. Rankin, ed., May 2015) (examining costs in

legal director of the National Homelessness Law Center explains, "It is more expensive to keep a person experiencing homelessness who has been arrested for a nonviolent offense in pretrial detention for months (as they often can't pay bail) than to provide them with housing."[182] Investigating the costs of criminalizing homelessness, journalists have found that taxpayers pay more than three times as much to criminalize a single person experiencing homelessness than to provide supportive housing.[183] A comprehensive study conducted at the University of Seattle Law School indicates that reduced incarcerations result in savings of between $1,400 and $1,800 per person annually, and those figures do not even take into account all the costs of arrest, adjudication, and post-release probation or parole procedures.[184]

The case of Los Angeles illustrates the type of evidence available to plaintiffs in proving the availability of less discriminatory, less expensive means than enforcing anti-camping legislation. The city has spent as much as $30 million annually on sweeps of homeless encampments, incurring further expenses through incarceration aimed at preventing a return to parks and other public property as dwelling places.[185] By 2023, in Los Angeles, according to the city's Homeless Services Authority, there were roughly 23,000 informal shelters—"tents, vehicles and makeshift shelters"—occupying public property.[186] Based on nationwide data, the cost of basic shelter bed provisions is approximately $16,000 per

---

Seattle and Spokane); GREGORY A. SHINN, RETHINK HOMELESSNESS & IMPACT HOMELESSNESS, THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA: THE CURRENT CRISIS & THE ECONOMIC IMPACT OF PROVIDING SUSTAINABLE HOUSING SOLUTIONS 8 (2014), https://shnny.org/uploads/Florida-Homelessness-Report-2014.pdf [https://perma.cc/JP7Y-H4UB] (examining costs in Central Florida); SARAH B. HUNTER ET AL., EVALUATION OF HOUSING FOR HEALTH PERMANENT SUPPORTIVE HOUSING PROGRAM, RAND CORP. viii (2017) (examining costs in Los Angeles County).

182. Eric Tars, *Alternatives to Criminalization: The Role of Law Enforcement*, EOPS OFF. E-NEWSLETTER (Dec. 2015), https://cops.usdoj.gov/html/dispatch/12-2015/alternatives_to_criminalization.asp [https://perma.cc/2WST-24NW].

183. Fraieli, *supra* note 181 ("It costs taxpayers $31,065 per year to criminalize a single person suffering from homelessness — through enforcement of unconstitutional anti-panhandling laws, hostile architecture, police raids of homeless encampments, and just general harassment. The cost of providing them supportive housing — $10,051 per year."). *See* Press Release, USICH Exec. Dir. Jeff Olivet, Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness (Oct. 26, 2022), https://www.usich.gov/news-events/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address [https://perma.cc/U3ZB-K2ZM].

184. Staten, *supra* note 181, at 27.

185. *Id*. at 28 ("In 2019, Los Angeles will spend $30 million on sweeps.").

186. *Homelessness in Los Angeles County 2023*, L.A. ALMANAC, https://www.laalmanac.com/social/so14.php [https://perma.cc/36NM-VALZ].

year;[187] whereas the average cost of incarcerating a single individual is $47,057 per year.[188] Consider the differential, using homelessness in Los Angeles as a suggestive example: $16,000 x 23,000 informal shelters = $368 million versus $47,057 x 23,000 informal shelters = $1.082 billion. Adding $30 million (the cost of the sweeps of homeless encampments) equals $1.112 billion.[189] Simple math suggests that shelter provisions are less expensive than criminalization.

Providing shelter is not only less discriminatory but less expensive than enforcing anti-camping legislation. Such evidence affords plaintiffs experiencing homelessness a basis for advancing a strong case of disparate impact in violation of the FHA.

Disparate Treatment

It is notoriously difficult to acquire direct evidence of discriminatory intent. Nevertheless, along with alleging violations of the FHA using a discriminatory effects framework, it may also be possible for plaintiffs experiencing homelessness to allege intentional discrimination against members of classes protected by the FHA, challenging disparate treatment in both the adoption and enforcement of anti-camping legislation. We might speculate that such challenges could — and should — rely on circumstantial evidence drawn from complaint-driven criminalization of homeless encampments as well as discretionary policing.

First, it may be possible for plaintiffs to advance arguments that camping bans have been adopted for discriminatory purposes. As evidence for that claim, it would be important to examine statements by local residents demanding anti-camping legislation as well as statements by government officials supporting the bans. Of course, direct evidence of discriminatory intent is rare, as the Fourth Circuit has observed:

> [O]fficials acting in their official capacities seldom, if ever,

187. Dennis P. Culhane & Seongho An, *Estimated Revenue of the Nonprofit Homeless Shelter Industry in the United States: Implications for a More Comprehensive Approach to Unmet Shelter Demand*, HOUS. POL'Y DEBATE 11 (2021), https://nlihc.org/sites/default/files/Estimated-Revenue-of-the-Nonprofit-Homeless-Shelter-Industry-in-the-United-States-Implications-for-a-More-Comprehensive-Approach-to-Unmet-Shelter.pdf [https://perma.cc/Y6HC-M52C].

188. CHRISTIAN HENRICHSON, JOSHUA RINALDI & RUTH DELANEY, THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION, VERA INSTITUTE OF JUST., https://www.vera.org/publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration [https://perma.cc/FB5E-QSYD].

189. While these are certainly "back-of-the-envelope" calculations, they strongly suggest that advocates, with access to better data produced in discovery, could make a compelling empirical case on this prong in most jurisdictions.

> announce on the record that they are pursuing a particular course of action because of their desire to discriminate . . . . Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record. It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for the purposes of proving . . . discrimination in a case such as this.[190]

Therefore, gathering circumstantial evidence of a discriminatory purpose is critical as well.

The type of evidence that may be available to support disparate treatment claims is illustrated by two recent FHA cases against a South Carolina county and an Arizona city concerning the denial of zoning applications.[191] In the South Carolina case, the plaintiffs alleged public expression of racial animus, "that there was intense public opposition to the zoning application and that it was characterized by racist euphemism and derogatory undertones, not only online generally but through emails and letters sent directly to the Council."[192] Plaintiffs further alleged that racism characterized the speech of elected officials; "'[m]any of the public statements made by the Council members opposing the Zoning Application echoed the euphemistic and racially coded language used by many of the public speakers.'"[193] The Court found the evidence persuasive of discriminatory intent, holding, "after reviewing the alleged comments . . . by [County residents] and by Council members in a light most favorable to Plaintiffs, the Court finds that Plaintiffs have plausibly alleged that a discriminatory purpose was a motivating factor in Defendants' decision to deny the zoning application."[194]

In the Arizona case also, evidence of racist public expression proved persuasive to the Court in finding a violation of the FHA. The Court cited claims that "the language alleged to have been used by the neighbors opposing Plaintiffs' rezoning request was sufficiently racially charged to raise the inference of racial animus and to put the decision-making body on notice."[195] The Court found the plaintiffs "put forth evidence to support . . . allegations that

---

190. *Smith v. Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982).

191. S.C. State Conf. v. Georgetown Cnty., No. 2:22-CV-04077-BHH, 2023 WL 6317837 (D.S.C. Sept. 28, 2023); Ave. 6E Invs., LLC v. Yuma, 217 F.Supp.3d 1040 (D. Ariz. 2017).

192. *S.C. State Conf.*, 20232023 WL 6317837, at *11.

193. *Id.*

194. *Id.* at *12.

195. *Ave.* 6E *Invs.*, 217 F. Supp. 3d at 1055.

such comments were in fact made in letters and during council meetings,"[196] concluding that "evidence shows that the City Council, at least in part, based its denial on the opposing neighbors' concerns"—concerns that expressed "discriminatory animus."[197]

Evidence of discriminatory animus, as expressed by the public and/or government officials in relation to the enactment of the anti-camping laws—gleaned from the public record and freedom of information requests—likewise could offer the basis for claims about intent, supporting disparate treatment challenges to the legislation. As the Fourth Circuit found, proof of a discriminatory purpose requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[198]

Second, it may be possible for plaintiffs to argue that the camping bans are enforced more harshly or with greater frequency against members of protected classes. Mere observation of the persistence of homeless encampments—punctuated by police sweeps—suggests the prohibitions are not uniformly or consistently enforced, nor are the penalties evenly distributed. It is hardly inconceivable, as with enactment of the bans, that enforcement may be influenced by discriminatory animus, including the racial biases and racial stereotypes of neighbors and merchants in the vicinity of the encampments, for in many cities sweeps have been motivated by resident complaints.[199] Additionally, government officials, such as police officers, enforcing the ordinances are likely subject to implicit bias. As city council members in Portland, Maine, bluntly observed recently, "Unconscious bias remains firmly rooted in society's views of homelessness."[200] Evidence of that bias — both the complaints that motivate enforcement and the arrest statistics needed to support a claim of disparate treatment in enforcement— may be difficult to obtain prior to the filing of a complaint. Nevertheless, plaintiffs should consider pleading such a claim (if they have a good faith basis to do so) and pursuing that evidence in discovery. This also requires "sensitive inquiry" into available circumstantial and direct evidence.

---

196. *Id.*

197. *Id.*

198. *S.C. State Conf.*, 2023 WL 6317837, at *12.

199. *See, e.g.*, Brian Howey, *Complaints From Neighbors Now Driving City's Response to Homeless Camps*, S.F. PUB. PRESS (Feb. 20, 2020), https://www.sfpublicpress.org/complaints-from-neighbors-now-driving-citys-response-to-homeless-camps/ [https://perma.cc/LB7U-E8FK].

200. Trevorrow & Pelletier, *supra* note 30.

Using both disparate impact and disparate treatment theories, private plaintiffs should invoke the protections of the FHA to challenge the discrimination inherent in the criminalization of homelessness.

B. Public Enforcement

Federal government agencies[201] have several advantages over private plaintiffs in seeking to limit the criminalization of homelessness under fair housing law, from the power to enforce Title VI of the 1964 Civil Rights Act and the authority to request information from cities agencies receiving federal funds to greater financial resources to pursue challenges to the anti-camping legislation. Agencies including HUD, the Department of Justice, and the Interagency Council on Homelessness have expressed opposition to criminalization, but, to date, have taken little legal action against the adoption and enforcement of the measures.[202] That should change.

i. Government Agency Opposition to the Criminalization of Homelessness

The federal government is already rhetorically opposed to the criminalization of homeless. HUD, for example, has publicly announced:

> [C]riminalization policies further marginalize men and women who are experiencing homelessness, fuel inflammatory attitudes, and may even unduly restrict constitutionally protected liberties and violate our international human rights obligations. Moreover, there is ample evidence that alternatives to criminalization policies can adequately balance the needs of all parties.[203]

In 2015, HUD inserted a new question into the application for grants under its $2 billion Continuum of Care (CoC) program, "designed to promote a community-wide commitment to the goal of ending homelessness,"[204] in order to award local governments and non-profit providers higher scores and potentially increased

---

201. State agencies may also have important authority in this area, but the authority of state agencies is beyond the scope of this Article.

202. *See* sources cited *infra* notes 208, 212, and 219.

203. HUD EXCHANGE, DECRIMINALIZING HOMELESSNESS, https://www.hudexchange.info/homelessness-assistance/alternatives-to-criminalizing-homelessness/ [https://perma.cc/3UPF-7XMN] (last visited Apr. 4, 2024).

204. The CoC Program is authorized by subtitle C of title IV of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11381–11389, and the CoC Program Rules are in 24 C.F.R § 578.

funding for demonstrating their prevention of the criminalization of homelessness.[205] In 2016, the grant application again was updated with specific guidance for CoC programs on anti-criminalization; a Notice of Funding Availability (NOFA) provided for awarding additional points to CoCs that implemented specific strategies to prevent criminalization of homelessness within the CoC's geographic area. Maximum points will be awarded to CoCs that indicate specific strategies to ensure homelessness is not criminalized, such as engaging or educating local policymakers, engaging or educating law enforcement, implementing community plans, or engaging or educating businesses.[206]

Although the Trump Administration sought to remove these incentives, HUD's 2019 funding authorization statutorily required the Department to retain the prior criteria for CoC programs,[207] so the NOFA continued to state that HUD would reward CoCs that "implement specific strategies to prevent the criminalization of homelessness . . . ."[208] The anti-criminalization incentive remains in place, and indeed HUD has grown more specific in objecting to anti-camping measures such as "bans on public sleeping . . . ."[209] The 2023 NOFA reiterates, under the heading, "*Criminalization",* that additional points will be awarded if applicants "[i]mplement specific strategies to prevent the criminalization of homelessness within the CoC's geographic area,"[210] and expressly encourages dismantling anti-camping laws and establishing protections for the civil rights of people experiencing homelessness, along with promoting access to housing and services:

---

205. *See* TARS, *supra* note 34, at 3.

206. CMTY. PLAN. & DEV., U.S. DEP'T OF HOUS. & URB. DEV., NOTICE OF FUNDING AVAILABILITY (NOFA) FOR THE FISCAL YEAR (FY) 2016 CONTINUUM OF CARE PROGRAM COMPETITION 1, 35 (2016), https://www.hud.gov/sites/documents/2016COCCOMPNOFA.PDF [https://perma.cc/8RRK-NPS7].

207. The Fiscal Year (FY) 2019 funds were authorized by the Consolidated Appropriations Act of 2019 (Public Law 116-6, approved February 15, 2019). *See* CMTY. PLAN. & DEV., U.S. DEP'T OF HOUS. & URB. DEV., NOTICE OF FUNDING AVAILABILITY (NOFA) FOR THE FISCAL YEAR (FY) 2019 CONTINUUM OF CARE PROGRAM COMPETITION 1, https://files.hudexchange.info/resources/documents/FY-2019-CoC-Program-Competition-NOFA.pdf [https://perma.cc/KJ3Z-Q5G8]. *See* also TARS, *supra* note 34, at 3.

208. CMTY. PLAN. & DEV., *supra* note 207, at 64.

209. CMTY. PLAN. & DEV., U.S. DEP'T OF HOUS. & URB. DEV., NOTICE OF FUNDING AVAILABILITY (NOFA) FOR THE FISCAL YEAR (FY) 2023 CONTINUUM OF CARE PROGRAM COMPETITION AND RENEWAL OR REPLACEMENT OF YOUTH HOMELESS DEMONSTRATION GRANTS 1, 83 (2023), https://www.hud.gov/sites/dfiles/CPD/documents/FY-2023-CoC-NOFO-Publication.pdf.

210. *Id*. at 83.

> Indicate specific strategies to (1) ensure homelessness is not criminalized and (2) to reverse existing criminalization policies such as bans on public sleeping or other behaviors associated with homelessness. This includes engaging and educating local policymakers and law enforcement to reduce criminalization of homelessness and adopt protocols that uphold civil rights and prioritize connections to housing and services, implementing community plans, or engaging and educating businesses.[211]

The DOJ has taken positions similar to those of HUD, promoting "alternatives to the criminalization of homelessness."[212] In a Community Policing Dispatch, the DOJ has stated that not only does the criminalization of homelessness "do little to prevent and end homelessness but it also takes law enforcement officers away from their important work of solving crime and protecting the public."[213] According to the DOJ, enforcing criminalization is neither cost effective nor successful: "law enforcement can play an important role in creating solutions to homelessness that we know are more effective than criminalization and can even save taxpayer dollars."[214] The DOJ has also lent support to cruel and unusual punishment challenges to criminalizing homelessness by filing amicus briefs;[215] as the head of the Civil Rights Division stated, prosecuting people experiencing homelessness "for something as innocent as sleeping, when they have no safe, legal place to go, violates their constitutional rights."[216] The DOJ's Office of Community Oriented Policing Services has expressly advocated against criminalization, stating, "arresting people for performing basic life-sustaining activities like sleeping in public takes law enforcement professionals away from what they are trained to do: fight crime."[217] In seeking alternatives to incarceration, the DOJ has worked with HUD to sponsor outreach programs for people experiencing homelessness to resolve warrants for offenses such as sleeping on a sidewalk.[218]

---

211. *Id*.

212. OFF. OF PUB. AFFS., CONSTRUCTIVE ALTERNATIVES TO CRIMINALIZATION (May 29, 2012), https://www.justice.gov/archives/opa/blog/constructive-alternatives-criminalization [https://perma.cc/4JJK-H7P5].

213. ERIC TARS, ALTERNATIVES TO CRIMINALIZATION: THE ROLE OF LAW ENFORCEMENT, 8 COPS OFF. E-NEWSLETTER 12 (2015), https://cops.usdoj.gov/html/dispatch/12-2015/alternatives_to_criminalization.asp [https://perma.cc/ZV6M-KVQ6].

214. *Id*.

215. Press Release, Off. of Pub. Affs., Justice Department Files Brief to Address the Criminalization of Homelessness (Aug. 6, 2015).

216. *Id*.

217. Tars, *supra* note 182.

218. OFF. OF PUB. AFFS., *supra* note 212.

The ICH has also publicly opposed the criminalization of homelessness, collaborating with HUD and the DOJ. Under the Helping Families Save Their Homes Act adopted by Congress in 2009, the ICH is expressly charged with "develop[ing] alternatives to laws and policies that prohibit sleeping, eating, sitting, resting, or lying in public spaces when there are no suitable alternatives, result in the destruction of property belonging to people experiencing homelessness without due process, or are selectively enforced against people experiencing homelessness."[219] A 2012 ICH report, *Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness*,[220] remains a leading guide for homeless rights advocates.[221] A 2023 ICH report, *From Evidence to Action: A Federal Homelessness Research Agenda*, flags "an increase in harmful and dangerous local and state laws that criminalize homelessness," noting the need to examine the "impact of anti-camping laws" and "effects of encampment sweeps."[222]

Federal agencies have the means to turn this agenda into action and, importantly, some of those means can *only* be employed by the government. Those means should be used in legal challenges to the anti-camping laws and encampment sweeps in order to reverse the criminalization of homelessness.

ii. Federal Government Enforcement Actions

HUD and DOJ Enforcement of the FHA

In challenging the enactment and enforcement of the anti-camping legislation, HUD has authority to initiate a complaint and, after investigating, make a finding of discrimination under the FHA that can result in the filing of a lawsuit by the DOJ. The DOJ can also initiate litigation to address a pattern of practice of housing discrimination.[223] That authority should be used to pursue theories of both discriminatory effects and disparate treatment under the

219. Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, § 1004(a)(12), 123 Stat. 1668 (May 20, 2009).

220. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS (2012), https://www.usich.gov/guidance-reports-data/federal-guidance-resources/searching-out-solutions-constructive-alternatives [https://perma.cc/B5DX-D5X9].

221. TARS, *supra* note 34.

222. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, FROM EVIDENCE TO ACTION: A FEDERAL HOMELESSNESS RESEARCH AGENDA, 2024-2028 13 (Nov. 2023), https://www.usich.gov/sites/default/files/document/From%20Evidence%20to%20Action_A%20Federal%20Homelessness%20Research%20Agenda%20November%202023.pdf [https://perma.cc/BK22-LST5].

223. 29 U.S.C. §§ 3610, 3613, 3614.

FHA, as addressed above. In tandem, HUD should file complaints, and the DOJ should initiate litigation against local jurisdictions similar to the cases brought by both departments in challenging exclusionary zoning ordinances and discriminatory nuisance and crime-free housing ordinances.[224]

In addition, under the FHA, all federal departments and agencies have a duty to administer their programs "in a manner affirmatively to further the purposes of [the Act]" and to "cooperate with the Secretary [of HUD] to further such purposes."[225] The FHA imposes a special duty on HUD to affirmatively further the purposes of the FHA—referred to as a duty to affirmatively further fair housing (AFFH).[226] HUD should fulfill this duty in a manner that minimizes the discriminatory impact of state and local criminalization laws.

HUD can rely on a rule it proposed in early 2023 to implement the AFFH, once it becomes final, to induce cities and states to eliminate laws and ordinances criminalizing homelessness. The rule is modeled on HUD's 2015 AFFH rule,[227] which required grantees receiving specified forms of HUD funding to assess the existence of fair housing within their borders and set goals to affirmatively further fair housing. While the 2015 rule was repealed in 2020, under the Trump administration, the proposed AFFH rule restores its provisions,[228] under which, when finalized, jurisdictions should be required to assess any policies that tend to criminalize homelessness—determining, in particular, whether they have a disparate impact on protected classes and to set goals to eliminate that impact under their mandatory "Equity Plans."[229] Because the rule will require recipients of HUD funds to indicate "which

224. *See* Joint Statement of the Dep't of Hous. & Urb. Dev. and the Dep't of Just., State and Local Land Use Laws and Practices and the Application of the Fair Hous. Act (Nov. 10, 2016); HUD Off. of the Gen. Couns., Guidance on Application of the Fair Hous. Act Standards to the Enforcement of Local Nuisance and Crime-Free Hous. Ordinances Against Victims of Domestic Violence, Other Crime Victims, & Others Who Require Police or Emergency Services (Sept. 13, 2016).

225. 42 U.S.C. § 3608(d).

226. 42 U.S.C. § 3608(e); U.S. DEP'T OF HOUS. AND URB. DEV., FACT SHEET: THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING, https://www.hud.gov/sites/dfiles/FHEO/documents/AFFH-Fact-Sheet.pdf [https://perma.cc/5P5U-DP6K].

227. 80 Fed. Reg. 42352 (July 16, 2015).

228. 88 Fed. Reg. 8516 (Feb. 9, 2023). *See*, in particular, proposed § 5.154.

229. The rule requires an Equity Plan that assesses, among other things, "investments in infrastructure; and (vii) Discrimination or violations of civil rights law or regulations related to housing or access to community assets based on race, color, national origin, religion, sex, familial status, and disability." 88 Fed. Reg. 8562 (proposed § 5.154(c)(3)(vii)) (Feb. 9, 2023).

protected class groups experience significant disparities in access to . . . community assets"[230]—and defines community assets to include facilities providing "a desirable environment" and meeting "the needs of residents throughout the community"[231]—community assets should be broadly construed to include parks and other public spaces in order to permit HUD to gather data on the disparate impact of criminalization measures as a possible predicate to further enforcement action.

HUD and DOJ Enforcement of Title VI

HUD and DOJ should also explore using Title VI of the 1964 Civil Rights Act to combat the criminalization of homelessness. Enforceable only by federal funding agencies, Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[232]

Because jurisdictions with laws that criminalize homelessness almost certainly receive federal funds, a challenge to their legislation, such as camping bans, is possible under Title VI.[233] The same disparate impact and disparate treatment theories that can be pursued under the FHA, as addressed above, also can be pursued under Title VI in relation to a "program or activity receiving Federal financial assistance."[234] In the wake of *Alexander v. Sandoval*,[235] there is no implied private right of action under Title VI, [236] and thus only federal agencies, like HUD and the DOJ, may bring challenges to the criminalization statutes under Title VI.

To implicate Title VI, it is not sufficient that a jurisdiction with a camping ban receive federal funds to support any of its programs. Rather, to trigger a Title VI challenge, the discrimination must

230. 88 Fed. Reg. 8563 (proposed § 5.154(d)(4)(i)) (Feb. 9, 2023).

231. 88 Fed. Reg. 8558 (proposed § 5.152) (Feb. 9, 2023).

232. 42 U.S.C. § 2000d.

233. U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL, § V(A), https://www.justice.gov/media/1121301/dl?inline [https://perma.cc/8SUZ-5NWG].

234. *See id*. Similar action is possible on behalf of people with disabilities under Section 504 of the Rehabilitation Act as it uses identical language concerning "any program or activity," but protects only "handicapped individual[s]." 29 U.S.C. § 794. Disparate impact is actionable under the Rehabilitation Act. *See, e.g.,* Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983). Moreover, the Act expressly creates a private right of action unlike Title VI. 29 U.S.C. § 794a.

235. 532 U.S. 275 (2001).

236. *See* South Camden Citizens in Action v. N.J. Dep't of Env't Prot., 145 F. Supp. 2d 446 at 508–09 (D.N.J. 2001) (citing Alexander v. Sandoval, 532 U.S. 275 (2001)).

occur in the "program or activity" that receives the federal support.[237] A public program or activity covered by Title VI includes "a department, agency, special purpose district, or other instrumentality of a State or of a local government."[238] Yet within such public programs and activities, a particular targeted unit allegedly engaging in discrimination need not be the direct recipient of federal funds to implicate Title VI. The DOJ Title VI Legal Manual explains the meaning of "program or activity" with regard to the prohibition of discrimination in public institutions:

> [T]he 'program or activity' that Title VI covers encompasses the entire institution and not just the part of the institution that receives federal financial assistance. 42 U.S.C. § 2000d-4a. Moreover, the part of the program or activity that receives assistance can be, and often is, distinct from the part that engages in the allegedly discriminatory conduct. [239]

Therefore, Title VI would not be implicated where certain agencies or departments receive federal funds while others adopt or enforce criminalization measures. Rather, under Title VI, a single department or agency — a "program or activity"—must be identified that both receives federal funds and has adopted or enforces a criminalization measure, even if separate subunits of the department or agency satisfy those two requirements.

Two types of public institutions are ripe for investigation for the purpose of Title VI challenges to the camping bans central to the criminalization of homelessness: police departments and housing agencies.

Police Departments

In all likelihood, a police department that enforces homelessness criminalization measures receives federal funding for various purposes. Such a department would constitute a "program or activity" covered by Title VI prohibitions against discrimination, even in cases where the federal assistance supports a subunit not directly involved in the alleged discriminatory conduct.[240] The DOJ would be empowered therefore to withdraw funding from that police department under 42 U.S.C. § 2000d-1(1). The DOJ would also have authority to bring civil actions seeking injunctions against enforcement of specific homelessness criminalization measures under 42 U.S.C. § 2000d-7(a), with support for such Title VI

237. *See* 42 U.S.C. § 2000d.

238. U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL*, supra* note 233, § V at 24.

239. *Id.* at 23.

240. 42 U.S.C. § 2000d, 2000d-4(a)(1). *See also* U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL, *supra* note 233, at 23–27.

challenges resting on disparate impact and/or disparate treatment theories of liability.

Furthermore, a federal funding agency, such as the DOJ, has authority under Title VI to initiate affirmative compliance review ensuring non-discrimination by recipients of federal funds.[241] Exercise of that federal authority should be directed against police departments that enforce camping bans through sweeps of homeless encampments whose punitive force falls disproportionately on people of color and people of disabilities.

Housing Agencies

It is also likely that state and local governments that have adopted laws that criminalize homelessness have housing agencies that receive federal funding from HUD.[242] Under Title VI, claims that housing agencies discriminate in promulgating or enforcing criminalization measures may be harder to prove than similar challenges against police departments. However, persuasive arguments could be made that in failing to provide sufficient shelter services, HUD-funded housing agencies drive people experiencing homelessness into encampments, without other alternatives, and thereby expose their life-sustaining activities, such as sleeping, to criminal prosecution and punishment.

Additionally, because HUD funds Public Housing Authorities' (PHAs) police,[243] if PHA police belong to police departments that enforce the criminalization of homelessness, there may be a basis for HUD to investigate and enforce Title VI against police departments that target people experiencing homelessness for violating camping bans.

Finally, as arms of the federal government, both the DOJ and HUD have authority under Title VI to make pre-litigation requests for information from public bodies receiving federal funds, where there is reason to suspect a Title VI violation because of disparate treatment in the adoption or enforcement of a camping ban and/or because of the disparate impact of the ban. Such evidence may prove probative in undergirding Title VI challenges.

---

241. U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL, *supra* note 233, at 5.

242. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1.

243. U.S. DEP'T OF HOUS. AND URB. DEV., PUB. AND INDIAN HOUS. NOTICE PIH 95-58 (PHA), GUIDELINES FOR CREATING, IMPLEMENTING AND MANAGING PUB. HOUS. AUTHORITY POLICE DEPARTMENTS IN PUB. HOUS. AUTHORITIES (1995), https://www.hud.gov/program_offices/administration/hudclips/notices/pih/95pihnotices [https://perma.cc/62XG-ATB3].

The breadth of federal authority—the full deployment of the resources of the DOJ and HUD to enforce fair housing law—has the potential to afford people experiencing homelessness essential support in challenging the punishment of their life-sustaining activities. In keeping with the guidance of the 2023 ICH report, *From Evidence to Action*, both public and private action is needed to reverse the criminalization of homelessness.[244]

Conclusion

The point of this exploration of fair housing law is to show how its antidiscrimination protections provide a basis for defending the rights of people experiencing homelessness through challenges to the enactment and enforcement of laws that criminalize camping on public property. This Article steps beyond simply criticizing the spate of anti-homelessness criminal measures as harmful and dangerous[245] to address how the harms disproportionately affect people of color and people with disabilities. And it steps beyond calls for alternatives to the criminalization of homelessness[246] to specify how fair housing law — the Fair Housing Act, with the duty it imposes on federal agencies to affirmatively further fair housing, and Title VI of the Civil Rights Act — presents private plaintiffs and agencies of the federal government means to challenge camping bans and police sweeps of homeless encampments and thereby promote humane and nondiscriminatory alternatives.

The public record does not reveal what happened to Roscoe Billy Ray Bradley, Jr., a man experiencing homelessness who lived under a California freeway, claiming in response to a Culver City ordinance that his tent was his property and he was "not going anywhere."[247] But the 2023 Culver City measure criminalizes camping in public places, exemplifying the tide of anti-homelessness legislation sweeping the country.[248] It bars people experiencing homelessness from living in public parks, passageways, alleyways, rights-of-way, streets, sidewalks, greenbelts, medians, and parking lots.[249] Like other bans nationwide, it broadly defines camping to include: "use of, settling, fixing in place, setting up, storing, locating, or leaving behind in a prohibited public place any or a combination of the following: tents,

244. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 222, at 13.
245. *Id*.
246. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 220.
247. Lozano, *supra* note 2.
248. CULVER CITY, CAL., MUN. CODE § 9.10.700.
249. *Id*.

huts, other temporary physical shelters, cots, beds, or hammocks."[250] Police presence is anticipated during sweeps, which the city terms "cleanups."[251]

Because people experiencing homelessness are disproportionately people of color and people with disabilities—both protected classes under fair housing law—two possible avenues of challenge to the anti-camping measures exist under the guarantees of fair housing laws: claims of disparate impact and claims of disparate treatment. As a person of color, Roscoe Billy Ray Bradley, Jr. could potentially find protection through both. As a private plaintiff, he could find protection under the FHA, but under Title VI, which affords no private right of action, only federal agencies, such as HUD or the DOJ, could proceed on his behalf.

Challenges under fair housing law offer a novel approach to reversing the criminalization of homelessness. Punitive camping bans raise profound concerns about the treatment of vulnerable populations, making a crime of life-sustaining efforts by people experiencing homeless who are disproportionately people of color and people with disabilities. How courts will view claims under fair housing law is uncertain, but pursuit of those claims is necessary to confront lawmakers with evidence of the normative harms and fiscal costs of criminalizing homelessness.

---

250. *Id.*

251. *Culver City Approves Anti-Camping Ban*, FOX11 (Feb. 14, 2023), https://www.foxla.com/news/culver-city-bans-camping-in-public-places [https://perma.cc/7HJT-A6YC]. The Culver City ordinance was adopted in the wake of the declaration of a Homeless State of Emergency in Los Angeles, on the grounds that the crisis would migrate to nearby suburbs like adjacent Culver City. Gillian Moran Perez & Jessica P. Oglivie, *Culver City Votes to Ban Public Camping, Targeting Street Encampments*, LAIST (Feb. 14, 2023), https://laist.com/news/culver-city-will-vote-on-anti-camping-ban-targeting-homeless-encampments [https://perma.cc/9EYE-MHTM].