

LECTURE

ARE POLICE THE KEY TO PUBLIC SAFETY?: THE CASE OF THE UNHOUSED

Barry Friedman*

ABSTRACT

We as a nation have to think deeply about what it means for a community to be safe, and what role the police play (or do not play) in achieving that safety. We have conflated, if not entirely confused, two very different things. One is the desire to be safe, and how society can assist with safety, even for the most marginalized or least well-off among us. The other is the role of the police. Contrary to what many seem to think, the police are not a one-size-fits-all provider of public safety.

In this paper, I discuss this issue in the context of one of the most intractable and challenging problems in the United States: that of unhoused individuals living among us. Rather than doing what we are able to do to help them find their way to safety, we criminalize their conduct. This does not solve the problem—indeed it creates a revolving door of street to jail to street. We reach this result because we have failed to utilize cost-benefit analysis around public safety issues and are especially neglectful of social costs, and because we also have failed to have a candid conversation about what public safety means and how to achieve it. This paper suggests alternative approaches to public safety, instead of relying so heavily on the police. One of them is an untried idea of creating an entirely new set of first responders—individuals holistically trained, including in social services, mediation, and much else—to deal effectively with social needs they encounter on the streets.

INTRODUCTION	1598
I. POLICING: AN ODYSSEY	1601
II. HOMELESSNESS	1606
A. What Police Do	1607

* Jacob D. Fuchsberg Professor of Law, Affiliated Professor of Politics, and Director of the Policing Project, New York University School of Law. This Article was the basis for a lecture at Arizona State University School of Law delivered on November 15, 2021. I am grateful to the Academy for Justice at ASU for the invitation to speak, and for the help I received along the way. Special thanks to the commentators, Brandon del Pozo, Trevor Gardner, Ben McJunkin, Maria Ponomarenko, for participating, and for input. My research assistants rendered much valuable assistance: Tim Duncheon, Anaika Miller, Marigny Nevitt, Yelena Niazyan. This work was produced with generous support of the Filomen D’Agostino and Max E. Greenberg Research Fund at New York University School of Law.

B. The Unhoused Population 1608

III. CRIMINALIZATION 1612

IV. THE POLICE 1618

V. COST-BENEFIT ANALYSIS 1624

VI. PUBLIC SAFETY 1630

A. The Duty of Protection 1630

B. An Affirmative Obligation to Help the Homeless 1634

VII. TAKEAWAYS 1637

A. The Mistakes We Make 1637

B. Transforming First Response 1638

CONCLUSION 1640

INTRODUCTION

The entire world has lived through a year or more of crises. The pandemic caused all of us to interrupt life as we knew it to fight off a highly contagious and deadly disease. Dealing with the pandemic took our eye off another crisis that is equally dire and catching up to us all too quickly: the change in the planet’s climate, which promises great displacement of masses of people and ultimately may threaten our very existence as a species.

Here in the United States, we have endured yet another crisis: over-policing and public safety. Concerns about policing have been with us for decades.¹ These concerns took on a certain urgency after Michael Brown was killed in Ferguson, Missouri, and in the wake of other high-profile police shootings, particularly those involving Black and Brown individuals.² Then, relatively early in the pandemic, Officer Derek Chauvin of the Minneapolis Police Department kept a knee on the back of George Floyd as Floyd pleaded for his life, could not breathe, and ultimately died.³ Floyd’s killing was callous; many officers stood nearby as it happened, a crowd watched it all on the street and some videotaped it for the public to see.⁴ The result was months of protests, calls to defund or even abolish the police, and intense discussions over the future of policing and the nature of public safety.⁵

1. See generally Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG. (May 29, 2020), <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/>; Linda Poon & Marie Patino, *CityLab University: A Timeline of U.S. Police Protests*, BLOOMBERG CITYLAB (Aug. 28, 2020, 4:57 PM), <https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality> (providing an overview of significant protests against police brutality from the 1990s through 2020).

2. See, e.g., Gene Demby, *The Butterfly Effects of Ferguson*, NPR (Aug. 11, 2016, 3:00 PM), <https://www.npr.org/sections/codeswitch/2016/08/11/489494015/the-butterfly-effects-of-ferguson> (detailing how protests against police violence, and media coverage of these protests, changed after Michael Brown was shot and killed).

3. See Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (describing the circumstances leading up to George Floyd’s murder).

4. See *id.*

5. See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>; BLACK LIVES MATTER, 2020 IMPACT REPORT 32

Just as it seemed that real reform of policing might happen, and even in an enduring way, gun violence and the homicide rate shot up, particularly in America's inner cities.⁶ Fear of crime became a leading news story, as it had not been since the end of the 1960s.⁷ Suddenly, the debate began to shift yet again, with many calling for the sort of get-tough measures that led policing into crisis in the first place. People in the United States now are experiencing whiplash over the subject.⁸ The quickly swinging pendulum—from getting policing under control, to getting violence under control—has left many people unsure what to think. It is the nature of pendulums that they swing, and sometimes to extremes; with regard to the public debate over policing (as with perhaps much else) that is unfortunate. There are answers to the questions that plague us, and they are not going to be found by constantly changing our approach in response to recent events. Rather, the issues we face require study, reflection, following the evidence where it leads, and perhaps a willingness to think outside the box.

We as a nation have to think deeply about what it means for a community to be safe and what role the police play (or do not play) in achieving that safety. We have conflated, if not entirely confused, two very different things. One is the desire to be safe, and how society can assist with safety, even for the most marginalized or least well-off among us. The other is the role of the police. Contrary to what many seem to think, the police are not a one-size-fits-all provider of public safety. Rather, police have, and always have had, a very specific set of roles: maintaining order, keeping the peace, and enforcing the law.⁹ Whatever one may think about

(2021), <https://blacklivesmatter.com/2020-impact-report/> (“Our ultimate goal is abolition. The system cannot be reformed.”); *id.* at 35 (“[W]hen George Floyd was murdered, . . . it was a breaking point for people everywhere. . . . In times of stress and hardship, we turned to each other. Because we know that *we keep us safe*.”).

6. Neil MacFarquhar, *With Homicides Rising, Cities Brace for a Violent Summer*, N.Y. TIMES (June 1, 2021), <https://www.nytimes.com/2021/06/01/us/shootings-in-us.html> (noting that homicide rates in large cities across the country increased an average of thirty percent in 2020 and an additional twenty-four percent at the beginning of 2021).

7. See Susan Page & Ella Lee, *Exclusive: In Poll, Only 1 in 5 Say Police Treat People Equally Even as Worries About Crime Surge*, USA TODAY (July 8, 2021, 7:08 AM), <https://www.usatoday.com/story/news/politics/2021/07/08/poll-worries-crime-most-say-police-dont-treat-all-equally/7880911002/> (finding that crime was the top concern among poll respondents); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 276 (2009) (describing how the public's concern about rising crime paved the way for Richard Nixon's presidential win in 1968); PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* 123–25 (2018) (noting that “public anxiety about urban violence” in the 1960s led President Lyndon Johnson to toughen his stance on crime, demonstrated by his signing of the Law Enforcement Assistance Act in 1965 and his refusal to acknowledge the Kerner Commission's report about causes of urban unrest).

8. See Page & Lee, *supra* note 7 (finding that while crime was the top concern among poll respondents, the expected call for tough-on-crime policies “has been tempered by broad concerns about law enforcement tactics and the equality of the criminal justice system”).

9. See ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 17 (1971) (“Though superficially their role is to preserve the peace by coping with any individuals in the large aggregation who violate laws, they must be prepared to restore order as well.”); see also EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 36 (1970) (describing the capacity to use force as the core of the police role).

these functions,¹⁰ they are never going to be the sole—nor perhaps even the primary—mechanisms of achieving public safety.

Rather than discussing these issues in the abstract, I do so through the lens of one of the most intractable and challenging problems in the United States: the unhoused individuals living among us. As will be evident if it is not already, the situation of unhoused individuals—whom many refer to as “homeless”—is a public safety issue. And, like many public safety issues, it has two sides. People who are housed view those who are homeless skeptically and often as a nuisance or a threat. But these individuals are not safe. Rather than try to help them find their way to safety, we criminalize their conduct and use the police to enforce those criminal laws.¹¹ Because the plight of, and problems attributed to, unhoused people both seem intractable and arouse great passions, I will use them to reflect on and perhaps reconsider our views about the relationship between public safety and policing.

My ultimate claim is that policing as we know it is not achieving public safety and that it is time to rethink fundamentally the role of the police as society’s first responders. Part of the reason police are saddled with so many social problems is because, as the police themselves point out frequently, they are the only ones who respond around the clock, all days of the week and year.¹² It is true that society needs this sort of first responder. What I want to suggest, however, is that this necessity for first responders does not necessarily imply a need for policing as we know it. If we are willing to think past what is familiar and instead focus on what is apt to be successful, we might consider an entirely new form of first responder, one trained holistically to actually address societal problems, rather than use force and the criminal law.

In considering the question of public safety, I want to invite you to think about who the “culprit” in the story about to unfold is. There are many, many reasons to be fed up with, and angry about, American policing, and to want to change it. The reasons have been all too evident in recent years. But, still, the culprit here is not the police—or at least not solely the police. Rather, it is all of us. The sorts of problems I discuss were not brought upon us by the police; the police have been left to deal with them, because our elected representatives have abdicated their responsibilities. It is time for that to change.

10. Policing has had a troubled history, beginning with slave patrols in the South, and including suppressing labor and civil rights movements. *See, e.g.,* Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> (describing the role police played in enforcing Jim Crow laws, busting coal strikes, and killing Native Americans).

11. *See infra* Part III.

12. *See* CHARLES W. DEAN, RICHARD LUMB, KEVIN PROCTOR & JAMES KLOPOVIC, SOCIAL WORK AND LAW ENFORCEMENT PARTNERSHIPS: A SUMMONS TO THE VILLAGE 12 (2000); Tommy Landau, *Policing and Security in Four Remote Aboriginal Communities: A Challenge to Coercive Models of Police Work*, 38 CAN. J. CRIMINOLOGY 1, 5 (1996); Sylvester Amara Lamin & Consoler Teboh, *Police Social Work and Community Policing*, COGENT SOC. SCIS., July 25, 2016, at 1, 9.

I begin by describing my own odyssey around policing and policing reform, because I am relatively certain that upon hearing it, lawyers and budding lawyers alike will find some of it familiar. And in doing so, I hope you begin to question what the deep-seated problem with policing actually is. I am going to ask who the police are and what they do, and address a common misconception that the police are “crime-fighters.” With the stage thus set, I turn to the problem of homelessness in the United States, and how we have dealt with it—largely through criminalization. That is where the police come in.

Next, I point to two failings of democratic governance around policing, both of which are exemplified by our approach to the unhoused. The first is a failure to employ cost-benefit analysis to analyze what achieving public safety should look like. The second is a failure to talk honestly about what public safety even means. These two come together as explanations for our criminalization of the unhoused and our police enforcement against them.

Finally, I want to introduce a new idea about the way forward. We live in a world in which “reforming” the police has been juxtaposed with “defunding” or “abolishing” them.¹³ I want to suggest two other verbs: “transforming” and “replacing.” Like it or not, the police perform some functions that are necessary in a large and complex society. But the institution of policing, which has changed remarkably little in 150 years, may not be suited to performing those functions well in our twenty-first century world. I offer an alternative, one that is both remote from our current consciousness and yet (I hope) will seem extremely obvious. That solution is a set of holistically trained first responders who are incentivized to treat the use of force and law enforcement as very last resorts, and who are taught and encouraged to address social problems in a lasting way.

I. POLICING: AN ODYSSEY

The argument I am about to make did not come easily to me, in part because I began with a misinformed set of prior beliefs. I want to tell you about both my misconceptions and my realizations, as I have written about and worked around policing. I am sure my own path is not unique, and learning how I traveled it may help the reader reach a similar destination.

Relatively late in my career as a constitutional law professor, I started to think and write—and ultimately to work in the “real world”—on policing issues. Before that, my scholarship was focused on judges and judicial review. What ties these

13. See, e.g., BLACK LIVES MATTER, *supra* note 5, at 32 (“Our ultimate goal is abolition. The system cannot be reformed.”); see also Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 464–65 (2018) (arguing that police reforms typically “do not address the underlying structural issues” and instead “increase resources and legitimacy to the institutions that maintain inequality and systematic suffering”); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016) (“Reform of police departments can save lives; when successful, it causes the police to kill fewer people. . . . [H]owever, attempts to reform the system might actually hinder the more substantial transformation American criminal justice needs.”).

subjects together is the idea of accountability. Both judges and police suffer from a lack of accountability.¹⁴

Living in the United States these last few years, one can hardly have missed the fact that something is seriously awry with policing. For some, consciousness of the problem might have started with the fact of widespread use of stop and frisk in cities like New York, Chicago, and Philadelphia, or racial profiling in automobile stops throughout the country, or the persistent racial disparity that surrounds policing generally.¹⁵ Maybe you focused on Edward Snowden's revelations of widespread spying by the government in the name of national security,¹⁶ an example of the widespread surveillance the government often conducts against people for whom there is no suspicion of wrongdoing whatsoever.¹⁷ Or for some it might

14. See generally Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS (June 30, 2020, 12:00 GMT), <https://www.reuters.com/investigates/special-report/usa-judges-misconduct/> (describing cases of judicial misconduct and the difficulties associated with holding judges accountable, including a lack of publicly available information about instances of misconduct and weak judicial oversight commissions); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1843–55 (2015) (noting that policing is rarely subject to typical democratic accountability mechanisms, such as legislative directives or cost-benefit analyses of department policies).

15. See, e.g., Ashley Southall & Michael Gold, *Why 'Stop-and-Frisk' Inflamed Black and Hispanic Neighborhoods*, N.Y. TIMES (Nov. 17, 2019), <https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html> (discussing the use of stop and frisk in New York City); Greg Holston, *Stop and Frisk Still Plagues Philadelphia*, PHILA. INQUIRER (Jan. 3, 2019), <https://www.inquirer.com/opinion/commentary/stop-and-frisk-black-men-philadelphia-police-20190103.html> (discussing use of stop and frisk in Philadelphia); A.D. Quig & Sarah Zimmerman, *'Stop and Frisk' Still Disproportionately Impacting Black Chicagoans: Study*, CRAIN'S CHI. BUS. (Oct. 24, 2019, 2:41 PM), <https://www.chicagobusiness.com/government/stop-and-frisk-still-disproportionately-impacting-black-chicagoans-study> (discussing continuing racial disparity in stop and frisk in Chicago); Erik Ortiz, *Inside 100 Million Police Traffic Stops: New Evidence of Racial Bias*, NBC NEWS (Mar. 13, 2019, 1:00 PM), <https://www.nbcnews.com/news/us-news/inside-100-million-police-traffic-stops-new-evidence-racial-bias-n980556> (reporting on finding by the Stanford Open Policing Project, which examined nearly 100 million traffic stops conducted from 2011 to 2017 across 21 state patrol agencies and found that Black and Latino drivers were more likely to be stopped, despite less evidence of wrongdoing against them); SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 2–6 (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> (discussing racial disparity in policing and its potential causes).

16. See generally Edward Snowden: *Leaks that Exposed US Spy Programme*, BBC NEWS (Jan. 17, 2014), <https://www.bbc.com/news/world-us-canada-23123964>.

17. See, e.g., Jennifer Valentino-DeVries, *How the Police Use Facial Recognition, and Where It Falls Short*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/technology/facial-recognition-police.html> (discussing controversies surrounding use of facial recognition technology in Florida); Vera Eidelman & Jay Stanley, *Rapid DNA Machines in Police Departments Need Regulation*, AM. C.L. UNION (Oct. 2, 2019, 3:45 PM), <https://www.aclu.org/blog/privacy-technology/medical-and-genetic-privacy/rapid-dna-machines-police-departments-need> (outlining concerns related to unregulated use of rapid DNA technology); ÁNGEL DÍAZ, BRENNAN CTR. FOR JUST., NEW YORK CITY POLICE DEPARTMENT SURVEILLANCE TECHNOLOGY (Oct. 7, 2019), <https://www.brennancenter.org/our-work/research-reports/new-york-city-police-department-surveillance-technology> (“The New York Police Department (NYPD) . . . has purchased and used new surveillance technologies while attempting to keep the public and the City Council in the dark.”); Tanvi Misra, *Who's Tracking Your License Plate?*, BLOOMBERG CITYLAB (Dec. 6, 2018, 9:31 AM), <https://www.citylab.com/equity/2018/12/automated-license-plate-readers-privacy-data-security-police/576904> (noting that of the 2.5 billion

have been the events in Ferguson, Missouri following the shooting of Michael Brown and the many incidents of police shootings that followed.¹⁸ All of this, of course, occurred before the events of the last year. And far too much of what goes wrong with policing falls unequally on Black and Brown communities, indigenous peoples, the marginalized and the vulnerable.

These problems are the “collateral consequences” of policing. They are not the core mission of what the police *do*, but rather the hugely consequential and often tragic impacts on people and society as the police pursue their mission.¹⁹ These collateral consequences result from the assignment of the state’s monopoly on coercive authority and the use of force to the police. They are the sorts of things lawyers focus on, often by trying to find recourse in legal regimes like the Fourth Amendment. I, too, once believed the way out was pursuing common law, statutory, and constitutional remedies against officers who did wrong.

My first realization was that the accountability mechanisms we bring to these collateral consequences are radically incomplete, if not seriously misguided. This realization caused me to write a book, *Unwarranted: Policing Without Permission*. Note the subtitle, for there is the clue to what I first understood about the failings of accountability around policing.

Whenever things go wrong in policing, people—especially lawyers—look to a familiar set of after-the-fact remedies:²⁰ Civil rights suits against police departments and cities or individual officers (including the debate over qualified immunity), criminal prosecutions of cops, federal civil rights investigations and federal monitors, civilian review boards, and so on. What is notable is how many people

license plates scanned by 173 law enforcement agencies in 2016 and 2017, 99.5 percent were not associated with criminal activity).

18. See, e.g., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> (summarizing events surrounding and following the shooting of Michael Brown); Krishnadev Calamur, *S.C. Dashcam Video: A Broken Tail Light, A Routine Traffic Stop, A Fleeing Man*, NPR (Apr. 9, 2015, 5:55 PM), <https://www.npr.org/sections/thetwo-way/2015/04/09/398615265/s-c-dash-cam-video-a-broken-tail-light-a-routine-traffic-stop-a-fleeing-man> (reporting on the shooting death of Walter Scott); Brian McBride & Morgan Winsor, *Woman Live-Streams After Police Fatally Shoot Boyfriend in Minnesota*, ABC NEWS (July 7, 2016, 7:12 AM), <https://abcnews.go.com/US/woman-livestreams-officer-involved-shooting-boyfriend/story?id=40396521> (reporting on the police shooting of Philando Castile during a routine traffic stop).

19. There are some critical scholars who argue that none of this is accidental. See, e.g., Butler, *supra* note 13, at 1425 (“[M]any of the problems identified by critics are not actually problems, but are instead integral features of policing and punishment in the United States. They are how the system is supposed to work.”); Anna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1786 (2020) (“[P]olice violence is routine, is legal, takes many shapes, and targets people based on their race and class . . . [P]olice violence reflects and reproduces our political, economic, and social order.”); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4 (2010) (describing the criminal justice system “as a stunningly comprehensive and well-disguised system of racialized social control”).

20. See BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* 20 (2017) (“[M]ost of the oversight in policing today is *after-the-fact* review. . . . Most oversight is about *misconduct*, when it is the regular conduct of policing agencies that needs attention as well.”).

think these sorts of accountability measures are broken, in that they are not keeping policing within acceptable limits.²¹

We always are trying to fix the problems of policing on the back end, after bad things have happened, rather than on the front end before they go wrong. Call this the difference between back-end and front-end accountability (or what I called in my book “democratic policing”).²² When law students learn about separation of powers in constitutional law, or how agencies work in administrative law, part of the learning is about back-end accountability, like oversight hearings and lawsuits to enforce legal obligations. But most of what we teach in constitutional law or administrative law is front-end accountability—the process of making the law itself.

Front-end accountability is basic to law. There are rules, in the form of statutes and regulations, written to keep bad things from happening. They are drafted publicly and transparently.²³ People have input.²⁴ We typically apply some form of cost-benefit analysis to see that the rules we put in place do more good than harm.²⁵ The overarching point is that we try to get it right on the front end, resorting to back-end accountability mechanisms only when things go off the rails.

21. See, e.g., Emily Ekins, *Policing in America: Understanding Public Attitudes toward the Police. Results from a National Survey*, CATO INST. (Dec. 7, 2016) <https://www.cato.org/policing-in-america/chapter-3/perceptions-police-accountability-integrity> (“Nearly half of Americans (46%) believe police are not ‘generally held accountable for misconduct’ when it occurs.”); Ebony Slaughter-Johnson, *No Accountability: How the Civil Justice System Fails Black Americans Killed by Police*, SALON (Apr. 16, 2019, 6:30 AM), https://www.salon.com/2019/04/16/no-accountability-how-the-civil-justice-system-fails-black-americans-killed-by-police_partner/ (detailing the ways the civil court system fails victims of police misconduct); Matthew Nesvet, *My Year As A New Orleans Consent Decree Insider*, APPEAL (July 30, 2019), <https://theappeal.org/my-year-as-a-new-orleans-consent-decree-insider/> (explaining why consent decrees between police departments and the federal government fail to hold police departments accountable for wrongdoing); N.Y. C.L. UNION, MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY 1994-2006 (2007), https://www.nyclu.org/sites/default/files/publications/nyclu_pub_mission_failure.pdf (critiquing New York City’s Civilian Complaint Review Board for failing to investigate claims of police misconduct and noting that CCRB’s disciplinary recommendations are often ignored).

22. Cf. FRIEDMAN, *supra* note 20, at 16 (“When it comes to policing and its governance, our much-admired system of democratic accountability and transparency is largely cast aside.”).

23. Transparency is a fundamental component of democratic accountability. See, e.g., LON L. FULLER, *THE MORALITY OF LAWS* 42–44 (rev. ed. 1969) (arguing that the rule of law requires *ex ante* rule promulgation *by the public*); CARY COGLIANESE, HEATHER KILMARTIN & EVAN MENDELSON, *TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS* 2–5 (2008) (arguing that transparency and public participation advance the quality and legitimacy of the ruling process).

24. See, e.g., OFF. OF THE FED. REG., *A GUIDE TO THE RULEMAKING PROCESS*, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited on Feb. 7, 2020) (explaining the federal rulemaking process, during which members of the public may submit comments); N.Y. DEP’T OF STATE, DIV. OF ADMIN. RULES, *RULE MAKING IN NEW YORK*, https://www.dos.ny.gov/info/pdfs/whatisrulemaking_flyer.pdf (last visited on Feb. 7, 2020) (explaining that the public may respond to proposed rules during public hearings and prescribed comment periods).

25. See generally MAEVE P. CAREY, CONG. RSCH. SERV., R41974, *COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS* (2014) (outlining the use of cost-benefit analysis in the federal rulemaking process). See also Exec. Order No. 12,866, 3 C.F.R. § 638 (1994). (“In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives”); Maria Ponomarenko & Barry Friedman, *Benefit-Cost Analysis of Public Safety: Facing the Methodological Challenges*, 8 J. BENEFIT COST ANALYSIS 305, 306–07 (2017) (discussing the use of benefit-cost analysis throughout government in other areas “on par with public safety”).

In policing, it is just the opposite: almost all discussion of accountability occurs on the back end, with far too little attention at the front.²⁶ Most of what the police do is governed only by the broadest and vaguest commands to enforce the law.²⁷ For example, County Sheriffs in Arizona are instructed to “[p]reserve the peace” and “[a]rrest . . . all persons who attempt to commit or who have committed a public offense.”²⁸ That is not very illuminating. It does not say anything about when force may be used, or in what form, or about what surveillance tools are permitted, or whether data should be collected about racial disparities in policing. There is an ocean of things that those few words do not say, and we are not going to fill in all the cracks with after-the-fact remedies. We need to start regulating the front end of policing, establishing statutes and enforcing department policies that govern the use of force, stops, surveillance, and much else.²⁹

One such initiative is the Policing Project, which I co-founded with the mission to work with all stakeholders to bring front-end accountability to policing.³⁰ Early on, the organization, with public input, helped Camden and New York City draft policies for the use of body cameras, and we did the same in Los Angeles around the release of footage after following an officer-involved shooting.³¹ We worked with then-Chief Chris Magnus and the Tucson, Arizona Police Department to set up a Community Advisory Board.³² We have an extremely large pilot project ongoing in Chicago to give the public a say in how it is policed on a day-to-day basis, and we have worked with grassroots groups to pass an ordinance creating a Community Commission for Public Safety and Accountability—a public-led body that will make policy for the Chicago Police Department.³³ We are working with

26. See FRIEDMAN, *supra* note 20, at 59 (noting that “when it comes to policing, we have forsaken [the] very basic principle [of front-end oversight]”).

27. See *id.* at 16 (“The typical enabling statute of a policing agency simply authorizes it to enforce the criminal law—but says little or nothing about *how* to do so. We have adopted a few laws on the ‘how’ of policing . . . but these form a woefully incomplete framework.”). In Phoenix, Arizona, for example, the police department’s duties are outlined in only general terms, such as “enforcement of the State laws and City ordinances, protection of life and property, preservation of law and order, [and] investigation of crimes.” PHX. CITY CODE § 2-119 (2021), https://phoenix.municipal.codes/CC/2_ArtIV.

28. ARIZ. REV. STAT. ANN. § 11-441(A) (2009).

29. See FRIEDMAN, *supra* note 20, at 72 (“Whether adopted by a legislative body, or by policing agencies themselves, what is needed are transparent, democratically accountable rules.”).

30. See *Our Mission*, POLICING PROJECT, <https://www.policingproject.org/our-mission> (last visited Sept. 24, 2021).

31. See *Body-Worn Cameras*, POLICING PROJECT, <https://www.policingproject.org/bwc-issues> (last visited Jan. 29, 2019) (providing links to Policing Project reports on body worn camera use by the LAPD, NYPD, and CCPD).

32. See *Tucson Police Seek Applicants for Community Advisory Panel*, ARIZ. PUB. MEDIA (Feb. 1, 2017), <https://news.azpm.org/p/news-topical-politics/2017/2/1/105585-tucson-police-seek-applicants-for-community-advisory-panel/>.

33. See *Chicago NPI*, POLICING PROJECT, <https://www.policingproject.org/chicago-npi> (last visited Jan. 31, 2019) (“In Chicago, the Policing Project is working in collaboration with the Chicago Police Department and Chicago residents to pilot a Neighborhood Policing Initiative. The goal of the initiative is to improve public safety through a collaborative relationship between the police and the community they serve.”); *Policing Project Partners with GAPA as Chicago Projects Picks Up Steam*, POLICING PROJECT (Mar. 12, 2018), <https://www.policingproject.org/news-main/2018/3/13/chicago-project-picks-up-steam> (describing the Policing Project’s role in helping the city pass an ordinance creating a Citizens Commission for Public Safety and Accountability).

tech companies, police departments, advocates, and activists to establish procedures for the ethical use of policing technology that is racially just and respectful of civil liberties.³⁴ Since George Floyd was killed, we have been drafting model statutes for adoption at the state and local government level that would regulate the use of force, pretextual automobile stops, and other police encounters.³⁵ In short, we are trying to address the litany of collateral consequences of policing—stops, arrests, searches, use of force, and racial disparities, the privacy violations by surveillance—by changing on the front end how police do their job.

In the course of doing this work, however, I came to realize that policing has not one fundamental problem (the lack of front-end accountability) but two. There was another problem that ran much deeper, than the sorts of “collateral consequences” that motivated my original work; and that goes to the core of the policing function itself.

The problem is not just what goes wrong as police do what they are supposed to do, but that the very mission we, as a society, have assigned the police is misguided. Police are asked to do too much in society, and in their attempt to fulfill these duties, they cause harm. That harm comes not only in the form of the sort of collateral consequences that motivated my work originally, but even more fundamentally, harm from the fact that the police simply cannot address the sheer number of problems we dump in their institutional lap.

In short, there are not one but two sorts of harms around policing. One is the set of collateral consequences that understandably attract so much attention. The other is all the problems police are called upon to solve, but cannot. Those in need remain needy, and the problems that exist remain unsolved. And this is as much a fault of how we as a society view public safety, as it is of the police themselves.

II. HOMELESSNESS

In pursuing my argument that we need to think differently about public safety and how to achieve it, I could talk about many things. I could take up the problem of people with substance issues or mental illness—issues that are getting a lot of attention today.³⁶ I could discuss policing in the context of quality-of-life offenses,

34. See, e.g., POLICING PROJECT, SECOND REPORT OF THE AXON AI & POLICING TECHNOLOGY ETHICS BOARD: AUTOMATED LICENSE PLATE READERS 5 (Oct. 2019), https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5dadec937f5c1a2b9d698ba9/1571679380452/Axon_Ethics_Report_2_v2.pdf (outlining recommendations developed by Axon Enterprise, Inc. for the ethical development of automated license plate readers); POLICING PROJECT, REPORT TO THE LOS ANGELES POLICE COMMISSION SUMMARIZING PUBLIC FEEDBACK ON LAPD VIDEO RELEASE POLICIES 1, <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59cc0d5459cc682dca066575/1506544982924/Report+to+the+Los+Angeles+Police+Commission+Summarizing+Public+Feedback+on+LAPD+Video+Release+Policies.pdf> (last visited Jan. 31, 2020) (summarizing Policing Project efforts to gather feedback on whether, when, and how the LAPD should make body-worn camera footage publicly available).

35. See *Model Legislation & Legislative Commentary*, POLICING PROJECT, <https://www.policingproject.org/legislation> (last visited Sept. 24, 2021).

36. See, e.g., Jackson Beck, Melissa Reuland & Leah Pope, *Behavioral Health Crisis Alternatives: Shifting from Police to Community Responses*, VERA INST. OF JUST. (Nov. 2020), <https://www.vera.org/behavioral-health-crisis-alternatives> (describing alternatives to policing for behavioral health crises, noting that “[t]oo often,

such as littering, public urination, or public intoxication. I even could make the same points with regard to traffic enforcement. The list is a long one, and I will allude to some of these issues below. But my central focus is on how we deal with people who are unhoused, individuals colloquially referred to as “homeless.”

A. What Police Do

In this country, we have a strange idea of how police spend their time. Listening to people talk about it, including leading public figures, some seem to be under the impression that the police ride around all day trying to catch criminals.³⁷ Surely there are many police who also think that is their job.³⁸ And protecting people from crime is our society’s primary conception of public safety.³⁹

In reality, what the police do is infinitely more complicated, and a lot of it involves dealing with social problems that go far beyond than crime prevention. In the 1970s–1990s, there were elaborate studies by social scientists regarding how police spend their time.⁴⁰ Those studies do not tell us what the police do precisely.⁴¹ But they are crystal clear on what they do not do, which is ride around all

encounters between the police and people in crisis . . . do not end in . . . referral to the long-term supports people with mental illnesses and substance use disorders need to thrive”).

37. Fighting crime is certainly what our political leaders valorize the police for doing. *See, e.g.*, Richard M. Nixon, Radio Address on Crime and Drug Abuse, 1 PUB. PAPERS 982, 983 (Oct. 15, 1972, 5:07 PM) (“As J. Edgar Hoover often used to tell me, it is our local police forces who are the real frontline soldiers in the war against crime.”); *Clinton Signs Crime Bill, Plans Public Forums*, S. FLA. SUN-SENTINEL (Sept. 14, 1994), <https://www.sun-sentinel.com/news/fl-xpm-1994-09-14-9409130486-story.html> (“This bill puts government on the side of . . . the brave men and women who put their lives on the line for us every day, not the criminals or those who would turn away from law enforcement.”); Roge Karma, *We Train Police to Be Warriors – And Then Send Them Out to Be Social Workers*, VOX (Oct. 8, 2018), <https://www.vox.com/2020/7/31/21334190/what-police-do-defund-abolish-police-reform-training> (“Donald Trump described [police officers’] job as follows: ‘Every day, our police officers race into darkened alleys and deserted streets, and onto the doorsteps of the most hardened criminals . . . the worst of humanity.’” (second alteration in original)).

38. *See, e.g.*, Ronal Serpas, *Former New Orleans Police Supt.: Nation Should Take Louisiana’s Lead on Justice Reform*, ADVOCATE (La.) (Aug. 28, 2018), https://www.theadvocate.com/baton_rouge/opinion/article_171cfd0e-aadb-11e8-b0af-47bd6e7de4e5.html (“I became a cop because I care about the safety of my community and have spent decades on the front lines of America’s fight against serious and violent crime.”); J. David Goodman & Al Baker, *William Bratton, New York’s Influential Police Commissioner, Is Stepping Down*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/nyregion/bill-bratton-nypd-commissioner.html> (“We never stop trying to drive down crime and quell disorder; I’m going to do it in lock step with the people we’re dedicated to protect. It is, after all, what we do now.” (quoting Commissioner Bratton’s successor, then-NYPD Chief James P. O’Neill)).

39. *See* Barry Friedman, *What Is Public Safety*, 102 B.U. L. REV. (forthcoming 2022) (manuscript at 24–25) (on file with author) (discussing the importance society places on the government’s protective function, as evidenced by police department budgets and public valorization of law enforcement officers).

40. *See, e.g.*, Theresa Ervin Conover & John Liederbach, *Policing on Demand: An Observational Study of Mobilization and Citizen Encounters Across Communities*, 17 INT’L J. POLICE SCI. & MGMT. 170, 171–72 (2015); Christine N. Famega, *Proactive Policing by Post and Community Officers*, 55 CRIME & DELINQUENCY 78, 82–85 (2009) [hereinafter *Proactive Policing*]; Brian K. Payne, Bruce L. Berg & Ivan Y. Sun, *Policing in Small Town America: Dogs, Drunks, Disorder, and Dysfunction*, 33 J. CRIM. JUST. 31, 32 (2005); Christine N. Famega, *Variation in Officer Downtime: A Review of the Research*, 28 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 388 (2005); John Liederbach, *Addressing the “Elephant in the Living Room”: An Observational Study of the Work of Suburban Police*, 28 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 415, 417–19 (2005).

day catching criminals.⁴² It turns out that a relatively small amount of policing actually involves fighting crime—at least if your notion of crime is things like homicide and sexual assault and burglary and so on.

Instead, most of a cop's day is spent on patrol, often responding to 911 calls.⁴³ Much of this involves vehicular traffic issues.⁴⁴ But beyond this, they answer calls from people with a litany of problems or complaints, whether it is barking dogs, or an ill relative, or someone in mental distress, or someone overdosing.⁴⁵ Sociologists in the 1960s–1980s documented and wrote about how the primary function of policing was dealing with social problems or social disorder of just this nature.⁴⁶ Today, police also engage in “proactive policing”—such as stop and frisks, arrests for minor offenses, and the like.⁴⁷ Still, patrol and social problems is a lot of what they do. Which brings us to the topic of this Article: how we as a society deal with unhoused individuals. Because we often look to the police to address this issue.

B. *The Unhoused Population*

It is hard to know how many people are without housing in the United States. The U.S. Department of Housing & Urban Development (“HUD”) estimated in January 2020 that the number was between five hundred and six hundred thousand

41. In conducting these studies, scholars often have “collapse[d] the activities conducted into fewer general categories.” *Proactive Policing*, *supra* note 40, at 85.

42. *See, e.g.*, Liederbach, *supra* note 40, at 417 (“A major theme of the earliest studies concerning urban officer workload involved dispelling the popular myth that police spend most of their time protecting the ‘thin blue line’ between law and order.”).

43. Payne et al., *supra* note 40 at 32.

44. *See, e.g.*, Conover & Liederbach, *supra* note 40, at 176 tbl.3 (2015) (reporting that between 11.54% and 54.17% of Cincinnati police departments’ time was spent on traffic issues); Payne et al., *supra* note 40, at 32 (noting that various studies showed traffic problems represented significant percentages of the 911 calls received by police departments, ranging from 9% to 25%).

45. *See* Payne et al., *supra* note 40, at 32–36.

46. *See, e.g.*, JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* 16 (1968) (“The patrolman’s job is defined more by his responsibility for *maintaining order* than by his responsibility for enforcing the law.”); Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 17, 40 (Herbert Jacob ed., 1974) (“Fearing the role of the nurse or, worse yet, the role of the social worker, the policeman combines resentment against what he has to do day-in-day-out with the necessity of doing it.”); *see also* ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 17 (1971) (noting that “[t]hrough superficially the[] role [of the police] is to preserve the peace by coping with any individuals . . . who violate laws, they must be prepared to restore order as well”).

47. *See* NAT’L ACADS. OF SCI., ENG’G & MED., *PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES* 16 (David Weisburd & Malay K. Majmundar eds., 2018) (describing police departments’ shift in focus from the traditional “obligations of the police to respond to the occurrence of crime and to investigate and bring offenders to justice” to “proactive” policing approaches “that could be successful in crime prevention irrespective of whether they had been seen in the past”); *see also, e.g.*, CITY & CNTY. OF S.F. BUDGET & LEGIS. ANALYST’S OFF., *POLICY ANALYSIS REPORT: HOMELESSNESS AND THE COST OF QUALITY OF LIFE LAWS* 1 (2016) (“The City [of San Francisco] incurred approximately \$20.6 million in 2015 for sanctioning homeless individuals for violating quality of life laws.”); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 281–83 (2009) (comparing the number of non-felony arrests—that is, arrests for quality-of-life offenses—before and after the adoption of zero tolerance policing in New York City and noting, for example, that non-felony arrests increased from 86,000 in 1989 to 176,000 in 1999).

people.⁴⁸ Many housing and homelessness organizations believe the true number is at least twice that, and perhaps as many as 3.5 million people, or about one out of every hundred people living in the United States.⁴⁹ That was before the pandemic; surely the problem is worse now.⁵⁰

The homeless population is disproportionately male and single, but it includes plenty of women and entire families too.⁵¹ Over one hundred thousand of the federal number, some eighteen percent, are children under the age of eighteen.⁵² The

48. MEGHAN HENRY, TANYA DE SOUSA, CAROLINE RODDEY, SWATI GAYEN & THOMAS JOE BEDNAR, U.S. DEP'T OF HOUS. & URB. DEV., 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 6 (2021) [hereinafter 2020 ANNUAL HOMELESS ASSESSMENT REPORT] (reporting that 580,466 people experienced homelessness in January 2020).

49. See, e.g., NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES (2018) [hereinafter HOMELESSNESS IN AMERICA: OVERVIEW OF DATA], https://homelesslaw.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf (estimating between 2.5 and 3.5 million unhoused persons in America); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, DON'T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA 6–7 (2017) [hereinafter DON'T COUNT ON IT], <https://homelesslaw.org/wp-content/uploads/2018/10/HUD-PIT-report2017.pdf> (explaining the flaws in HUD's methodology).

50. Even before the pandemic the numbers were on the rise. See 2020 ANNUAL HOMELESS ASSESSMENT REPORT, *supra* note 48, at 7, 11 (noting that 12,751 more people across the country were counted as unhoused in 2020 than 2019, and that the unhoused population in Arizona grew by almost 10% over the same period); Jill Cowan, *Homeless Populations Are Surging in Los Angeles. Here's Why*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/us/los-angeles-homeless-population.html> (reporting that the number of people experiencing homelessness in Los Angeles grew 43% in Alameda county, 42% in Orange county, and 50% in Kern county between 2017 and 2018); HOMELESSNESS IN AMERICA: OVERVIEW OF DATA, *supra* note 49 (“Since [2008], indications are that the [homelessness] crisis has deepened.”). The pandemic is expected only to increase the number of people experiencing homelessness. See DANIEL FLAMING, ANTHONY W. ORLANDO, PATRICK BURNS & SETH PICKENS, ECON. ROUNDTABLE, LOCKED OUT: UNEMPLOYMENT AND HOMELESSNESS IN THE COVID ECONOMY 31 (2021) (noting that researchers expect the recession created by the pandemic to cause about twice as many people to experience homelessness as the Great Recession, and that chronic homelessness is expected to increase by 49% nationally).

51. See 2020 ANNUAL HOMELESS ASSESSMENT REPORT, *supra* note 48, at 8, 20 (reporting that roughly 60% of the total number of people experiencing homelessness in 2020 were male, but that women made up 60% of people experiencing homelessness in families with children); JOY MOSES & JACKIE JANOSKO, NAT'L ALL. TO END HOMELESSNESS, DEMOGRAPHIC DATA PROJECT: GENDER AND INDIVIDUAL HOMELESSNESS 2, <https://endhomelessness.org/wp-content/uploads/2019/09/DDP-Gender-brief-09272019-byline-single-pages.pdf> (stating that “men are the majority of individuals experiencing homelessness in almost all” of the assessed geographic areas, but noting that women make up 29% of those experiencing homelessness overall); U.S. CONF. OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 23 (2014), <https://www2.cortland.edu/dotAsset/655b9350-995e-4aae-acd3-298325093c34.pdf> (noting that, as compared to the total population and those living in poverty, those who are homeless are more likely to be unaccompanied); *Family Homelessness in the United States: A State-by-State Snapshot*, NAT'L ALL. TO END HOMELESSNESS (Feb. 20, 2018), https://endhomelessness.org/resource/family-homelessness-in-the-united-states-state-by-state-snapshot/?emailsignup&gclid=EAlaIQobChMImpSe4oGa5wIVi56zCh3qyglfEAAiAAAEgLde_D_BwE (relying on a 2017 point-in-time study to report that “[a]lmost 60,000 families with children (57,971) are homeless on any given night in the United States”).

52. 2020 ANNUAL HOMELESS ASSESSMENT REPORT, *supra* note 48, at 7.

racial makeup of people who are without housing is diverse but still skews towards people of color.⁵³

Some of those experiencing homelessness are sheltered, while others are both homeless and unsheltered.⁵⁴ Those without shelter are sometimes described as “sleeping rough” out on the streets.⁵⁵ It is an important distinction, though, as you might imagine, there is fluidity between the two groups. In those federal numbers, thirty-nine percent of people who were counted as experiencing homelessness were entirely unsheltered.⁵⁶

The primary reason why the federal number diverges so significantly from other estimates is that it includes only the people who could be counted—in shelters or on the street—on the one night a year that the federal government stages a count of homeless individuals.⁵⁷ There are obviously enormous logistical difficulties in training the number of volunteers required to pulling off that sort of evaluation in one night. More fundamentally, that sort of count does not include all the people who are doubling up in space, or couch-surfing.⁵⁸ It does not include those who do not want to be observed or counted, which tend to be families (who do not want their children taken from them), or those not in the country lawfully (who do not

53. See *id.* at 1 (reporting that Black people made up 39% of all individuals experiencing homelessness, despite making up only 12% of the population); Jugal K. Patel, Tim Arango, Anjali Singhvi & Jon Huang, *Black, Homeless and Burdened by L.A.’s Legacy of Racism*, N.Y. TIMES (Dec. 22, 2019), <https://www.nytimes.com/interactive/2019/12/22/us/los-angeles-homeless-black-residents.html> (reporting that Black people make up 8% of Los Angeles County’s population, but 42% of those experiencing homelessness); NAT’L SURV. OF PROGRAMS & SERVS. FOR HOMELESS FAMS., INTERGENERATIONAL DISPARITIES EXPERIENCED BY HOMELESS BLACK FAMILIES 1 (2012), https://www.icphusa.org/wp-content/uploads/2015/01/ICPH_UNCENSORED_3.1_Spring2012_TheNationalPerspective_IntergenerationalDisparitiesExperiencedbyHomelessBlackFamilies.pdf (reporting that, in 2010, one out of every 141 persons in Black families stayed in a homeless shelter, compared with one out of every 990 persons in white families).

54. See 2020 ANNUAL HOMELESS ASSESSMENT REPORT, *supra* note 48, at 8 (identifying demographic characteristics of the homeless population, including whether individuals were sheltered or unsheltered).

55. See Ian Frazer, *Hidden City*, NEW YORKER (Oct. 28, 2013), <https://www.newyorker.com/magazine/2013/10/28/hidden-city> (noting that unsheltered homeless have long been described as “sleeping rough”).

56. 2020 ANNUAL HOMELESS ASSESSMENT REPORT, *supra* note 48, at 1. However, some individual states have much higher rates of unsheltered homelessness. *Id.* at 67 (reporting that more than 75% of chronically homeless individuals in California, Arkansas, Hawaii, Oregon, and Montana are unsheltered).

57. See LAUREN DUNTON, TOM ALBANESE & TRACY D’ALANNO, U.S. DEP’T OF HOUS. & URB. DEV., POINT-IN-TIME COUNT METHODOLOGY GUIDE (2014), <https://files.hudexchange.info/resources/documents/PIT-Count-Methodology-Guide.pdf> (recommending that HUD “select the best *night* . . . to conduct the count” (emphasis added)); see also NAT’L COAL. FOR THE HOMELESS, CURRENT STATE OF HOMELESSNESS (2018), <https://nationalhomeless.org/wp-content/uploads/2018/04/State-of-things-2018-for-web.pdf> (explaining that HUD has adopted a narrow definition of homelessness that does not include families doubling up with friends, or those who live in motels or vehicles or other hidden locations that may not interact with volunteers conducting counts); DON’T COUNT ON IT, *supra* note 49 (“[V]isual street counts are problematic for several reasons. The first is that the people need to be seen in order to be counted . . .”).

58. See NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 12 (2019) [hereinafter NO SAFE PLACE], https://homelesslaw.org/wp-content/uploads/2019/02/No_Safe_Place.pdf.

want to be removed).⁵⁹ It also does not include those in hospitals, mental health facilities, or substance abuse facilities, or those in jails and prisons.⁶⁰ As the Ninth Circuit said in a recent decision, “[i]t is widely recognized that a one-night point in time count will undercount the homeless population.”⁶¹

Underscoring the inadequacy of HUD’s numbers, the United States Department of Education (“DOE”) counts things very differently. DOE estimates that there were over one million public schoolkids alone who were homeless between 2018 and 2019.⁶² Of these, about seventy-seven percent lived “doubled-up” with family or friends, just over twelve percent were living in shelters, other transitional housing, or awaiting foster care, and some four percent (yes, about 40,000 children) were unsheltered, living out on the street.⁶³

According to HUD, there were almost 11,000 homeless people in Arizona as of 2020.⁶⁴ Nearly seventy-five percent of chronically homeless Arizonans are unsheltered.⁶⁵ The January 2019 point-in-time count showed over 6,600 homeless individuals in Maricopa County alone, over 3,000 of whom were unsheltered.⁶⁶ Even before the pandemic, those numbers were increasing, drawing local media attention.⁶⁷ And remember, those HUD numbers are almost certainly undercounts. DOE numbers show that just over 21,000 students in Arizona experienced homelessness during the 2017-2018 school year, over 4,400 of whom were in shelters or transient housing, and over 600 of whom were out on the street.⁶⁸

There are a variety of reasons for homelessness, though at its core it is about poverty and a lack of essential services. Chief among the reasons are rising housing

59. See *The Pitfalls of HUD’s Point-in-Time Count*, SCHOOLHOUSE CONNECTION (2020), <https://www.schoolhouseconnection.org/the-pitfalls-of-huds-point-in-time-count/> (“Homeless families also are less likely than single adults to stay on the streets and other outdoor locations where they can be included in [point-in-time] counts, often because they are afraid that their children will be removed from their custody.”); WHATCOM CNTY. COAL. TO END HOMELESSNESS, A HOME FOR EVERYONE: 2018 ANNUAL REPORT 9 (2018), <https://www.cob.org/Documents/planning/community-development/2018-point-in-time-count.pdf> (noting that “immigrants, even those with legal status, may consciously avoid participating [in point-in-time counts] out of concerns of reprisal”).

60. See NO SAFE PLACE, *supra* note 58, at 12.

61. *Martin v. City of Boise*, 920 F.3d 584, 604 (9th Cir. 2019) (internal quotation marks omitted).

62. NAT’L CTR. FOR HOMELESS EDUC., FEDERAL DATA SUMMARY, SCHOOL YEARS 2016-17 THROUGH 2018-19, at 7 (2021), <https://nche.ed.gov/wp-content/uploads/2021/04/Federal-Data-Summary-SY-16.17-to-18.19-Final.pdf>.

63. *Id.* at 13–15. “Doubled-up” is defined in this report as those “sharing housing with others due to a loss of housing, economic hardship, or a similar reason.” *Id.* at 13.

64. 2020 ANNUAL HOMELESS ASSESSMENT REPORT, *supra* note 48, at 80.

65. *Id.* at 66.

66. MARICOPA ASS’N OF GOV’TS, 2019 POINT-IN-TIME (PIT) COUNT REPORT 1, 4 (2019), <https://perma.cc/K65C-B8J2>.

67. See, e.g., Jessica Boehm, *Phoenix Residents Reported 1,500 Homeless Encampments*. See *Where They Are*, AZ CENTRAL (May 7, 2019, 5:24 PM), <https://www.azcentral.com/story/news/local/phoenix/2019/05/06/phoenix-homelessness-increase-reported-encampments-community-services/3410072002/>.

68. *Arizona Homelessness Statistics*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Jan. 2020), <https://www.usich.gov/homelessness-statistics/az>.

prices and wages that simply have not kept up.⁶⁹ According to HUD, there is nowhere in the United States where a person working one full-time (forty hours per week), minimum-wage job can afford fair market rent for a two-bedroom rental home.⁷⁰ In the most expensive metro areas, workers would have to work at least eighty hours per week at minimum wage to afford even a one-bedroom rental.⁷¹ The homeless population also disproportionately includes those with mental health or substance abuse issues.⁷²

Sheltered or unsheltered, being homeless is no picnic. Most of us have seen people experiencing homelessness carting their possessions around in shopping carts and strollers, or on their backs. Sitting ragged on corners or street benches; sleeping in parks and storefronts. Bathing in public restrooms; urinating or defecating, sometimes barely out of view. And yet, even as you see those people, and even if you engage in acts of compassion—be it working in shelters, contributing to a charity, or giving the occasional handout—I am not sure anyone who has not experienced it firsthand can really imagine the horror of living on the street, or being transferred from shelter to shelter; constantly confronting some combination of abject vulnerability, lack of hope, and endless government red tape just to find shelter.⁷³ I know I cannot—not for lack of trying, but because I find it impossible to wrap my head around the awfulness and sadness of it all.

III. CRIMINALIZATION

So, what do we do about the homeless population? Not what *should* we do, but what *do* we as a society actually do?

We criminalize them.⁷⁴ We do much more, of course, some of which is kind and caring and helpful, and some of which is successful. I will turn to some of these

69. See Frazer, *supra* note 55 (“The problem is not the poor’s lack of character but a lack of places in the city where they can afford to live and of jobs that pay a decent wage.”); NAT’L COAL. FOR THE HOMELESS, WHY ARE PEOPLE HOMELESS? (2007), <https://www.nationalhomeless.org/publications/facts/Why.pdf> (“Two trends are largely responsible for the rise in homelessness over the past 20-25 years: a growing shortage of affordable rental housing and a simultaneous increase in poverty.”).

70. NAT’L LOW INCOME HOUS. COAL., OUT OF REACH: THE HIGH COST OF HOUSING 4 (2021), https://nlihc.org/sites/default/files/oor/2021/Out-of-Reach_2021.pdf.

71. *Id.* at 17.

72. See NAT’L COAL. FOR THE HOMELESS, SUBSTANCE ABUSE AND HOMELESSNESS (2017), <https://nationalhomeless.org/wp-content/uploads/2017/06/Substance-Abuse-and-Homelessness.pdf> (aggregating studies and concluding that “most statistics prove that substance abuse is much more common among homeless people than in the general population”); NAT’L COAL. FOR THE HOMELESS, MENTAL ILLNESS AND HOMELESSNESS (2009), https://www.nationalhomeless.org/factsheets/Mental_Illness.pdf (citing a 2009 report by the Substance Abuse and Mental Health Services Administration, which found that twenty to twenty-five percent of the U.S. homeless population suffers from some form of severe mental illness—compared to six percent of Americans overall).

73. See generally Frazer, *supra* note 55 (describing day-to-day life of homeless people living on New York City’s streets and in its shelters).

74. See, e.g., Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. POVERTY L. & POL’Y 545, 550–53 (2006) (providing an overview of laws that effectively criminalize homelessness); Kevin M. Fitzpatrick & Brad Myrstol, *The Jailing of America’s Homeless: Evaluating the Rabble*

initiatives momentarily. But first, I focus on the criminalization part of the story because it frames what I want to say about policing and the way we approach public safety.

“Out of sight, out of mind” is where many in our society seem to prefer unhoused individuals to remain.⁷⁵ In order to deal with the problem of homeless—often unkempt, sometimes mentally ill or substance-addicted—people, cities pass laws to keep the homeless from living under foot or in public spaces. There are laws against camping in certain spaces, or often even against camping anywhere in entire cities.⁷⁶ There are laws against vagrancy and loitering.⁷⁷ There are laws that prohibit begging and panhandling.⁷⁸ There are laws that prohibit sitting or lying down in public.⁷⁹ There are laws that prohibit sleeping in vehicles.⁸⁰ There are even laws that prohibit sharing food with unhoused people—a law that my wife would have violated countless times, for while she disapproves of my giving money to strangers, she will go buy food if someone is hungry. Almost ten percent of cities have that particular law.⁸¹ The National Law Center on Homelessness & Poverty has documented how these laws are on the rise.⁸²

Criminalizing homelessness is a dubious strategy to “solve” the problem, but consider the terrific harm it does to the unhoused people themselves. The collateral harms of policing discussed earlier—the stop and frisks, arrests, use of force,

Management Thesis, 57 CRIME & DELINQUENCY 271, 288 (2011) (finding that homeless persons are overrepresented among those arrested and booked into local jails).

75. See generally Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255 (1994) (discussing “compassion fatigue”—the decrease in support for efforts to ameliorate homelessness and a sense of hopelessness in finding solutions). See also Saelinger, *supra* note 74, at 558 (explaining that municipal laws criminalizing homelessness are often in response to “a psychological desire of elites simply to make the homeless invisible”); Bruce G. Link, Jo C. Phelan, Ann Stueve, Robert E. Moore, Michaeline Bresnahan & Elmer L. Struening, *Public Attitudes and Beliefs About Homeless People*, in HOMELESSNESS IN AMERICA 143, 147 (Jim Baumohl ed., 1996) (reporting the results of a survey showing that a majority of respondents endorsed policies to restrict the ability of homeless persons to sleep or camp in public places).

76. See NO SAFE PLACE, *supra* note 58, at 18 (discussing municipal laws banning public camping and noting that 34% of cities have laws barring “camping” throughout the city while 57% have them for particular locations).

77. See *id.* at 8 (finding 33% of surveyed cities make it illegal to loiter in public anywhere in city and 65% percent criminalize loitering in specific public areas).

78. See *id.* at 20 (finding 24% of surveyed cities ban begging anywhere in public and 76% prohibit begging in particular public places).

79. See *id.* at 22 (finding a majority of surveyed cities have laws prohibiting sitting or lying down in public).

80. See *id.* at 8 (finding 43% of surveyed cities have laws prohibiting sleeping in vehicles).

81. See *id.* at 24–25 (“[M]any cities have chosen to restrict homeless persons’ access to food under the flawed premise that providing homeless persons with free food encourages them to remain homeless.”).

82. See *id.* at 8 (“There has been an increase in laws criminalizing homelessness since [the organization’s] last report in 2011.”). The United States is hardly alone in this. See, e.g., LUCY ADAMS, THE WINSTON CHURCHILL MEM’L TR. OF AUSTL., IN THE PUBLIC EYE: ADDRESSING THE NEGATIVE IMPACT OF LAWS REGULATING PUBLIC SPACE ON PEOPLE EXPERIENCING HOMELESSNESS 13–14 (2014) (discussing criminalization of homelessness in Australia).

etc.—are visited on many people who are arrested, and the homeless are no different.⁸³ But it is more than that. A homeless person's possessions may not look like much to you, but those few things may be all that they have. Sometimes the police are careful with those possessions, sometimes not.⁸⁴ Just being asked to “move along” may displace homeless people from a place they felt safe. Additionally, even if someone is homeless, they may well be working.⁸⁵ Getting arrested frequently is often the cause of losing a job, either because one cannot show up to work, or because an employer does not want an arrestee as an employee.⁸⁶ For the same reason, getting arrested may hinder someone from getting a job on the front end.⁸⁷

Now let us think about what we are accomplishing with these laws. I try very hard—as all good lawyers should—to see every side of an issue, and I can understand the urge to pass these laws. It is not just a lack of compassion that causes people and those in power to want to push the homeless out of view. Some people see the homeless populations as threatening, particularly those with obvious mental health issues.⁸⁸ Others see it as a sanitation issue.⁸⁹ Some believe that the homeless

83. MADELINE BAILEY, ERICA CREW & MADZ REEVE, VERA INST. OF JUST., *NO ACCESS TO JUSTICE: BREAKING THE CYCLE OF HOMELESSNESS AND JAIL 3* (2020) (reporting that many homeless people experience being arrested, searched, or cited by police officers).

84. See Dale Eisinger & Reuven Blau, *Cops, Sanitation Workers Destroying Personal Possessions of Homeless, Charges NYCLU*, N.Y. DAILY NEWS (Dec. 21, 2015), <https://www.nydailynews.com/new-york/city-trashing-homeless-people-personal-possessions-nyclu-article-1.2473328> (discussing a New York Civil Liberties Union lawsuit accusing police officers of “destroying the personal possessions of homeless people that they force to move from public spaces”).

85. See, e.g., David Wagner, *Working While Homeless: A Tough Job For Thousands of Californians*, NPR (Sept. 20, 2018), <https://www.npr.org/2018/09/30/652572292/working-while-homeless-a-tough-job-for-thousands-of-californians> (discussing the lives of employed homeless Californians); *Employment and Homelessness*, HUD EXCHANGE, <https://www.hudexchange.info/homelessness-assistance/employment/#snaps-employment-strategies-in-rapid-re-housing-programs> (last visited Mar. 5, 2022) (“Most people who are at risk of or experiencing homelessness want to work. In fact, many are employed but earn too little to meet their basic needs.”).

86. See Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. PA. J.L. & SOC. CHANGE 81, 85–89 (2017) (providing a number of case studies in which individuals were fired following their arrests and were not re-hired after acquittal).

87. See Brendan Lynch, *Never Convicted, but Held Back by a Criminal Record*, TALK POVERTY (Dec. 9, 2014), <https://talkpoverty.org/2014/12/09/held-back-by-a-criminal-record/> (explaining that “when it comes to getting jobs, a mere arrest can be just as bad as a conviction”).

88. See, e.g., Michael Gold, *Boy, 6, Critically Injured in Attack by Homeless Man, Police Say*, N.Y. TIMES (Oct. 11, 2019), <https://www.nytimes.com/2019/10/11/nyregion/queens-boy-attack.html> (detailing an incident in which a mentally ill homeless man assaulted a child); Stephen Eide, *Letting Mentally Ill Homeless Live on the Streets is a False Kindness*, N.Y. POST (Oct. 7, 2019), <https://nypost.com/2019/10/07/letting-mentally-ill-homeless-live-on-the-streets-is-a-false-kindness/> (explaining how “[u]ntreated serious mental illness [among the homeless] poses a serious threat to the non-mentally ill homeless”).

89. See, e.g., Brief for the National Law Center on Homelessness & Poverty, et al. as Amici Curiae Supporting Appellants at 7–8, *Joyce v. City & Cnty. of S.F.*, 87 F.3d 1320 (9th Cir. 1996) (No. 95-16940) (quoting a police memorandum describing a policy of “mak[ing] San Francisco ‘inhospitable to homeless people’ and noting one police captain’s statement that “not one officer wants to deal with filth, flea infested, disease [sic] ridden people” (alteration in original)); Anna Maria Barry-Jester, *Sweeps of Homeless Camps in California Aggravate Key Health Issues*, NPR (Jan. 10, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/01/10/794616155/sweeps-of-homeless-camps-in-california-aggravate-key-health-issues> (“Communities

drive away tourists or shoppers, hurting economic development.⁹⁰ Others feel that homeless people make it harder for housed people to enjoy parks and public spaces.⁹¹

Still, there are real reasons to question the soundness of these laws. There are moral grounds to question the use of the criminal law to deal with this problem, two of them in particular. First, there is the harm principle. We generally do not tend to criminalize conduct unless the conduct creates harm, even when that harm is rather attenuated or unlikely.⁹² In some instances, such as with homelessness, one can see the possible harm: there are issues of people feeling threatened or having concerns about sanitation. But sometimes, unhoused people are simply an inconvenience, in the sense that we do not want to have to come face-to-face with the plight of others. Using that as a basis for arresting people and incarcerating them, or even just fining them, is flat out unacceptable.⁹³

Second, the criminal law tends to be deployed only when there is a certain degree of culpability present in one's conduct. Not always; there are, for example, strict liability crimes of various sorts.⁹⁴ But one has to ask hard questions about

up and down California, increasingly frustrated with the growing number of homeless people living on public property, have tasked police and sanitation workers with dismantling encampments that they say pollute public areas and pose serious risk of . . . disease.”).

90. See, e.g., David Montanaro, *LA Business Owners Fed Up with Homeless Crisis: Mayor Keeps Promising Action, but 'There Is No Improvement,'* FOX NEWS (July 12, 2019), <https://www.foxnews.com/us/los-angeles-business-owners-fed-up-homeless-crisis> (“Peter Mozgo and his wife, attorney Maria Janossy, told *Fox & Friends* on Friday that they’re losing potential customers because more and more people are sleeping on the sidewalks around their business . . .”); Rob Waters, *No Place Left to Go: Business Districts Keep Homeless Populations on the Move*, NEXT CITY (Feb. 18, 2019), <https://nextcity.org/features/view/no-place-left-to-go-business-districts-keep-homeless-populations-on-move> (discussing a Denver 2012 anti-camping ordinance passed at the behest of the Downtown Denver Partnership).

91. See, e.g., Chelsea Jensen, *Paddlers Say Homeless Ruining Bays*, HAW. TRIB.-HERALD (Jan. 20, 2020, 12:05 AM), <https://www.hawaiitribune-herald.com/2020/01/20/hawaii-news/paddlers-say-homeless-ruining-bays/> (discussing concerns among residents that the homeless population has reduced the public's enjoyment of a local bay); Michel Martin, *Philadelphia Affluent Want A Homeless-Free Park*, NPR (Aug. 6, 2008, 12:00 PM), <https://www.npr.org/transcripts/93334091?storyId=93334091?storyId=93334091> (reporting that local residents have complained that “homeless people are ruining the ambiance of [Rittenhouse Square park] by camping out, using it as a toilet and for sex”); Elizabeth Whitman, *Phoenix Has a \$5 Million Program to Help the Homeless. What Is It Doing?*, PHX. NEW TIMES (Oct. 17, 2019, 7:00 AM), <https://www.phoenixnewtimes.com/news/phoenix-homeless-outreach-program-community-bridges-arizona-cares-11374873> (observing that the Phoenix city government's description of one of its programs to help homeless people “depicts homelessness as a blight and a nuisance”); Boehm, *supra* note 67 (noting that \$1.4 million of the proposed Phoenix city budget will “address negative [homeless] activity” in the city's parks).

92. See generally *Theories of Criminal Law*, STAN. ENCYC. OF PHIL. (Aug. 6, 2018), <https://plato.stanford.edu/entries/criminal-law/> (explaining the “harmful conduct” and “harm prevention” principles).

93. See Jeremy Waldron, *Homelessness and Community*, 50 U. TORONTO L.J. 371, 384 (2000) (“[P]olitical and social theories that count as harm – for purposes of social policy – the negative feelings of anger and annoyance that people experience when they are shown that their society is *not* living up to its ideals . . . are treading on very dangerous ground.”).

94. Strict liability crimes are those which do not require a finding that the perpetrator had a “guilty” state of mind. See generally Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463, 463 n.3 (1981) (describing strict liability offenses as those “for which there is liability without culpability”); Alan C. Michaels, *Constitutional Innocence*, 112 HARV.

incarcerating people or imposing fines and fees on them for conduct they simply cannot control.⁹⁵ Although undoubtedly there are scofflaws out there, people who just keep insisting on sleeping in that doorway after they have been told to go somewhere else, few able-bodied people of sound mind really want to be this poor, and live on the street. Many unhoused people *are* struggling with mental illness or difficult issues of substance use.⁹⁶ Or just simple poverty.⁹⁷ It is wrong to treat them as “guilty” of something they cannot fix. Poverty is many things, but it should not be illegal.

If moral concerns do not move you, ask how successful these laws are at actually addressing the problem of homelessness, even if you view the “problem” as unhoused people being underfoot. In *Martin v. City of Boise*, a panel of the Ninth Circuit struck down a law prohibiting sleeping on the streets and held that a law that “imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them,” violates the Constitution.⁹⁸ This means that a community cannot make it illegal to sleep on the street unless there is a real alternative (e.g., a bed in a shelter). Some judges asked, unsuccessfully, for rehearing en banc because they believed the Constitution permitted criminalizing this type of conduct even when no alternative shelter is available.⁹⁹ When the en banc court decided not to take the case—as the Supreme Court also declined to do—some disgruntled judges issued strongly worded dissents.¹⁰⁰ Judge Martha Berzon, author of the panel majority, wrote her

L. Rev. 828, 830 (1999) (“[S]trict liability crimes contain a material element for which the actor’s culpability is irrelevant.”).

95. Consider, for instance, public urination. People need to urinate, and not all circumstances in which they do so are deterrable or morally culpable. See Daniel Denvir, *Peeing Is Not a Crime*, CITYLAB (July 21, 2015, 3:20 PM), <https://www.citylab.com/equity/2015/07/peeing-is-not-a-crime/399068/> (“Citing people for public urination criminalizes someone for doing something that society, the state and the market effectively encourages by making public restrooms scarce.”).

96. See, e.g., NAT’L COAL. FOR THE HOMELESS, MENTAL ILLNESS AND HOMELESSNESS, *supra* note 72 (reporting approximately a quarter of the country’s homeless population suffers from some form of severe mental illness); NAT’L COAL. FOR THE HOMELESS, SUBSTANCE ABUSE AND HOMELESSNESS, *supra* note 72 (explaining that substance use is significantly more common among homeless people than the general population).

97. See NAT’L COAL. FOR THE HOMELESS, *supra* note 69 (noting the documented rise in homelessness over the past several decades is partially explained by simultaneous rise in poverty rates); *Homelessness in America*, NAT’L COAL. FOR THE HOMELESS, <https://nationalhomeless.org/about-homelessness/> (last visited on Feb. 6, 2020) (“Homelessness and poverty are inextricably linked. . . . Difficult choices must be made when limited resources cover only some . . . necessities. Often it is housing, which absorbs a high proportion of income that must be dropped.”).

98. *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).

99. *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), *denying reh’g en banc*, 902 F.3d 1031, *cert. denied*, 140 S. Ct. 674 (2019).

100. See *id.* at 590–99 (Smith, J., dissenting from the denial of rehearing en banc) (“The panel’s decision, which effectively strikes down the anti-camping and anti-sleeping Ordinances of Boise and that of countless, if not all, cities within our jurisdiction, has no legitimate basis in current law.”); *id.* at 599–603 (Bennett, J., dissenting from the denial of rehearing en banc) (“[T]he panel’s decision . . . is wholly inconsistent with the text and tradition of the Eighth Amendment . . .”).

own forceful concurrence in response.¹⁰¹ She was particularly irate that one of the dissents had published the following photo, which was not in the record, and indeed not even from Boise (it is from Los Angeles).¹⁰²



A Los Angeles Public Sidewalk

In her concurrence, she wrote:

What the pre-*Martin* photograph *does* demonstrate is that ordinances criminalizing sleeping in public places were never a viable solution to the homelessness problem. People with no place to live will sleep outside if they have no alternative. Taking them to jail for a few days is both unconstitutional, for the reasons discussed in the opinion, and, in all likelihood, pointless.¹⁰³

Criminalizing homelessness not only is pointless; it rarely is anything other than a momentary patch on the problem. Homelessness is a chronic condition that criminalization is not fixing. Studies suggest between one-fifth and two-thirds of unhoused people have been arrested one or more times in their adult lives.¹⁰⁴ In 2017, unhoused individuals in Portland, Oregon constituted fifty-two percent of

101. See *id.* at 588–90 (Berzon, J., concurring in the denial of rehearing en banc).

102. See *id.* at 589 (“For starters, the picture is not in the record of this case and is thus inappropriately included in the dissent.”).

103. *Id.*

104. Pamela J. Fischer, Alan Ross & William R. Breakey, *Correlates of Arrest in Baltimore Homeless Population*, 20 CONTEMP. DRUG PROBS. 385, 386 (1993).

arrests, even though they were less than three percent of the population.¹⁰⁵ This is hardly an isolated phenomenon. Denver police, for instance, issued over 20,000 tickets in a four-year period to just 3,800 unhoused people under anti-homeless ordinances.¹⁰⁶ In 2016, 250 chronically unhoused people in Denver accumulated 1,500 arrests and 14,000 days in jail.¹⁰⁷ In Seattle, of the 1,300 people who had four or more bookings in 2013, fifty-nine percent were homeless.¹⁰⁸ In 2015, San Francisco spent over \$20 million to sanction homeless people under quality of life ordinances, some \$18.5 million of which was for police involvement, even though—as a report from the San Francisco government itself concluded—enforcement had no impact on the incidence of homelessness.¹⁰⁹

Which is to say, our jails are a revolving door for homeless people. If you are homeless, you are more likely to end up in jail or prison, and if you are put in jail or prison, the collateral consequences are more likely to render you homeless. The rate of homelessness among those incarcerated in state and federal prisons is four to six times higher than that of the general population.¹¹⁰ Some of those individuals assuredly committed offenses that are worthy of moral condemnation and punishment. But if the goal here is to sweep the streets permanently of those who are unhoused, it is not at all clear we are succeeding. We simply have created a revolving door of pain.

IV. THE POLICE

If you want to indulge this criminalization approach though, you need the police. They are the ones who roust the sleeping bodies, who mandate that the shopping carts and baby strollers be moved, that the whole “clutter” be disposed of, and that

105. Rebecca Woolington & Melissa Lewis, *Portland Homeless Accounted for Majority of Arrests in 2017, Analysis Finds*, OREGONIAN (June 27, 2018, 8:37 PM), https://www.oregonlive.com/portland/index.ssf/2018/06/portland_homeless_accounted_fo.html.

106. ARIEL SCHREIBER & BECCA BUTLER-DINES, UNIV. OF DENVER STURM COLL. OF L., HOMELESS ADVOCACY POL’Y PROJECT, TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO: DENVER CITY SPOTLIGHT 1 (2018).

107. Liz Gelardi, *Denver Apartments for Homeless Will House 250*, ABC DENVER (Jan. 28, 2016, 1:17 AM), <https://www.thedenverchannel.com/news/local-news/denver-using-86m-loan-to-build-apartments-for-chronically-homeless-people>.

108. Marc Stiles & Coral Garnick, *The Price of Homelessness: Humanitarian Crisis Costs Seattle Area More than \$1B*, PUGET SOUND BUS. J. (Nov. 22, 2017), <https://www.bizjournals.com/seattle/news/2017/11/16/price-of-homelessness-seattle-king-county-costs.html>. Fully ninety-four percent of those with four or more bookings per year “had a behavioral health condition and needed psychiatric medications and/or detox.” *Id.*

109. See LATOYA McDONALD, JULIAN METCALF & SEVERIN CAMPBELL, CITY & CNTY. OF S.F., BUDGET & LEGIS. ANALYST’S OFF., POLICY ANALYSIS REPORT: HOMELESSNESS AND THE COST OF QUALITY OF LIFE LAWS 1–2, 15 (2016), <https://perma.cc/35XN-R4H8> (“One of the main goals of quality of life laws was to preserve public spaces in the City. However, the number of homeless living on the streets has increased from 3,016 in 2011 to 3,505 in 2015, an increase of 16 percent, limiting the effectiveness of quality of life laws.”).

110. Greg A. Greenberg & Robert A. Rosenheck, *Homelessness in the State and Federal Prison Population*, 18 CRIM. BEHAV. & MENTAL HEALTH 88, 94–95 (2008).

the person be ticketed or hauled off to jail.¹¹¹ And their role in doing so raises interesting questions, not just about the strategy of criminalization, but also about how we deploy police and to what end. Because to the extent one thinks of police as crimefighters, more often than not this is the sort of “crime” they are after.

Rather than requiring me to raise these questions, let us allow the police to do it themselves. I often say that the police are some of the most progressive folks around. I know that sounds unlikely: that is not the stereotype of a cop, and it may not reflect how many cops are voting in elections. But what distinguishes the cops from many of us is that they are out there on the street every day dealing with the problems that most of us rarely encounter. They know what the score is.

Here is just a sampling of things officers have said about the unhoused population:

We are not trained or equipped to ‘help’ these people. We are the police, tasked with dealing with the ‘crimes,’ not social disorders that no one else seems to be able to deal with. Quite frankly, it’s not our job.

....

I would like to believe that I act with some compassion, but quite frankly we are busy dealing with many other issues and we don’t have much time to babysit an adult and try to find someone to help him. It’s easier for us to place someone in jail than it is to get a facility to take them. Sad but true.

....

... With regard to the jails and courts, simply throwing these people into jail isn’t going to help them or the criminal justice system. EDPs (emotionally disturbed persons) will only be victimized more in jails and take up space that is needed for real criminals. . . . I feel many cops think that by throwing them in jail or psych wards they are making a quick and easy fix, but they aren’t, they’re only adding to the bigger problem.¹¹²

To be clear, not all cops are even that understanding. As I was writing this piece, a remarkable image that came across my Twitter feed.¹¹³ The cops in Mobile, Alabama, apparently confiscated signs from panhandling homeless folk and proudly displayed this “quilt.”

111. BAILEY ET AL., *supra* note 83, at 3 (discussing law enforcement agencies’ use of move-along orders and forced evictions, which frequently result in the destruction of homeless people’s personal property).

112. Robert Hartmann McNamara, Charles Crawford & Ronald Burns, *Policing the Homeless: Policy, Practice, and Perceptions*, 36 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 357, 367 (2013) (quoting various officers questioned for a study examining the role of law enforcement in addressing the problem of homelessness).

113. Gretchen Koch (@gretchenkoch), TWITTER (Dec 30, 2019, 9:22 AM), <https://twitter.com/GretchenKoch/status/1211653757806809089>.

11:13

facebook.com



Preston [redacted] is with Alex [redacted] and 2 others.
17 hrs · 🌐

Wanna wish everybody in 4th precinct a Merry Christmas , especially our captain . Hope you enjoy our homeless quilt!

Sincerely, Panhandler patrol.



 71

20 Comments

 Like

 Comment

Speaking generally, what the cops think—and that may include these cops from Mobile—is that having them (and thus the criminal justice system) deal with problems with the homeless population is ridiculous. In a 2013 study of police departments, interviewed officers commonly said that “it should not be the responsibility of the police to deal with [the homeless] population.”¹¹⁴ Cops do not think they are suited to it. And at least some of them (though there is clearly a difference of opinion) do not think hassling, moving, ticketing, and arresting homeless people is fixing the problem.¹¹⁵ Finally—and this is an important point—they think their real work is catching criminals.¹¹⁶ Just not this kind of “criminal,” apparently.

For what it is worth, and it is worth generalizing for a moment, the statements are not so different from things officers have said about mental health or substance use or roaming canines. As one Ohio police chief said about the opioid crisis, “law enforcement has been forced to take the lead on this, and we probably are not the best professionals to be doing this, because our job really is to enforce the laws.”¹¹⁷ Or as former Dallas Police Chief (and current Chicago Superintendent) David Brown put it:

We are asking cops to do too much in this country. . . . We are. Every societal failure, we put it off on cops to solve. Not enough mental health funding, let the cops handle it. . . . Here in Dallas we got a loose dog problem; let’s have the cops chase loose dogs. Schools fail, let’s give it to the cops. . . . That’s too much to ask. Policing was never meant to solve all these problems.¹¹⁸

As a historical claim, this is all probably wrong. Policing always has been about a lot more than chasing down criminals.¹¹⁹ Among the many deplorable “traditions” in which police have been involved in this country, there’s one more generous one that most people don’t know about. Dating back to the 1800s, when we first started to see organized policing agencies in this country, one of the police’s functions was to provide shelter for, rather than arrest, those who needed it. Often they were

114. McNamara et al., *supra* note 112, at 367.

115. See Sarah Holder, *Why Calling the Police About Homeless People Isn’t Working*, BLOOMBERG: CITYLAB (Sept. 25, 2019, 10:18 AM), <https://www.citylab.com/equity/2019/09/homeless-person-complaints-when-to-call-police-311-report/597742/> (noting that “many police officers [in San Francisco] were reticent to follow through on complaints and engaging with homeless people because they knew how few services there are available” and recognizing that in many cases, officers are “just moving people around and not solving the problem”).

116. See *supra* notes 37–38 and accompanying text.

117. Katie Zezima, *As Opioid Overdoses Rise, Police Officers Become Counselors, Doctors and Social Workers*, WASH. POST (Mar. 12, 2017), <http://wapo.st/2mgA7Ma>.

118. Brady Dennis, Mark Berman & Elahe Izadi, *Dallas Police Chief Says ‘We’re Asking Cops to Do Too Much in This Country,’* WASH. POST (July 11, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/grief-and-anger-continue-after-dallas-attacks-and-police-shootings-as-debate-rages-over-policing/> (second and third alterations in original).

119. See *supra* Part II.A.

people with serious alcohol problems.¹²⁰ But as a claim about competence, about what cops are good at, about whether they ultimately are likely to solve the social problem, the protestations of the police that they are the wrong responders seem right on.

Think, if you will, about the sets of skills one would expect to see in first responders asked to deal with the homeless. First, some basic medical training, the kind that emergency medical technicians (“EMTs”) have. Then, a deep awareness of available social services, and a capacity to know how to mobilize them effectively. Third, one may want these responders to have great mediation skills. A big part of dealing with homelessness and other social issues on the street involves mediating disputes between those who think someone should not be doing something and those who think the person is entitled to do it.¹²¹ I am guessing (though our knowledge on this front is deeply insufficient) that many of a cop’s daily interactions with people also requires this sort of mediation skill on a regular basis.¹²² When it succeeds, problem solved; when it doesn’t, enforcement follows.

Now measure this basic set of skills up against the training we actually give police officers. A group of students and I have worked to collect information on required training for new cops, both by state certifying bodies, and by particular departments.¹²³ Below is a pie chart showing what the training regime looks like in Nashville, Tennessee.¹²⁴ We have broken the training into mediation, social services, medical, use of force, law enforcement, and administrative.

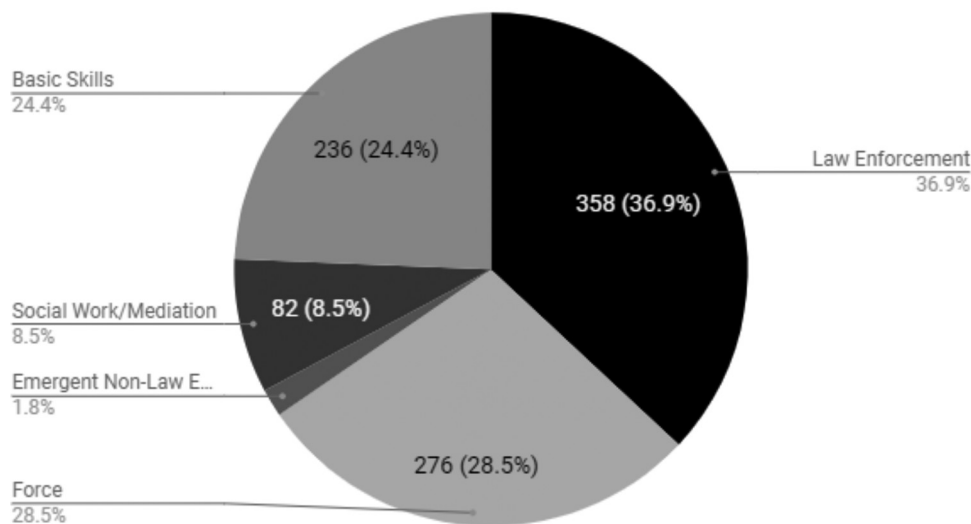
120. See WILSON, *supra* note 46, at 118–21 (describing how cops dealt with “drunks” in the 1800s and how administrators often referred to drunkenness as a “social or medical problem”).

121. See George T. Patterson, *Police Social Work: A Unique Area of Practice Arising from Law Enforcement Functions*, NAT’L ASS’N OF SOC. WORKERS, N.Y. CHAPTER (July 2008), <https://www.naswnyc.org/general/custom.asp?page=77> (“Examples of service related functions include responding to family disputes in which no crime has occurred and crisis intervention and mediation skills are required.”).

122. See, e.g., Maria R. Volpe, *Police and Mediation: Natural, Unimaginable or Both*, in MOVING TOWARD A JUST PEACE: THE MEDIATION CONTINUUM 91, 91 (Jan Marie Fritz ed., 2013) (“[S]ince police work has always involved the handling of a variety of conflict situations, historically mediation related interventions have been a part of routine police work.”); Patterson, *supra* note 121 (explaining the “80/20 rule,” which claims that about twenty percent of what police do is “crime fighting” and eighty percent of their time is spent on “service related tasks” such as crisis intervention and mediation).

123. See Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 947 (2021).

124. *Id.* at 948.

Figure 1. Nashville Training Breakdown**NASHVILLE ACADEMY**

In my experience, this breakdown is typical of most police departments. There usually is a very large emphasis on the use of force and law enforcement, and significantly less importance placed on the rest of the skills that I have been suggesting would be needed to deal with social problems.

To be clear, I am not minimizing the importance of the training the police do receive. Obviously, law enforcement officers need to learn the law. And they need to learn how the system works, whether it is dispatch protocols, interviewing witnesses, or testifying in court. Indeed, training on the use of force is particularly essential. The use of force is an often-discussed and highly contentious issue.¹²⁵ Even if we hope for a non-enforcement outcome to street encounters, with the unhoused population and others, force—or at least its presence—may well be needed in some circumstances.

On the one hand, some officers are too quick to use force, or to use too much of it.¹²⁶ And there are some individuals, especially those with mental health issues,

125. See, e.g., Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (reporting that an estimated fifteen to twenty-six million people participated in protests against police use of force in the weeks following George Floyd's murder).

126. For example, the national conversation has recently focused on the case of Breonna Taylor, a young woman who was killed in a police raid of her home, despite the fact that neither she nor her boyfriend were suspects targeted in the drug raid. See Nicholas Bogel-Burroughs, *Months After Louisville Police Kill Woman in Her Home, Governor Calls for Review*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/us/breonna-taylor-louisville-shooting.html>. Similarly, the police used deadly force against Eric Garner for selling

who may react quite poorly to the use of force.¹²⁷ That is why so many departments today finally are providing specialized training to those who deal with mental health issues.¹²⁸ But on the other hand, encounters can go south quickly, endangering those present. The threat of force could be necessary in some encounters, even if it is never deployed.¹²⁹ Indeed, the very presence of force may act both as a deterrent and a means of bringing a problem to a safe conclusion. But to ensure force is used judiciously, and only when necessary, we may well want more force training, not less, including training on how to avoid using it as much as cops are currently using it.

The bottom line, though, is this: we send cops to deal with lots of problems for which they are poorly trained. Cops may be the first responders, but it is not clear they are the right or best responders. At least, not on their own.

Ultimately, I want to ask what we should do about this mismatch. But first, I must address the question of why we do this at all. Why do we criminalize the homeless? Why do we use police this way? And to that question I offer two answers.

V. COST-BENEFIT ANALYSIS

The first reason we criminalize the homeless is a failure to think intelligently about our wallets when it comes to public safety. We are cheap. On the one hand, we do not want unhoused people around. On the other hand, housing the homeless is expensive, and people are generally unwilling to pay for it.¹³⁰ So we call the police and ask them simply to make the homeless go away.

“loosies,” or loose cigarettes, on the street. Ashley Southall, *Police Investigators Determined Officer Choked Eric Garner*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/nyregion/eric-garner-death-daniel-pantaleo-trial-chokehold.html>. Police across the United States kill more than 1,000 civilians each year, compared to about 10 police killings each year by British and German police combined. Brendan O’Flaherty & Rajiv Sethi, *How Fear Contributes to Cops’ Use of Deadly Force*, MARSHALL PROJECT (May 1, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/05/01/can-understanding-fear-mitigate-police-violence>.

127. See Amy C. Watson & Anjali J. Fulambarker, *The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners*, 8 BEST PRACS. MENTAL HEALTH 1, 6 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3769782/pdf/nihms500811.pdf> (describing how mental health “[p]roviders felt that police officers lacked understanding of mental illness and would often exacerbate crisis situations”); Erica Goode, *For Police, a Playbook for Conflicts Involving Mental Illness*, N.Y. TIMES (Apr. 25, 2016), <https://www.nytimes.com/2016/04/26/health/police-mental-illness-crisis-intervention.html> (noting that “routine police actions aimed at control—placing a hand on a person’s shoulder, for example—can backfire with someone with a severe mental illness”).

128. See Michael S. Rogers, Dale E. McNiel & Renée L. Binder, *Effectiveness of Police Crisis Intervention Programs*, 47 J. AM. ACAD. PSYCHIATRY & L. 1, 1–4 (2019), <http://jaapl.org/content/early/2019/09/24/JAAPL.003863-19#ref-9> (explaining the origin and subsequent national and international spread of Crisis Intervention Team training as a specialized police curriculum developed to reduce the risk of serious injury or death during interactions between police officers and persons with mental illness).

129. See Bittner, *supra* note 46, at 33 (noting that we expect the police to show up as purveyors of force even in the many situations that will not ultimately require that force to be deployed).

130. See Saelinger, *supra* note 74, at 545 & n.5 (explaining “compassion fatigue” around homelessness).

It is at least an open question, however, whether this seemingly cheap and easy solution really is as cheap and easy as it appears. Or whether we actually are being penny wise and pound foolish. Whether our short-term cheap solution is causing us greater expense in the long run. This issue illustrates our peculiar failure to employ cost-benefit analysis around issues of public safety.

There is plenty of evidence that policing agencies do not adopt the most effective policing strategies. Many agencies still engage in some form of random patrol, although the consensus has long been that it is not effective in deterring or detecting crime.¹³¹ Professors Chris Koper and Cynthia Lum argue—based on evidence from careful study—that agencies have been fast to adopt surveillance technologies such as automated license plate readers and cell site simulators even when the benefits are uncertain, and have been slow to adopt techniques that have been proven effective, such as hot spot policing.¹³²

But even if policing techniques are effective from a crime-reduction and deterrence standpoint, and even if they are affordable for policing agencies, that calculus usually still fails to take account entirely of the social costs of policing. This is what I meant earlier by the collateral consequences of policing. Stop and frisk compromises liberty, implicates racial discrimination, and creates psychological stress.¹³³ The use of SWAT teams causes the destruction of property and injuries to persons.¹³⁴ Facial recognition involves potentially serious losses of liberty and privacy.¹³⁵ All of these are costs, and if these costs are not considered when deciding

131. See Lawrence W. Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing and Tracking*, 42 CRIME & JUST. 377, 387 (2013) (“[T]he conclusion that random patrol did not work was widely accepted. . . . None of that stopped the widespread use of random patrol.”); see also PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE’S EASTERN DISTRICT 108–10 (2008) (arguing that having cops patrol and wait for service calls keeps them from doing a variety of more valuable tasks, including walking around neighborhoods, building relationships, and trouble-shooting problem areas).

132. See Christopher S. Koper & Cynthia Lum, *The Limits of Police Technology*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 517, 517–20 (David Weisburd & Anthony Braga eds., 2d ed. 2019).

133. See Ponomarenko & Friedman, *supra* note 25, at 314–15 (discussing the social costs of police-citizen encounters).

134. An investigation by the New York Times identified at least 81 civilian and 13 law enforcement deaths from SWAT raids from 2010 to 2016, with many others being severely injured. Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html>; see also Radley Balko, *Shedding Light on the Use of SWAT Teams*, WASH. POST (Feb. 17, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/02/17/shedding-light-on-the-use-of-swat-teams/?utm_term=.b94e898828fe (noting that a study of the use of SWAT teams in Maryland revealed that about two of every three SWAT raids used forcible entry). The direct monetary cost of SWAT raids is also significant, as the hourly cost of a raid can run to thousands of dollars. See, e.g., Joy Diaz, *How Much It Costs Austin Every Time SWAT Teams Roll Out*, KUT 90.5 (Aug. 4, 2014, 7:22 AM), <https://www.kut.org/post/how-much-it-costs-austin-every-time-swat-teams-roll-out>.

135. See generally Clare Garvie, Alvaro Bedoya & Jonathan Frankle, *The Perpetual Line-Up: Unregulated Police Face Recognition in America*, GEO. L. CTR. PRIV. & TECH. (Oct. 18, 2016), <https://www.perpetuallineup.org/> (discussing the liberty and privacy implications of the FBI’s facial recognition program in the United States); EUR. UNION FUNDAMENTAL RTS. AGENCY, FACIAL RECOGNITION TECHNOLOGY: FUNDAMENTAL RIGHTS CONSIDERATIONS IN THE CONTEXT OF LAW ENFORCEMENT (2019) (examining fundamental rights implications of law enforcement’s reliance on live facial recognition technology in the European Union).

which policing strategies to adopt, then we have no assurance policing is proceeding along the best of paths.

Throughout government, we use cost-benefit analysis (“CBA”) as a primary tool in determining agency policy. When Ronald Reagan became President in 1980, he put in place an Executive Order mandating the use of CBA in making decisions about regulatory policy.¹³⁶ This was controversial, as many felt it was an attempt to dismantle the regulatory state.¹³⁷ But it has not played out that way. Instead, in areas ranging from workplace safety to environmental protection, CBA now is the accepted means for determining how government should proceed.¹³⁸ It is how we make the best decisions we can with the information we have.¹³⁹

This has not been as true of policing, however. There is a movement for “evidence-based policing” that suggests that policing be based in firm evidence of what works and what does not.¹⁴⁰ That seems uncontroversial. Still, as leading scholars in the evidence-based policing world have indicated, take-up on the idea is slow,¹⁴¹ which is why we have suboptimal policing. But evidence-based policing itself tends to fall short by focusing on the efficacy of policing measures, too often to the neglect of the social costs. Scholars have noted, on occasion, the failure to subject policing techniques and tactics to cost-benefit scrutiny.¹⁴²

Take, as one example, the issue of arrests. Although many police tend to think of arrests as “benefits”—getting someone who violated the law off the streets—

136. Exec. Order No. 12,291, 3 C.F.R. § 127 (1981).

137. John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 404 (2008).

138. See, e.g., Michael A. Livermore, *Can Cost-Benefit Analysis of Environmental Policy Go Global?*, 19 N. Y.U. ENV'T. L.J. 146, 148 (2011) (“While cost-benefit analysis remains controversial as a tool to shape environmental policy, the technique is ‘here to stay’ and has become a central instrument for evaluating and justifying regulatory decisions in the developed world.”).

139. Cost-benefit analysis serves as a “natural corrective” to judgments made in the face of a lack of information or on the basis of mental short-cuts that produce errors. See Cass R. Sunstein, *Cognition and Cost-Benefit Analysis* 10 (Univ. of Chi. L. Sch. John M. Olin L. & Econ. Working Paper, Paper No. 85, 1999).

140. The movement for evidence-based policing began in the 1990s. See Lawrence W. Sherman, *Evidence-Based Policing*, 1 IDEAS AM. POLICING, July 1998 (framing evidenced-based policing as a “new paradigm”). Since then, evidence-based policing organizations have been established in multiple countries. See AMERICAN SOCIETY OF EVIDENCE-BASED POLICING, <https://www.americansebp.org/> (last visited Feb. 6, 2020); SOCIETY OF EVIDENCE-BASED POLICING, <https://www.sebp.police.uk/> (last visited Feb. 6, 2020) (United Kingdom); CANADIAN SOCIETY OF EVIDENCE-BASED POLICING, <https://www.can-sebp.net/> (last visited Feb. 6, 2020).

141. See, e.g., Sherman, *supra* note 131, at 438 (“Evidence-based policing in 2013 still had a long way to go.”); Cynthia Lum, *Translating Police Research into Practice*, 11 IDEAS AM. POLICING, Aug. 2009, at 3 (“Despite its potential, . . . evidence-based policing has not rapidly diffused into American policing.”); David Weisburd & Peter Neyroud, *Police Science: Toward a New Paradigm*, NEW PERSPS. POLICING, Jan. 2011, at 3 (“[T]he evidence-based model for developing practices and policies has not been widely adopted by police agencies.”).

142. See, e.g., Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 901–905 (2015) (noting that although police coercion imposes significant costs, those costs often are undercounted or ignored entirely in setting policy); Barry Friedman & Elizabeth G. Janszky, *Policing’s Information Problem*, 99 TEX. L. REV. 1, 3 (2020) (“[W]e spend over \$100 billion a year in the United States on achieving public safety . . . and yet we have far too little understanding of what sort of policing actually works.”).

most social scientists think of an arrest as a cost.¹⁴³ For years, officers have been rewarded for collaring folks, and police departments have counted arrests in the benefit category.¹⁴⁴ But in reality, arrests impose a number of serious costs on society and offenders alike, whether it is court time, prison beds, or the outward ripple effects on the families of those who are justice-system involved, making it difficult to find work or feed a family.¹⁴⁵ The correct measure of a benefit brought about by policing is not whether someone is taken into custody; it is whether we are deterring or preventing crime in the first place, and fostering an increased perception of public safety.¹⁴⁶ An arrest may take a car thief off the street, but the market for stolen car parts may be such that another thief will step in to take his place.¹⁴⁷ If so, it is unclear what we have accomplished by the arrest. This is not to say we should never arrest the culpable; rather, the issue is whether we are bringing down car theft in an optimal way.

There are a number of reasons one could speculate as to why cost-benefit analysis is not employed widely in policing and public safety. One of them surely is the culture of insularity and secrecy that surrounds policing.¹⁴⁸ Given the nature of the work, some secrecy is necessary. No one wants to endanger officers or the public by spilling operational or tactical details, such as protocols for dealing with active shooters. Yet, the amount of information that has been withheld by police in the name of secrecy is wholly out of proportion to what actually is required.¹⁴⁹ As Professor Rachel Harmon has noted, those who want information from the police often have to fight tooth and nail to get it.¹⁵⁰ Agencies simply are loath to open themselves up to scrutiny over even basic police activity like stops, low-level

143. Compare Malcolm K. Sparrow, *Measuring Performance in a Modern Police Organization*, NEW PERSPS. POLICING, Mar. 2015, at 13 (noting that when New York City implemented aggressive order maintenance tactics, high arrest rates “seem[] to have been a source of pride”), with Cynthia Lum & Daniel S. Nagin, *Reinventing American Policing*, 46 CRIME & JUST. 339, 344–48 (2017) (“Our point . . . is that there are significant costs to arrests and that their crime control effectiveness is often not demonstrable.”).

144. See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 359–60 (2016) (“Departments encourage arrests . . . use arrest numbers as a measure of productivity and a basis for overtime pay.”).

145. Michael Tonry, Commentary, *The Fog Around Cost-of-Crime Studies May Finally Be Clearing: Prisoners and Their Kids Suffer Too*, 14 CRIMINOLOGY & PUB. POL’Y 653, 660–61 (2015) (explaining that the costs of incarceration include, among other things, offenders’ lost earnings, the reduced life chances and living standards for their children).

146. See Charles F. Manski & Daniel S. Nagin, *Assessing Benefits, Costs, and Disparate Impacts of Confrontational Proactive Policing*, 114 PROCS. NAT’L ACAD. SCIS. 9308 (2017) (providing a model of policing analysis that assesses the benefit of a policing technique in terms of its crime reduction); Billy Henson & Bradford W. Reynolds, *The Only Thing We Have to Fear is Fear Itself. . . and Crime*, 9 SOCIO. COMPASS 91, 99 (2015) (arguing that “fear of crime” is a serious problem that reduces quality of life).

147. See Harmon, *supra* note 144, at 358–59 (arguing that arrests are not an effective way to deter crime).

148. See Rachel A. Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1129–30 (2012) (discussing why so little information is collected by police departments); see also Barry Friedman, *Secret Policing*, 2016 U. CHI. LEGAL F. 99, 100 (2016) (arguing that “despite attempts to bring policing officials closer to the communities they police, pervasive secrecy is part of what has led to a breach of trust”).

149. See Friedman & Ponomarenko, *supra* note 14, at 1848–49, 1884–86.

150. Harmon, *supra* note 148, at 1130 n.32.

arrests, and uses of force.¹⁵¹ Whether it is the infamous “blue wall of silence,” in which police circle around and refuse to say what happened when one of their own engages in misconduct,¹⁵² or the resistance to collecting data that might lead to criticism, as happens around data on the demographics of police stops, this approach condemns us all to ignorance.¹⁵³ No field can advance with that attitude, and until law enforcement is willing to study itself rigorously and learn what works and what does not, it cannot, in any meaningful sense, call itself a profession.¹⁵⁴

Wherever one stands on the policing secrecy issue, though, the failure to deploy a cost-benefit analysis around something like homelessness enforcement simply is indefensible. There is no need for secrecy here, and not even any grounds for defensiveness on the part of policing agencies. They do not set homelessness policy; the general public does, through their elected legislative and executive branch officials. The police simply step in to enforce that policy.

The proper question, though, is whether that policy makes any sense from a cost-benefit perspective. There is not a lot of evidence on this score, but what there is suggests that if a cost-benefit approach is taken, using law enforcement is not a cost-effective way to deal with homelessness, but that more compassionate approaches may be. Three studies identified by the National Law Center—in Utah, in Albuquerque, New Mexico, and in Central Florida—all found that providing housing to the chronically homeless costs less than not doing so, when taking into

151. See *We Know How Many People are Killed by Vending Machines. We Don't Know How Many People Are Killed by Cops.*, ACLU (June 28, 2016), <https://www.aclu.org/video/we-know-how-many-people-are-killed-vending-machines-we-dont-know-how-many-people-are-killed> (noting that “police departments don’t often volunteer any of this data, even if they’re collecting it, because they’re concerned with their image and liability”).

152. See Philip Hayden, *Why an Ex-FBI Agent Decided to Break Through the Blue Wall of Silence*, USA TODAY (Jan. 31, 2019, 8:26 PM), <https://www.usatoday.com/story/opinion/policing/2019/01/31/blue-wall-of-silence-policing-the-usa-cops-community/2604929002/> (“[The blue wall of silence] refers to the unofficial oath of silence within departments. Cops don’t rat on cops.”)

153. There are currently twenty-four states that require the collection of racial profiling information for either or both traffic and pedestrian stops. See E-mail from Farhang Heydari, Deputy Dir., Policing Project, to author (Nov. 29, 2018, 3:44 PM) (on file with author). Police agencies too often find ways to avoid compliance with these data reporting laws without suffering any penalty. See, e.g., *SPLC Report: Louisiana Law Enforcement Agencies Must Collect, Publish Data On Police Activity*, S. POVERTY L. CTR. (Nov. 15, 2018), <https://www.splcenter.org/News/2018/11/15/Splc-Report-Louisiana-Law-Enforcement-Agencies-Must-Collect-Publish-Data-Police-Activity> (explaining that Louisiana’s law exempts agencies that have policies against racial profiling from making their data public, even though there are no standards for these policies); Peter Hirschfeld, *Many Vermont Police Agencies Aren't Following Traffic-Stop Data Collection Law*, N.H. PUB. RADIO (Apr. 25, 2016, 6:00 AM), <https://www.nhpr.org/2016-04-25/many-vermont-police-agencies-arent-following-traffic-stop-data-collection-law#stream/0v> (noting that because Vermont’s law has no meaningful enforcement mechanism, many police departments are not complying).

154. See Sherman, *supra* note 131, at 381–82 (arguing that policing has yet to become a “profession” by conventional measures because it does not restrict entry to those who have mastered knowledge and skills needed to provide a particular set of complex services).

account law enforcement and health care costs.¹⁵⁵ Below is a chart showing the way the costs break down in the Albuquerque program.¹⁵⁶

Reducing Costs with Housing First		
	One Year <u>Before</u> Housing First Program Cost	One Year <u>After</u> Housing First Program Cost
Hospital Inpatient	\$946,874.22	\$153,003.48
Emergency Room	\$208,439.74	\$181,272.62
Medical Outpatient	\$524,568.17	\$319,711.58
Mental Health Inpatient	\$21,732.62	\$54,089.00
Mental Health Outpatient	\$47,391.66	\$31,790.87
Shelter	\$117,948.92	\$0.00
Social Services Costs	\$27,272.36	\$155,264.74
Jail	\$51,540.30	\$18,448.89
Jail-Based Treatment	\$3,844.79	\$4,133.67
Housing First Program Housing Costs	\$0.00	\$309,706.37
Housing First Program Services Costs	\$0.00	\$106,473.07
Total	\$1,949,814.78	\$1,333,894.29
Annual Savings with Housing First Program		\$615,920.49
City of Albuquerque Heading Home Initiative Cost Study Report Phase I		

As you can see, the main approach of these studies is to compare the costs of the program for housing people and providing social services with the costs of jails and health care. I do not want to overclaim here; the methodology of these studies may be wrong, or simply too facile. Utah's state auditor recently called these results into question, citing poor data.¹⁵⁷ For example, the auditor found that key information for clients enrolled in rapid rehousing programs was either inaccurate or missing, leading to misleading conclusions about the effectiveness of the programs.¹⁵⁸ In one study the auditor reviewed, seventy-four percent of the clients included in the study never received subsidized housing through the rapid rehousing program and should not have been included in the study.¹⁵⁹ This sort of over-

155. NO SAFE PLACE, *supra* note 58, at 9 (noting, for example, that the Utah Housing and Development Division found that the annual cost of emergency room visits and jail stays for the average homeless person was \$5,670 more than the cost of providing an apartment and a social worker).

156. *Id.* at 31.

157. STATE OF UTAH, OFF. OF THE LEGIS. AUDITOR GEN., A PERFORMANCE AUDIT OF UTAH'S HOMELESS SERVICES, REPORT NO. 2018-12, at 11 (2018).

158. *Id.* at 11-12.

159. *Id.* at 12.

inclusion might have rendered the study's conclusions about effectiveness unreliable.

Even with good data that favors some approach other than criminalization, there are bound to be a host of political problems. Some legislators may oppose a more compassionate approach on ideological grounds, thinking this is the role of private charity, not government. It could be that budgetarily, the housing program costs are hard costs legislators must fund with tax dollars, while criminal justice or health care costs are buried in existing budgets. There are going to be deeply complicated issues about which level of government is paying for which approach, be it city, county, state, or federal, or whether governments have coordinated their responses. For instance, according to local reporting, the city of Surprise, Arizona is all too willing to drive its homeless population out, allowing neighboring jurisdictions to bear the cost.¹⁶⁰ On the other hand, a jurisdiction that has a policy of housing the homeless runs the risk of becoming a magnet for homeless individuals.

The cost-benefit approach I described of analyzing criminal justice, medical, and housing and social work costs also may neglect significant costs and benefits. For example, the cost of police resources is missing from that chart. But so too are the social benefits to people who no longer live on the street in terms of the quality of their lives. And perhaps also the social benefit that accrues to all of us, knowing we actually have solved a difficult problem or have helped better people's lives.

The only point I want to make—and it seems to me an incredibly important one—is that we should not simply assume that using law enforcement to address issues like homelessness is a cost-effective solution. Frequently, it's not.

VI. PUBLIC SAFETY

My next answer revolves around what we mean when we talk about “public safety.” The problem for me, though, is that I saw policing as causing a lot of collateral harm. That caused me to think a great deal about what public safety means, and to wonder whether we as a society are achieving it.

A. *The Duty of Protection*

When we talk about public safety, without a doubt the primary thing people have in mind is physical safety—the protection of person and property from physical threats and harm.¹⁶¹ This duty of protection is in the view of many the “first job of government.” It is the very reason, according to classical liberal scholars like

160. Boehm, *supra* note 67 (explaining that in 2018, Surprise, Arizona enacted an urban camping ordinance prohibiting people from sleeping in public places within the city limits as long as Surprise can offer shelter anywhere within a 50-mile radius).

161. See Friedman, *supra* note 39, at 13–15 (explaining that when people discuss public safety, they are usually referring to the government's protection function).

Hobbes, Locke, and Bentham, that people give up the liberty of living in a state of nature and form societies.¹⁶²

What is ironic is that despite widespread consensus that government has to perform this vital function, in *DeShaney v. Winnebago County*, the Supreme Court said just the opposite, holding that “nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty, and property of its citizens against invasion by private actors.”¹⁶³ In a terrific article called *The First Duty of Government*, Professor Steven Heyman sunders the *DeShaney* reasoning as completely antithetical to the entire history of Western thought from the Enlightenment through the ratification of the 14th Amendment following the Civil War.¹⁶⁴ As a simple question about why we have government, Heyman has to be right, and *DeShaney* has to be wrong. For what it is worth, I think there are plenty of alternative ways to understand *DeShaney*—for instance, that it is strictly a holding about the remedial capacity of courts. Ultimately, though, I believe when government fails to protect someone as badly as it did in that case—leaving a boy they fully knew was at risk to be beaten to death by his father—the government should be liable.

Some amount of the criminalization of homelessness finds its authority in the duty of protection. People feel threatened in person and property to some degree by homeless folks, by their presence and by their growing numbers.¹⁶⁵ They view homeless camps as unsanitary and threatening to public health.¹⁶⁶ And so they elect

162. See THOMAS HOBBS, *ELEMENTS OF LAW, NATURAL AND POLITIC* 110 (Ferdinand Tönnies ed., Cambridge Univ. Press 1928) (1640) (explaining that individuals relinquish their liberty to a sovereign with the understanding that the sovereign will provide them with protection); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 52, § 95 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690) (arguing that individuals exchange their natural liberty for “comfortable, safe, and peaceable living one amongst another” and “secure enjoyment of their properties”); 1 JEREMY BENTHAM, *THEORY OF LEGISLATION* 124 (Charles Milner Atkinson ed. & trans., 1914) (1802) (describing security as “the principal, indeed the paramount, object” of government).

163. 489 U.S. 189, 195 (1989) (finding county social services did not violate a child’s Fourteenth Amendment rights when it failed to intervene to protect him against his father’s violence, even though it had received numerous complaints of the abuse).

164. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 546 (1991) (“A central purpose of the Fourteenth Amendment and Reconstruction legislation was to establish the right to protection as a part of the federal Constitution and laws, and thus to require the states to protect the fundamental rights of all persons, black as well as white. In establishing a federal right to protection, the Fourteenth Amendment was not creating a new right, but rather incorporating into the Constitution the concept of protection as understood in the classical tradition.”).

165. See, e.g., Dean Balsamini, *Residents Claim Homeless Have Overrun Ritzy Lower Manhattan Neighborhoods*, N.Y. POST (Sept. 21, 2019, 7:43 PM), <https://nypost.com/2019/09/21/residents-claim-homeless-have-overrun-ritzy-lower-manhattan-neighborhoods/> (reporting New York City residents felt “scared,” and had taken to carrying mace in response to a rise in homelessness); Heather MacDonald, *San Francisco, Hostage to the Homeless*, CITY J. (S.F.), Fall 2019, <https://www.city-journal.org/san-francisco-homelessness> (quoting employee of a San Francisco home for seniors asserting that “[o]ur elderly are scared to go out” because of the number of homeless people on the nearby streets).

166. See, e.g., Balsamini, *supra* note 165 (reporting on concerns of New York City residents that growth in homeless encampments presents “a dangerous and unsanitary situation for those on the streets and the people

leaders who pass laws criminalizing the threats homelessness poses.¹⁶⁷

To be clear, to the extent criminalizing homelessness is not based on the perception of such a threat, government nonetheless has the theoretical ability to regulate it under its police power. The police power historically has allowed government to do practically anything it wants in the name of protecting the public health, safety, and morals of society.¹⁶⁸ Historically, the police power has been used in the most moralistic and picayune ways to criminalize a host of conduct that dubiously fits the notions of proper criminal liability. In the name of the police power, we have criminalized juggling in streets, putting on shows in one's window, breaking the Sabbath, and much more.¹⁶⁹ It is ironic, in fact, that at the same time the classical liberal scholars were theorizing about the limited state, they were living in a profound nanny state that criminalized all these things.

Indeed, criminalizing the unhoused is right up there with the classic uses of the police power. As Markus Dubber makes clear in an article on the police power, "vagrants really took it on the chin in olden days."¹⁷⁰ If you were living unattached to proper society, and seemed shiftless, the authorities would toss you out of town, often whipping or pillorying you first so as to emphasize the desire that you never come back. Sound familiar? That is a power certainly broad enough to make it unlawful to beg or sit in public, or even to offer food to those in need. The problem is that this use of the police power starts to run afoul of society's duty of protection, at least if one starts to take a more capacious view of what it means to achieve true public safety.

Public safety is Janus-faced; what you perceive as conduct threatening your safety may threaten mine as soon as the law is called about me. There is an unhoused person sleeping on a bench near your home. You do not feel safe. So,

who live in the neighborhood"); Barry-Jester, *supra* note 89 ("Communities up and down California, increasingly frustrated with the growing number of homeless people living on public property, have tasked police and sanitation workers with dismantling encampments that they say pollute public areas and pose serious risk of . . . disease.").

167. See generally NO SAFE PLACE, *supra* note 58 (discussing laws criminalizing homelessness, including those that outlaw sleeping in public, camping in public, and vagrancy).

168. See *New York v. Miln*, 36 U.S. 102, 139 (1837) (describing the state's police power "to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends," and noting that "where the power over the particular subject, or the manner of its exercise is not surrendered or restrained [by the Constitution] . . . the authority of a state is complete, unqualified, and exclusive").

169. See, e.g., Markus Dirk Dubber, "The Power to Govern Men and Things": Patriarchal Origins of the Police Power in American Law, 52 BUFF. L. REV. 1277, 1330 (2004) (mentioning an early American statute criminalizing jugglers); N.Y.C. CODE § 10-114 (2021) (criminalizing the staging of a puppet performance in the window of a building); Editorial, *Report on Overcriminalization Offers Sound Ideas for Oklahoma Lawmakers*, OKLAHOMAN (Nov. 17, 2016, 12:00 AM), <https://www.oklahoman.com/article/5527283/report-on-overcriminalization-offers-sound-ideas-for-oklahoma-lawmakers> (noting that in 2016 it was still illegal to break the Sabbath in Oklahoma).

170. Dubber, *supra* note 169, at 1287–88 (describing an English vagrancy law in the 1670s that called for whipping "rogues and vagabonds" and keeping them "in the house of correction until employment was found for them, or until they were banished").

you call the police to remove him. Now, he is not safe. And unlike the duty of protection the Supreme Court brushed aside in *DeShaney*, we should recognize that the police's duty towards the unhoused person is ensconced in tradition and law. Government may not harm the very people it is charged to protect. I often refer to James Madison in this regard. In Federalist 51, Madison famously said, "You must first enable the government to control the governed; and in the next place oblige it to control itself."¹⁷¹ In other words, once government is powerful enough to save us from the threats persistent in the state of nature, it becomes a Leviathan that threatens the liberty and safety of all of us. And so, government itself must be kept in check.

One might respond that even though government cannot willy-nilly harm its subjects, it surely can impose punishment so long as the requisites of the law—what we call due process—are met. That is the very function of the Due Process Clause, to set out the legal basis required for the government to take people into custody, and keep them, to fine them, or otherwise punish them. So long as the requirements of due process are met, then perhaps it is legitimate to criminalize the homeless.

Although that is the theory, the right line of argument, I want to push back hard against it, because in practice I believe it is deeply flawed.

First, due process surely requires that, substantively, the law be criminalizing only conduct that is worthy of criminalization, as my earlier arguments suggest. Putting people in jail who are not culpable or able to control their poverty, mental illness, or substance use violates constitutional commands of due process, although the Supreme Court tucks such laws doctrinally under the Eighth Amendment prohibition on cruel and unusual punishment.¹⁷² It was that line of cases on which the Ninth Circuit relied in *Martin* to hold that the state cannot make it unlawful to punish one for sleeping outside if one has nowhere else to go.¹⁷³

Second, I think it is time to confront the failure of our criminal justice system to afford due process, no more so than when it is prosecuting misdemeanors like the petty offenses used to harass the homeless. Professor Alexandra Natapoff's and Professor Issa Kohler-Hausman's books on misdemeanor "justice" are essential readings on this subject.¹⁷⁴ As their scholarship makes clear, people caught on the misdemeanor factory line plead guilty for many reasons that have nothing to do

171. THE FEDERALIST No. 51 (James Madison).

172. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that a law criminalizing the status of being a drug addict violated the Eighth and Fourteenth Amendments).

173. See *Martin v. City of Boise*, 920 F.3d 584, 615–16 (9th Cir. 2019) (citing *Robinson*, 370 U.S. 660; then citing *Powell v. Texas*, 392 U.S. 514 (1968)).

174. See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018).

with guilt: the desire to get out of jail at any cost;¹⁷⁵ the failure to provide lawyers with the time and resources to provide an actual defense;¹⁷⁶ and the fear of being caught in the clutches of prosecutors and judges whose primary mission is to speed things along and prevent these people from clogging up their system.¹⁷⁷ The law can indeed punish criminal conduct, so long as due process is observed. But we must make sure that is really what is happening.

Finally, when it comes to policing, I am of the view that there is actually a very serious due process deficit. When the police arrest someone, or hand out a summons, due process is potentially involved. In theory, one could challenge the summons, or defend against the accusation that will lead to imprisonment. A lot of what police officers do, however, lacks even that veneer. The police bounce homeless folks from place to place simply by exercising their authority to tell people to move along. The police are, as leading sociologists in the last century like Egon Bittner have taught us, the “or else” of society:¹⁷⁸ “do this or else I am going to arrest you.” So, people comply. But a threat of further action is not due process. It is coercion in the shadow of due process. That is a very serious problem within policing that requires more of our attention.

B. An Affirmative Obligation to Help the Homeless

Thus far, I have been arguing that public safety means that government has a duty of protection with regard to everyone involved. The government not only has to protect residents from the homeless, it also cannot harm those who are unhoused themselves when offering that protection. Thus, it cannot criminalize without due process, which is sorely lacking in how we currently treat the homeless.

I will go one step further and suggest that a capacious understanding of public safety actually imposes an affirmative requirement on society to help the homeless. At the least, *Martin* holds—I think correctly—that punishment of unhoused individuals is constitutionally impermissible unless society steps up and offers alternatives. So, we cannot criminalize camping without providing a place to sleep.¹⁷⁹ But

175. See NATAPOFF, *supra* note 174, at 109–11 (suggesting extended and time-consuming pretrial criminal proceedings play a role in defendants’ decisions to plead guilty).

176. *Id.* at 76 (discussing the impact of chronic underfunding of overburdened public defenders’ offices on misdemeanor pleas).

177. See Jordan Smith, *How Misdemeanors Turn Innocent People into Criminals*, INTERCEPT (Jan. 13, 2019, 9:30 AM), <https://theintercept.com/2019/01/13/misdemeanor-justice-system-alexandra-natapoff/> (“The confluence of pressures incentivizes guilty pleas for every single player in the system. It puts pressure on prosecutors to manipulate the system in order to get guilty pleas quickly. . . . It puts pressure on judges to validate those hundreds of thousands of guilty pleas that pass before them without checking the factual bases, without checking whether the law has been followed.” (quoting interview comments from Professor Alexandra Natapoff, U.C. Irvine Sch. of L.)).

178. See BITTNER, *supra* note 9, at 39 (“[T]he police are nothing else than a mechanism for the distribution of situationally justified force in society.”).

179. *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (holding that “as 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”).

I think that obligation goes further. We should not criminalize urinating in public if you do not provide ready bathrooms. And we should not criminalize panhandling unless we provide food to those who cannot afford it. If we do not want to be “bothered by” the conduct of those who are unhoused, we have to take care of them.

Enlightenment thinkers believed government had some obligation to provide subsistence for those who could not assure it themselves. Bentham, who doubted government could guarantee subsistence to the people through the passage of laws, nonetheless concluded, “we may lay it down as a general principle that the legislator ought to establish a regular contribution for the wants of indigence,” those being people “who are in want of what is absolutely necessary.”¹⁸⁰ Many leading figures on the political right today agree. Arthur Brooks, former president of the conservative think tank, the American Enterprise Institute, said in 2013, “[o]ne of the things . . . that we got wrong in the free enterprise movement is this war against the social safety net, which is just insane. The government social safety net for the truly indigent is one of the greatest achievements of our society.”¹⁸¹ Or, as conservative Republican Senator Mike Lee put it, “[a]lleviating the economic burdens of building a family isn’t—or at least *shouldn’t be*—a political issue. That’s because poverty shouldn’t be a political issue . . . it’s a *human* issue that each of us, regardless of party affiliation, has a moral obligation to address.”¹⁸²

This widely felt commitment to provide basic necessities is not wholly altruistic; politics and common sense play a role as well. As to the former, Republicans have come around on the issue over time as more and more people identifying with the party have needed the safety net below them.¹⁸³ More fundamentally, people understand that it is unsustainable for the populace to starve for the necessities of life while others live in comfort. Eritha ‘Akile’ Cainion, a candidate running for City Council in St. Petersburg, Florida, wrote that “[n]o one should feel safe in a city where people are starving [and] people are homeless.”¹⁸⁴ Bill de Blasio, New York City’s mayor, responded to people who insisted that attempting to reduce income inequality was “class warfare” by saying “allowing the income gap to stretch further *isn’t simply a threat to those at the bottom—but to every New*

180. BENTHAM, *supra* note 162, at 132.

181. James Pethokoukis, *Time for the American Right to Declare Peace on the US Welfare State*, AM. ENTER. INST.: AEIDEAS (Oct. 30, 2013), <http://www.aei.org/publication/time-for-the-american-right-to-declare-peace-on-the-us-welfare-state> (quoting comments by Arthur Brooks).

182. Senator Mike Lee, *Bring Them In – Remarks to the Sutherland Institute’s Center for Utah’s Economy* (Oct. 2, 2014), <http://www.lee.senate.gov/public/index.cfm/2014/10/bring-them-in-remarks-to-the-sutherland-institute-s-center-for-utah-s-economy>.

183. See, e.g., Jim Tankersley & Jason DeParle, *Two Decades After the ‘End of Welfare,’ Democrats Are Changing Direction*, N.Y. TIMES (Mar. 16, 2021), <https://www.nytimes.com/2021/03/13/business/economy/child-poverty-stimulus.html> (suggesting that more Republicans are supporting social welfare initiatives, such as child tax credits, because rural Americans are facing high rates of poverty).

184. Eritha ‘Akile’ Cainion, Letter to the Editor, *What is Public Safety?*, WKLY. CHALLENGER (St. Petersburg, Fla.) (July 27, 2017), <http://theweeklychallenger.com/what-is-public-safety/> (emphasis added).

Yorker.”¹⁸⁵ Perhaps both Cainion and De Blasio were making a statement about empathy, rather than suggesting that failing to provide for the needy has left us in actual danger. Still, Czar Nicholas II and Louis XVI likely would echo a sense of caution here.¹⁸⁶

One could extend this thought experiment about the government’s obligation to provide public safety quite a distance beyond simple things like food or housing. In addition to the obligation to prevent harm by third parties and the obligation to provide necessities to the poor, government is surely also responsible for following through on its commitments. The *DeShaney v. Winnebago County* Court recognized a version of this, holding that even if government lacks an affirmative obligation of care generally, once it takes someone into its custody and creates a dependency, it assumes a duty of care.¹⁸⁷ So, for example, the government must feed, clothe, and provide medical care for those in prison.¹⁸⁸ But the idea of dependency surely must extend beyond prison. To take two examples, every state in the country effectively promises to provide its residents with an education,¹⁸⁹ and I believe it is and should be actionable when that education is substandard. And government often promises, and indeed charges for, the provision of clean water, making what happened in Flint, Michigan, or Newark, New Jersey, untenable.¹⁹⁰ In theory, government did not need to take on these obligations, but having done so, it must do them reasonably well.

Although I think this is how we *should* think about public safety, it is not in fact how we do. When we as a society talk about public safety, we mostly are referring to the police and other existing emergency services like fire departments. Google is instructive here. Google “Arizona” and “public safety,” and you get the highway

185. Bill de Blasio, Mayor, N.Y.C., A Fork in the Road, State of the City Address (Feb. 10, 2014) (emphasis added).

186. See The Eleventh Hour (illustration), in PUNCH (London) (Nov. 15, 1905), <https://punch.photoshelter.com/image/I0000QKbsybJxxpc> (depicting the ghost of King Louis XVI warning Czar Nicholas II to “SIDE WITH YOUR PEOPLE, SIRE, WHILE THERE IS YET TIME. I WAS TOO LATE!”).

187. 489 U.S. 189, 199–200 (1989) (“[W]hen the State takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”).

188. See *id.* at 198–202 (citing cases such as *Estelle v. Gamble*, 429 U.S. 97 (1982), *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983), for the proposition that the government violates the Due Process Clause and the Eighth Amendment when “by the affirmative exercise of its power [it] so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety”).

189. See NAT’L CTR. FOR EDUC. STAT., STATE EDUCATION PRACTICES (SEP) tbl.5.1 (2017), https://nces.ed.gov/programs/statereform/tab5_1.asp (showing that all fifty states had compulsory education laws as of 2017).

190. See, e.g., Governor Rick Snyder, Mich., Prepared Remarks on the Flint Water Crisis (Jan. 19, 2016), https://www.michigan.gov/documents/snyder/Prepared+remarks_511427_7.pdf (stating that Michigan residents “expect” and “deserve clean, safe water” and that the “[g]overnment failed” its citizens by failing to provide it).

patrol.¹⁹¹ Google “Phoenix” and “public safety” and got the police (plus, to be fair, fire and some EMT).¹⁹²

When we talk about public safety in the United States, all too often what we mean is police and policing. And that is unfortunate. Because when we think about police, it leads, all too often, to criminalization. We have other agencies that worry about things like education and poverty, but government’s first duty, it seems, is to deal with “problems” by arresting them, sanctioning them, and putting them in jail. And it is just this sort of thinking, I would suggest, that leads to criminalizing social problems like homelessness, and dumping them in the hands of society’s clean up squad, the police.

VII. TAKEAWAYS

The question, of course, is where this discussion ultimately takes us. Much of the takeaways I think should be obvious by now, and I will summarize them here. It is a set of mistakes I believe we make, certainly around how we handle the problem of those who are unhoused, but also many other social problems. And I promised a whole new way to think about first response. That is where I want to end up.

A. *The Mistakes We Make*

To begin with, it is both remarkable and foolhardy that we tackle these pervasive, chronic, problems without deploying a more sophisticated cost-benefit analysis to explore our approaches. Every social science researcher studying public safety, and especially the flotilla of criminologists focused on policing, should be trained in CBA. Too often studies of policing stop at an analysis of efficacy—whether something “works”—without examining the “soft” social costs and benefits. Within government and within policing agencies, as decisions are made, at least some version of CBA should be deployed.

My second point follows from the first: if we were to employ CBA effectively in this area, I am reasonably confident we would conclude we err in making criminal law enforcement our first stop on the way to addressing social problems such as homelessness. It is expensive, and it does not actually solve many of these problems.

Third, we need to see social problems as public health issues, not only law enforcement ones, and tackle them by being smart, not just tough. Toughness has its place, to be sure, but even there, smart should precede tough. Toughness only makes sense where it works: we cannot deter undeterrable conduct, and we should not punish non-culpable conduct, especially if it is undeterrable. We need holistic solutions that actually address underlying difficulties. What I have said about

191. See *Highway Patrol Division*, ARIZ. DEPT. OF PUB. SAFETY, <https://www.azdps.gov/organization/hpd> (last visited July 20, 2021).

192. See *Police*, CITY OF PHX., <https://www.phoenix.gov/police> (last visited July 20, 2021).

unhoused people is also true of those with challenges around substance use and mental illness, and it may be true of much else, such as highway safety.

In short, we disserve ourselves and the police when we pass off these problems to law enforcement, and, frankly, the police should push back harder. Much of what we see in these areas is political failure; it is easier to avoid dealing with these problems and hope the police will take care of them for us. And it accords with a “get tough” mentality that seems deeply ingrained in the American psyche. The police should make clear they do not create these problems and what they are doing is not solving them. The police should not let politicians hide behind policing.

B. Transforming First Response

What you may be thinking—what I hope you *are* thinking—is that someone still has to deal with the immediate problems for which we call the police, including the unhoused. People still are going to call 911 and complain that an unhoused person is sleeping in their doorway. People who are unhoused may go into crises, in ways that lead others to call for emergency services. The same is true for a litany of problems for which we currently call the police. Someone has to deal with noise complaints, traffic accidents, domestic argument and violence calls, loose and dangerous animals, and active shooters. In short, society needs first responders.

Initially, in thinking through sending police to problems that do not suit them, my inclination was always to require greater specialization. Take your typical crime scene, which seems the most obvious place to find the police. But is it? After a crime has occurred, especially a serious one, what is typically needed is victim services and forensics.¹⁹³ The police are not particularly adept at either of these services.¹⁹⁴ Why not have expert victim assistance? And forensics is science, in which the real need is trained forensic examiners.

What I came to realize, however, was that, specialize all we might, the need for generalist first responders will persist. Emergencies happen. And in a lot of situations, someone has to get to a location quickly and deal with the emergency. That is why we have 911 and emergency dispatch. It may be that once the emergency is under control, other services will be required that would help address underlying problems. Ultimately, specialized assistance may be needed to actually solve problems. But we cannot even get to the underlying problem until we have dealt with the immediate problem. And *that* is the role the police most uniquely have played in society.

The challenge that we face is that even if the police are not always ideally suited to emergency response to any number of calls, there are, at present, a limited number of alternatives on the table. This is a question that comes up most frequently in

193. Friedman, *supra* note 123, at 972 (discussing the need for specialized units, such as forensics and victim services, after a crime has occurred).

194. *See id.* (noting that patrol officers are not trained for these specialized functions).

the area of mental health. Many police shootings occur while responding to those in mental crisis,¹⁹⁵ so society is developing alternatives to the traditional police response. Those alternatives tend to fall into three camps: increased training for the police;¹⁹⁶ response by some entity other than the police, such as mental health professionals;¹⁹⁷ and co-response by police and professionals.¹⁹⁸

Each of these three alternative responder models has arguments for and against it. Obviously, trained mental health professionals would deal with the situation best. But that presumes the situation does not turn dangerous for them. Too often when these alternative response models are on the table, professionals want the police there. That presents its own problem, as, even though some coercion may be necessary, the presence of the police can exacerbate a crisis.

The challenges with alternative responder models for mental health could be worked out over time, but the larger question for society is this: are we going to have an alternative responder model for each type of situation in which the police themselves might not be optimal? Jurisdictions are experimenting with replacing or supplementing the police with specialists in a number of situations, from traffic enforcement to domestic disagreements.¹⁹⁹ It is going to get awfully complicated—if nothing else, from the dispatch perspective—if society has three or four or more types of responders. Calls will have to be triaged, which is not always easy on the front end. It will be expensive to maintain all these systems.

It was at this point that I began to think of emergency room doctors: society's generalist specialists. Think about what happens when one goes to a hospital or urgent care center and sees a doctor with some training in emergency medicine. Those doctors have three functions. First, and most important, is to stabilize the

195. See, e.g., Amam Z. Saleh, Paul S. Appelbaum, Xiaoyu Liu, T. Scott Stroup & Melanie Wall, *Deaths of People with Mental Illness During Interactions with Law Enforcement*, 58 INT'L J. L. & PSYCHIATRY 110, 114 (2018) (finding that “approximately 23% of those killed in 2015 during civilian-police interactions had evidence of mental illness”).

196. See AMY C. WATSON, MICHAEL T. COMPTON & LEAH G. POPE, VERA INST. OF JUST., CRISIS RESPONSE SERVICES FOR PEOPLE WITH MENTAL ILLNESSES OR INTELLECTUAL AND DEVELOPMENTAL DISABILITIES: A REVIEW OF THE LITERATURE ON POLICE-BASED AND OTHER FIRST RESPONSE MODELS 27–33 (2019) (discussing the use of the Crisis Intervention Team (CIT) model, which utilizes a 40-hour specialized training “designed to provide officers with the knowledge, attitudes, and skills to safely and effectively intervene with people in crisis and link them to services”).

197. See *id.* at 39–44 (describing the Mobile Crisis Team (MCT) model, which provides “on-site crisis management” through the mental healthcare system and is typically unaffiliated with police).

198. See *id.* at 14–19 (describing the use of the co-responder team model, in which a police officer responds to crisis situations with a mental health clinician partner).

199. See, e.g., Hannah Metzger, *Council Committee Talks Expanding Denver's STAR Program, Replacing Police in Low-Level Incidents*, DENVER GAZETTE (Mar. 24, 2021), https://denvergazette.com/news/government/council-committee-talks-expanding-denver-s-star-program-replacing-police-in-low-level-incidents/article_074afa4e-8cfa-11eb-882d-2391b9959a48.html (describing a new program in Denver, Colorado, that dispatches paramedics or mental health clinicians to certain 911 calls); Cailin Crowe, *Cities Consider Taking Police Out of Traffic Stops*, SMART CITIES DIVE (June 3, 2021), <https://www.smartcitiesdive.com/news/cities-consider-taking-police-out-of-traffic-stops/600912/> (discussing how cities like Brooklyn Center, Minnesota, and Berkeley, California, have recently adopted reforms to reduce the role of police in traffic enforcement).

situation. End the crisis. Get the patient out of pain. Second, fix the problem if they can. Finally, if they cannot, they refer people to specialists equipped to solve the specific problem.

What we need as a society are a set of holistically trained generalist specialists to perform the same three functions as emergency room doctors. They would respond to calls for service and stabilize situations. They would solve what they could. And they would call in other city service providers to address underlying problems that they cannot.

Because this is a new idea—I have not heard or read of it elsewhere—there are a lot of details to be thought out. For example, what does it mean to be “holistically trained?” My own sense is that these responders would need training in a wide swath of disciplines: mediation, diagnosis of health issues, basic EMS, mental health, what social services are available, and so on, including most likely the use of force, and law. Then we have to think about incentives. What seems clear here is that we need a set of incentives other than to use force and law. Those should be absolute last resorts. We need first responders to have some authority to compel other city services to come in after a situation is stabilized and tackle underlying problems, lest the first responders get called (as they do at present) to the same address over and over.²⁰⁰

This is not the place to lay all the details out in full, but it seems an idea whose time has come. It is the natural evolution in a more sophisticated society of what policing was in the 19th century. It is one that is more likely to lead to optimal solutions and avoid harm.

When I discuss this idea with people, they often point to inevitable opposition from police unions. But that may not be the case. Policing is in trouble in this country. Homicides and concerns about crime are rising, and police departments are finding themselves below full staffing. People are seeing that the police as currently constituted simply cannot do the job that is needed of dealing with all these social problems. If I were a police union leader, I would see the future in this new idea. I would be behind it as the future of policing.

CONCLUSION

Traditional policing is failing us, as demonstrated by the perpetual crisis of the unhoused. The culprit here is not necessarily the police, but society itself, which has failed to tackle the underlying social problem, and instead sent brute force to try to sweep it out of sight. This is short-sighted: it is expensive and does not deal with the underlying problem, which will remain and grow unless we tackle it head

200. See, e.g., Susie Steimle, *CA First Responders Fight ‘Frequent Flier’ Abuse of Emergency Services*, CBS SF BAYAREA (Dec. 30, 2018), <https://sanfrancisco.cbslocal.com/2018/12/30/ca-first-responders-fight-frequent-flier-abuse-of-emergency-services/> (describing emergency responders’ attempts to address the underlying medical and social problems of people who frequently call emergency services, many of whom “are homeless, just looking for a sandwich and a warm place to sleep”).

on. In this regard, the problem of how we treat unhoused members of our society is not so different than any number of other social problems. We are not going to “police” them away—that approach is what led us to mass incarceration, and still the problems are with us. It is time to think of new solutions, and I hope to have provided one worth considering: transforming first response entirely.