

# ARTICLES

## Searches and Seizures of the Unhoused

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*This Article provides the first comprehensive critique of the structural inadequacies present in nearly every aspect of Fourth Amendment jurisprudence for the unhoused. Privacy conceptions excluding what one knowingly, if involuntarily, exposes to the public erases any meaningful privacy protections for the unsheltered and unhoused. Protections from unwarranted entries into the home apply with lesser force when that home is erected illegally on public property and thus is itself evidence of the crime. Searches incident to arrest subject many unhoused persons to suspicionless searches of their entire lives, far beyond the limited purposes of such searches. Malleable conceptions of probable cause and reasonable suspicion sweep in disproportionate swaths of the unhoused, as police interpret behavior indicative of mental distress or addiction as suspicious criminal activity. Violent encampment removal tactics do not constitute Fourth Amendment “seizures,” as the word’s definition excludes police violence designed to disperse people from an area. And increasingly common psychiatric hold procedures often fall within the amorphous “special needs” exception to the Fourth Amendment, if they fall within the Amendment’s reach at all.*

*In addition to cataloguing these comprehensive privacy and liberty failures, this Article articulates an independent Fourth Amendment right to human dignity, grounded in the purpose and meaning of the Amendment. In so doing, this right to dignity informs a reframing of Fourth Amendment rights to privacy and bodily integrity, supported by the logical framework of recent Supreme Court cases about electronic data. This reframing protects a zone of privacy for involuntarily exposed intimacies and singular sensitive spaces like makeshift dwellings, as well as a right to bodily integrity that includes freedom from violent dispersal techniques. This dignity-based reframing, while salient for the unhoused, has broader implications for all of society and its relationship to the Fourth Amendment.*

*These issues require urgent attention. The United States recorded its largest ever unhoused population in 2024. Acute affordable housing shortages and climate-fueled natural disasters have exacerbated a*

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*decades-long unaddressed humanitarian crisis, straining resources in cities and rural areas alike. In response, state and local governments have pivoted to a more punitive approach to houselessness. Draconian “anti-camping” ordinances subject houseless people to fines or arrests while police destroy their property in encampment “sweeps,” disconnecting the unhoused from critical social structures. Quality-of-life laws criminalize basic biological functions in public. New York, California, and other states have expanded the reach of involuntary civil commitment procedures, forcibly hospitalizing and medicating people who are not at serious risk of harm in an effort to “get them off the streets.” And the Supreme Court’s decision in City of Grants Pass v. Johnson has acted as an accelerant; over one hundred cities passed new antihouselessness laws in the first six months after the decision. Police crackdowns on the unhoused have become more common and visible, largely exempt from the restraints of the one constitutional provision designed to constrain such conduct: the Fourth Amendment.*

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#### INTRODUCTION

In the richest nation on Earth, more people lack permanent housing than ever before.<sup>1</sup> In 2024, the U.S. Department of Housing and Urban Development (HUD) recorded the highest unhoused population in history with over 770,000 individuals experiencing homelessness on a single night in January 2024.<sup>2</sup> This

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1. See Samantha Delouya, *Homelessness Hit a Record High in the US This Year*, CNN (Dec. 27, 2024, at 13:51 ET), <https://www.cnn.com/2024/12/27/business/homelessness-highest-level-on-record/index.html> [<https://perma.cc/4ETN-ZV3Z>] (“Homelessness in the United States soared to the highest level on record, according to government data released Friday.”); R.I. Comm’n for Hum. Rts. v. Graul, 120 F. Supp. 3d 110, 117 (D.R.I. Aug. 13, 2015) (“In the richest Nation on earth, growing numbers of men, women, and children are living on the streets and eating out of garbage cans.”) (quoting 134 CONG. REC. H6196-01, 1988 WL 174641)); *GDP Ranked by Country 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/countries/by-gdp> [<https://perma.cc/UEN3-4XTT>] (last visited Jan. 30, 2026) (showing the United States with the largest national gross domestic product at \$28.78 trillion, over \$10 trillion more than second-place China); cf. Luca Ventura, *Richest Countries in the World 2025*, GLOB. FIN. MAG. (May 3, 2024), <https://gfmag.com/data/richest-countries-in-the-world/> [<https://perma.cc/3CMY-B2BL>] (showing the United States with the ninth largest per capita GDP adjusted for purchasing power parity).

2. HUD, THE 2024 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS viii, 2 (2024), <https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf> [<https://perma.cc/ZNX5-PY77>] (defining experiencing homelessness as lacking a “fixed, regular, and adequate nighttime residence”). No clear consensus exists regarding terminology. HUD, other government agencies, and most major media outlets use the word “homeless,” a term some find stigmatizing, dehumanizing, and incorrect. See Natalie Orenstein, *Homeless? Unhoused? Unsheltered? Word Choice Matters When Reporting on Oaklanders Who Don’t Have Permanent Housing*, OAKLANDSIDE (Nov. 10, 2020, at 12:54 PST), <https://oaklandside.org/2020/11/10/homeless-unhoused-unsheltered-word-choice-matters-when-reporting-on-oaklanders-who-dont-have-permanent-housing/> [<https://perma.cc/3UNRH69Z>] (“We do have a home—my tent is my home . . . .” (quoting Tiara D. Swearington)); Jocelyn Dong, *‘Homeless’ or ‘Unhoused’? If You Call People Who Live on the Streets ‘Homeless,’ Norm Carroll Is Likely to Correct You.*, PALO ALTO WKLY. (Aug. 24, 2005), <https://www.paloaltoonline.com/weekly/morgue/2005/>

represented an 18% increase from 2023, which itself saw a 12% jump from 2022.<sup>3</sup> While the causes of houselessness “are as varied as they are complex,”<sup>4</sup> static factors like mental illness, family violence, and substance abuse are compounded in this decade by acute affordable housing shortages and climate-related natural disasters, which have created an uncontrolled and unsustainable houselessness epidemic in America.<sup>5</sup>

The life of an unhoused person is perilous, precarious, and anything but private. This is true both for the one-third of unhoused individuals living in sheltered locations and the two-thirds of unhoused individuals living in public in what HUD describes as unsheltered “[areas] not meant for human habitation.”<sup>6</sup> Unhoused persons face health and safety risks from long-term exposure to the elements and an insecure food supply.<sup>7</sup> They suffer violence at approximately ten

2005\_08\_24.homesidea.shtml [https://perma.cc/6YTF-2XAM] (“I had a home . . . but people kept walking through my living room . . .” (quoting Norm Carroll)). Unless quoting other sources, this Article uses the terms “unhoused” or “houseless” in recognition that one can create an emotional “home” in a temporary environment while lacking the “fixed, regular, and adequate nighttime residence” of a house. HUD, *supra*, at viii. I also agree that “for housed people who are just looking for a way to help out, policing language isn’t the most helpful thing we could be doing.” Kayla Robbins, *Homeless, Houseless, Unhoused, or Unsheltered: Which Term Is Right?*, INVISIBLE PEOPLE (Aug. 25, 2022), <https://invisiblepeople.tv/homeless-houseless-unhoused-or-unsheltered-which-term-is-right/> [https://perma.cc/Y74Z-3FWA].

3. See HUD, *supra* note 2, at 13; Michael Casey, *US Homelessness Up 18% as Affordable Housing Remains Out of Reach for Many People*, ASSOCIATED PRESS (Dec. 27, 2024, at 17:33 ET), <https://apnews.com/article/homelessness-population-count-2024-hud-migrants-2e0e2b4503b754612a1d0b3b73abf75f> [https://perma.cc/95J3-3R3B]; Aimee Picchi, *Homelessness in America Reaches Record Level Amid Rising Rents and End of COVID Aid*, CBS NEWS (Dec. 15, 2023, at 14:48 ET), <https://www.cbsnews.com/news/homeless-record-america-12-percent-jump-high-rents/> [https://perma.cc/2ZDQ-UTLY].

4. *Kitchon v. City of Seattle*, No. 85583-2-I, 2024 WL 5040630, at \*1 (Wash. Ct. App. Dec. 9, 2024) (stating that causes of the “homelessness crisis” include “volatile housing markets, uncertain social safety nets, colonialism, slavery, and discriminative housing practices” (quoting *City of Seattle v. Long* 493 P.3d 94, 113 (Wash. 2021))).

5. See Laurie Hauber, *Criminalization of the Unhoused: A Case Study of Alternatives to a Punitive System*, 31 GEO. J. POVERTY L. & POL’Y 199, 216 (2024) (“The number one cause of homelessness is lack of available housing, closely followed by lack of a living wage. Other primary causes include domestic violence, medical expenses, bankruptcy, and untreated mental illness.” (citing NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES* (2015), [https://homelesslaw.org/wp-content/uploads/2018/10/Homeless\\_Stats\\_Fact\\_Sheet.pdf](https://homelesslaw.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf) [https://perma.cc/7KBU-6DLE])); NAT’L ALL. TO END HOMELESSNESS [hereinafter NAEH], *STATE OF HOMELESSNESS: 2024 EDITION* (2025), <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/#why-do-people-experience-homelessness> [https://perma.cc/GRV4-9YYZ]; HUD, *supra* note 2, at xiv (“[M]any of the [communities] that reported the largest increases in sheltered homelessness, reported . . . an increase from people who were displaced from natural disasters . . .”); *What Causes Homelessness? A Shortage of Affordable Housing*, NAEH, <https://endhomelessness.org/a-shortage-of-affordable-housing/> [https://perma.cc/T4ZD-HJAY] (last visited Jan. 30, 2026) (“America faces a dual crisis: wages have not kept pace with skyrocketing rents, while a severe shortage of affordable units further strains the market. . . . [M]illions of low-income households spend unsustainable portions of their income on rent, leaving them one financial emergency away from homelessness.”).

6. See HUD, *supra* note 2, at 1, 59.

7. See Erin Goodling, *Intersecting Hazards, Intersectional Identities: A Baseline Critical Environmental Justice Analysis of US Homelessness*, 3 NATURE & SPACE 833, 835, (2019) (describing exposure to “a host of issues, including lack of access to food and hygiene facilities . . . and exposure to the elements”); Elizabeth I. Loftus, James Lachaud, Stephen W. Hwang & Cilia Mejia-Lancheros, *Food*

times the rate of the average population, both from other houseless individuals and the general public.<sup>8</sup> And they suffer the indignity of undertaking life's most basic functions in public, involuntarily exposing to strangers the intimate parts of human existence so many of us take for granted in the privacy of our own homes.<sup>9</sup>

Rather than providing the funding and infrastructure necessary to solve this crisis,<sup>10</sup> state and local governments increasingly rely on criminal sanctions to punish the unhoused for what often amounts to involuntary activity.<sup>11</sup> Police officers arrest individuals or issue so-called “quality of life” citations for sitting, sleeping, drinking, urinating, or defecating in public.<sup>12</sup> Incident to these arrests, police seize and destroy the violators’ personal property, including their tents, medications, and critical documents necessary to access government benefits.<sup>13</sup> And

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*Insecurity and Mental Health Outcomes Among Homeless Adults: A Scoping Review*, 24 PUB. HEALTH NUTRITION 1766, 1767 (2020) (describing impacts of food insecurity on mental health among unhoused populations).

8. See Molly Meinbresse et al., *Exploring the Experiences of Violence Among Individuals Who are Homeless Using a Consumer-Led Approach*, 29 VIOLENCE & VICTIMS 122, 123, 129 (2014); Hannah Chimowitz & Adam Ruege, *The Costs and Harms of Homelessness*, CMTY. SOLS. (Sep. 25, 2023), <https://community.solutions/research-posts/the-costs-and-harms-of-homelessness/> [<https://perma.cc/G229-SAMT>] (“Whereas just under 1% of people nationwide reported experiencing a violent crime in 202 . . . a study conducted in 5 U.S. cities found that nearly half – an estimated 49% – of those experiencing homelessness had been victims of violent attacks.” (citations omitted)).

9. See Ron S. Hochbaum, *Bathrooms as a Homeless Rights Issue*, 98 N.C. L. REV. 205, 208 (2020) (“Homeless individuals have trouble accessing bathrooms in a world where municipalities fail to maintain public bathrooms and increasingly rely on private industry to provide that public good.”); Bryce Covert, *This Really Simple Idea Could Change Homeless People’s Lives*, THINKPROGRESS (Feb. 3, 2015, at 15:14 ET), <https://archive.thinkprogress.org/this-really-simple-idea-could-change-homeless-peoples-lives-6bffb0280e07/> [<https://perma.cc/Q7ZF-J2Z6>] (discussing the dignity that comes with access to a toilet, shower, and laundry machine).

10. See Michael S. Goldberg, *US Mayors Say Homelessness Crisis Falls to Them, but They Lack Support and Funding*, BU TODAY (Jan. 20, 2022), <https://www.bu.edu/articles/2022/us-mayors-lack-support-funding-for-homelessness-crisis/> [<https://perma.cc/3ZfV-SYZZ>] (“More than 60 percent of mayors say lack of resources hindered their ability to address homelessness and more than half say public opposition to new housing and shelters was an additional obstacle.”).

11. See Hochbaum, *supra* note 9, at 216–17 (cataloguing ordinances criminalizing public urination and defecation); Jennifer Ludden, *100-Plus Cities in the U.S. Banned Homeless Camping This Year. But Will It Work?*, WHYY (Dec. 26, 2024, at 17:00 ET), <https://whyy.org/articles/homeless-camping-bans-grants-pass/> [<https://perma.cc/L8FL-DWGU>] (describing “spike” in anti-camping legislation in the last six months of 2024).

12. See Joanna Laine, *From Criminalization to Humanization: Ending Discrimination Against the Homeless*, 39 N.Y.U. REV. L. & SOC. CHANGE 1, 7 (2015) (“Some anti-homeless policies prohibit specific activities, such as sleeping, sitting, or storing personal belongings in public spaces; panhandling; or sharing food with the homeless in public spaces.”); Jamelia N. Morgan, *Policing Marginality in the Public Space*, 81 OHIO ST. L.J. 1045, 1046–47 (2020) (“The housing crisis seems to have also prompted local jurisdictions to ramp up quality-of-life policing efforts in public spaces.”).

13. See Ruth Talbot, Asia Fields, Nicole Santa Cruz & Maya Miller, *Swept Away*, PROPUBLICA (Oct. 29, 2024), <https://projects.propublica.org/homeless-encampment-sweeps-taken-belongings/> [<https://perma.cc/B9GH-74QM>] (listing items discarded during encampment sweeps, including social security cards, baby shoes, seizure medication, credit cards, a wheelchair, and a spouse’s ashes); Angela Hart, *Tossed Medicine, Delayed Housing: How Homeless Sweeps Are Thwarting Medicaid’s Goals*, CNN (Sep. 11, 2024, at 6:00 ET), <https://edition.cnn.com/2024/09/11/health/homeless-encampments-sweeps-san-francisco-kff-health-news-partner/index.html> [<https://perma.cc/DQP5-TCHQ>] (describing how sweeps,

following the United States Supreme Court ruling in *City of Grants Pass v. Johnson*,<sup>14</sup> a growing number of cities have enacted draconian “camping bans,” prohibiting all unsheltered habitation at any time on any public property.<sup>15</sup> Those who run afoul of these bans, either individually or as part of an encampment, risk arrest, fine, property destruction, and violent dispersal at the hands of police and other government actors.<sup>16</sup>

This most American impulse to solve a public welfare crisis with the criminal law has failed, at least in terms of reducing the nation’s houseless population, and yet it continues unabated.<sup>17</sup> Indeed, the impunity with which police and other

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which force the unhoused to shuffle from street to street, cause them to lose important paperwork, lose touch with caseworkers, and “disrupt[] their continuity of care. It’s a huge waste of resources” (quoting Shannon Heuklom)); Martin Kaste, *San Francisco Ramps up Policing of Homeless Camps, with The Supreme Court’s Blessing*, OPB (Sep. 30, 2024), <https://www.opb.org/article/2024/09/30/san-francisco-ramps-up-policing-of-illegal-homeless-camps/> [<https://perma.cc/TG4N-4P2G>] (describing police encampment sweep actions that included giving an unhoused man a citation, releasing him, and “allow[ing] him to drag away most of his possessions - minus the tarp [his home], which has been impounded as evidence of a crime”); *Case Summary of Sanchez v. California Dept. of Transportation*, ACLU N. CAL. (Dec. 8, 2016), <https://www.aclunorcal.org/cases/sanchez-v-california-department-transportation/> (“The California Department of Transportation is violating the constitutional rights of homeless people by confiscating and destroying their property in ongoing sweeps.”).

14. 603 U.S. 520 (2024) (holding that criminalizing public sleeping despite a lack of accessible shelter alternatives is lawful and does not constitute cruel and unusual punishment); see *Leading Cases: Eighth Amendment Cruel—Unusual Punishment Clause—City of Grants Pass v. Johnson*, 138 HARV. L. REV. 375, 375 (2024) (“The Court’s ruling dramatically weakened, and potentially eroded, Eighth Amendment–based substantive limits on criminal laws.”).

15. Ludden, *supra* note 11; see also *Governor Newsom Orders State Agencies to Address Encampments in Their Communities with Urgency and Dignity*, GOVERNOR GAVIN NEWSOM (July 25, 2024), <https://www.gov.ca.gov/2024/07/25/governor-newsom-orders-state-agencies-to-address-encampments-in-their-communities-with-urgency-and-dignity/> [<https://perma.cc/82SQ-KD4S>] (“With the recent U.S. Supreme Court decision in *Grants Pass v. Johnson* [sic], local governments now have the tools and authority to address dangerous encampments and help provide those residing in encampments with the resources they need.”).

16. See, e.g., Martin Kaste, *San Francisco Ramps Up Policing of Homeless Camps, With the Supreme Court’s Blessing*, NPR (Sep. 30, 2024, at 13:00 ET), <https://www.npr.org/2024/09/30/nx-s1-5094930/supreme-court-homeless-camps-san-francisco> [<https://perma.cc/9YAJ-ZXQF>] (observing that officers have resumed arresting unhoused individuals “for violating a 19th century state law against ‘lodging’ in a public or private place without permission”); Cody Dulaney & Danielle Dawson, *Mayor Gloria’s Push for Homeless ‘Progressive Enforcement’ Leads to Eightfold Spike in Arrests*, INEWSOURCE (June 10, 2022), <https://inewssource.org/2022/06/10/san-diego-homeless-arrests/> [<https://perma.cc/RG62-ZYGA>] (“San Diego police have made eight times as many arrests for encroachment and illegal lodging . . . compared to the same time last year . . .”); Sam Hozian, *Homeless Residents Forcibly Displaced and Property Destroyed as Trump Increases Control of D.C.*, HOUS. NOT HANDCUFFS (Aug. 15, 2025), <https://housingnohandcuffs.org/2025/08/15/hnhnews3/> [<https://perma.cc/3JSZ-CVNY>] (describing recent law enforcement encampment sweep where “police evicted and destroyed the property of homeless people throughout D.C., throwing away people’s personal belongings, including tents and other property”).

17. See Nicole DuBois, Claire Herbert & E. Mae Sowards, *Why Criminalization Doesn’t Work: Research & Policy Insights*, NAEH (Feb. 4, 2025), <https://endhomelessness.org/resources/research-and-analysis/why-criminalization-doesnt-work-research-policy-insights/> [<https://perma.cc/GU72-V6W7>] (“[E]xtensive research makes one thing clear: [laws criminalizing homelessness] do not reduce homelessness. Instead, they worsen the crisis by increasing arrests, creating barriers to housing and services, and causing lasting harm to the people they target.”); see also *Five Charts That Explain the*

government agents invade the privacy and liberty interests of the unhoused highlights a major structural problem with the one constitutional provision intended to stand as a bulwark against such intrusions: the Fourth Amendment. Though the word “privacy” never appears in the U.S. Constitution, the Supreme Court has recognized the Fourth Amendment as the closest explicit textual source of both a zone of privacy from government interference and a related zone of protection from government violence.<sup>18</sup> This Amendment applies most forcefully to restrain the actions of police, given that “the principal concern of [the Fourth] Amendment’s prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations.”<sup>19</sup> It also provides a recourse for victims of police abuse to secure the remedy often most important to them: exclusion of illegally obtained evidence from their criminal trials.<sup>20</sup> And yet for the unhoused, the population arguably most in need of privacy and liberty protections, the Fourth Amendment offers neither.

This Article provides the first comprehensive analysis of how nearly every aspect of Fourth Amendment jurisprudence fails the unhoused.<sup>21</sup> The Amendment only applies to activity constituting a “search” or a “seizure,”<sup>22</sup> yet most deeply intrusive police activity directed at the unhoused constitutes neither under current

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*Homelessness-Jail Cycle—and How to Break It*, URB. INST. (Sep. 16, 2020), <https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it> (explaining that people with criminal convictions are more likely to experience homelessness, and being homeless increases the likelihood of future arrest and conviction).

18. *See* *Graham v. Connor*, 490 U.S. 386, 395 (1989) (“[T]he Fourth Amendment provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct . . .”).

19. *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977); *see also* *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (“[T]he evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or ‘writs of assistance’ to authorize searches for contraband by officers of the Crown.”).

20. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *cf.* *United States v. Calandra*, 414 U.S. 338, 347 (1974) (“The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . [T]he rule’s prime purpose is to deter future unlawful police conduct . . .”).

21. Many scholars have explored the criminalization of homelessness generally. *See generally, e.g.*, Ryan Isola, *Homelessness: The Status of the Status Doctrine*, 54 U.C. DAVIS L. REV. 1725 (2021) (analyzing the different constitutional interpretations of the status crimes doctrine in the context of anti-homeless ordinances); Seth Lemings, *The De-Criminalization of Homelessness*, 10 U.C. IRVINE L. REV. 287 (2019) (exploring the issue of homelessness, and offering solutions to both the criminalization of the homeless population and the housing shortage in California). Others have discussed the lack of constitutional protections for the poor. *See generally, e.g.*, Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003) (arguing that Supreme Court decisions have “seriously undermined” the application of the Fourth Amendment to poor people); Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, 85 IND. L.J. 355 (2010) (examining “pervasive discrimination” against poor people in the context of the Fourth Amendment’s right to privacy). Others have considered the limited question of whether temporary structures constitute “houses” under the Amendment. *See generally, e.g.*, Lindsay J. Gus, *The Forgotten Residents: Defining the Fourth Amendment “House” to the Detriment of the Homeless*, 2016 U. CHI. LEGAL F. 769 (2016) (arguing that temporary shelters should be considered “houses for Fourth Amendment purposes”); Gregory Townsend, *Cardboard Castles: The Fourth Amendment’s Protection of the Homeless’s Makeshift Shelters in Public Areas*, 35 CAL. W. L. REV. 223 (1999) (advocating for the courts to “consider whether a homeless defendant’s expectation of privacy is reasonable based on government acquiescence”).

22. *See* Charles E. Moylan, Jr., *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of “So What”?*, 2 S. ILL. U. L.J. 75, 76 (1977) (suggesting that if

jurisprudence. A “search” occurs when investigative activity infringes upon a “reasonable expectation of privacy,”<sup>23</sup> which one does not have in things “knowingly expose[d] to the public.”<sup>24</sup> The unhoused, whether voluntarily or not, knowingly expose their entire lives to the public, rendering any such exposure open to police snooping, free of Fourth Amendment constraints.<sup>25</sup> Likewise, a “seizure” occurs when a police officer uses force or a show of authority to submit someone to their grasp, as in a detention or arrest.<sup>26</sup> But using force to disperse, rather than to compel submission, including the violent force often used to break down unhoused encampments and forcibly disperse their occupants from public land, does not meet this narrow seizure definition and thus falls outside Fourth Amendment protection.<sup>27</sup>

Even when the Amendment does apply, its doctrinal underpinnings provide little real protection for the unhoused compared to the average population. While the home stands as the “first among equals” for protecting its occupants from warrantless evidentiary searches,<sup>28</sup> an unhoused person’s home—be it a tent, tarp, or other makeshift structure—often *is evidence* of criminal activity, at least when erected on public land in violation of anti-camping ordinances.<sup>29</sup> Moreover, malleable conceptions of reasonable suspicion and probable cause often disparately impact unhoused populations when police incorrectly interpret unusual or erratic behavior caused by mental illness or addiction as suspiciously criminal.<sup>30</sup> And unhoused individuals often lack any meaningful opportunity to consent to police investigative activity, especially when police (as a matter of policy or otherwise)

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government conduct does not rise to the level of a search or seizure, “the law does not give a constitutional damn about noncompliance.”).

23. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

24. *Id.* at 351 (majority opinion).

25. Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty, and Policing*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 240, 249–50 (2014) (“[T]hose who are homeless are forced to expose much of their behavior and belonging in public spaces in which they do not have a reasonable expectation of privacy, and thus no Fourth Amendment protection.”).

26. *Torres v. Madrid*, 592 U.S. 306, 311 (2021).

27. See Renée Paradis, *Carpe Demonstratores: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316, 333 (2003) (“Where suspects are free to leave but are not free to go about their business, no seizure is found.”); *Dundon v. Kirchmeier*, No. 16-cv-406, 2017 WL 5894552, at \*3, \*18 (D.N.D. Feb. 7, 2017) (declining to find a seizure where police pelted protesters with water cannons and rubber bullets to get them to leave an area).

28. *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable government intrusion.’” (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))).

29. Kaste, *supra* note 16 (“[T]he Supreme Court’s ruling [in *Grants Pass*] has effectively stripped homeless people of their Fourth Amendment protection against unreasonable search and seizure, because police are once again allowed to enforce the ‘illegal lodging’ law.”); *People v. Thomas*, 45 Cal. Rptr. 2d 4th 610, 613 (Cal. Ct. App. 1995) (holding that police did not violate houseless man’s Fourth Amendment rights when they searched the box in which he was living, because the shelter illegally occupied public property and thus conferred no reasonable expectation of privacy).

30. See *infra* Section II.E.

condition transportation or access to shelters, in lieu of arrest, on “consent” to search and seizure of belongings.<sup>31</sup>

Finally, a growing set of invasive government activities directed at the unhoused fall within the amorphous Fourth Amendment “special needs”<sup>32</sup> exception, placing clear search and seizure activity outside the Amendment’s usual protections. One such special need includes the expanded use of involuntary commitment procedures to compel houseless individuals into psychiatric treatment and forced medication in prison-like conditions.<sup>33</sup>

This critique is comprehensive and timely. Sharp rises in houselessness in both major cities and rural areas,<sup>34</sup> as well as the Supreme Court’s green light to criminalize “acts of” houselessness,<sup>35</sup> ensure increased interaction between the unhoused, the police, and the criminal legal system. As exacerbating conditions causing the recent sharp rise in houselessness—housing shortages and climate-related natural disasters—become part of the architecture of American public life,<sup>36</sup> it is likely that these increased interactions reflect not a momentary aberration but the new normal.

Herein lies this Article’s second major contribution. Where Part II catalogues the myriad ways current Fourth Amendment jurisprudence fails the unhoused,

31. See Dulaney & Dawson, *supra* note 16 (interviewing fifty-nine-year-old woman who police threatened to “come back . . . every day for the foreseeable future” and arrest her if she did not abandon her possessions and accept a transfer to a homeless shelter); Evanie Parr, *When a Tent Is Your Castle: Constitutional Protection Against Unreasonable Searches of Makeshift Dwellings of Unhoused Persons*, 42 SEATTLE U. L. REV. 993, 999 (2019) (“[S]ome shelters ‘require that homeless people consent to the search of their personal effects’ as a condition of entry.” (quoting NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, FROM WRONGS TO RIGHTS: THE CASE FOR HOMELESS BILL OF RIGHTS LEGISLATION 9 (2014), [https://homelesslaw.org/wp-content/uploads/2018/10/Wrongs\\_to\\_Rights\\_HBOR.pdf](https://homelesslaw.org/wp-content/uploads/2018/10/Wrongs_to_Rights_HBOR.pdf) [<https://perma.cc/4FZQ-RW6Y>])); MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE: A CASE FOR ABOLITION 162–64 (quoting a houseless woman who cycled between jails and involuntary commitment in “medicalized carceral spaces” who told interviewer that “[a]fter [a mental health] episode, whether the cops or the EMTs come get me, I often can’t tell whether I am in the jail or locked hospital ward. I guess one has slightly nicer sheets”).

32. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (holding that there are exceptions to the warrant requirement when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable” (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)).

33. Jamelia N. Morgan, *Psychiatric Holds and the Fourth Amendment*, 124 COLUM. L. REV. 1363, 1371, 1398 (2024) (“California governor Gavin Newsom’s CARE Court and New York City Mayor Eric Adams’s involuntary hospitalization policy exemplify the trend of . . . the use of preventative detention as a way of removing individuals who ‘appear[] to be mentally ill’ or are unable to care for themselves.”).

34. See *supra* note 3 and accompanying text.

35. See *City of Grants Pass v. Johnson*, 603 U.S. 520, 547 (2024).

36. See Graison Dangor, *The Housing Shortage Is Worse Than Ever—And Will Take a Decade of Record Construction to Fix*, *New Reports Say*, FORBES (June 16, 2021, at 09:34 ET), <https://www.forbes.com/sites/graisondangor/2021/06/16/the-housing-shortage-is-worse-than-ever-and-will-take-a-decade-of-record-construction-to-fix-new-reports-say/> [<https://perma.cc/RUF6-ZSGH>]; David Gelles & Austyn Gaffney, *‘We’re in a New Era’: How Climate Change Is Supercharging Disasters*, N.Y. TIMES (Jan. 16, 2025), <https://www.nytimes.com/2025/01/10/climate/california-fires-climate-change-disasters.html>; Mariya Bezgrebelna et al., *Climate Change, Weather, Housing Precarity, and Homelessness: A Systematic Review of Reviews*, 18 INT’L J. ENV’T RSCH. & PUB. HEALTH, May 2021, at 1, 11, 12 (“[H]omeless/vulnerably-housed populations are disproportionately exposed to climatic events (temperature extremes and natural disasters.”).

Part III charts an alternative approach grounded in the reality of the changing landscape of long-term houselessness. In doing so, it articulates an independent reasonable expectation of dignity protected by the Fourth Amendment, which is grounded in the philosophical traditions giving rise to the Amendment. This dignity interest provides the foundation for other doctrinal modifications responsive to the changing structural societal pressures that are exacerbating involuntary houselessness, including a right to privacy in involuntary biological functions and makeshift dwellings made public by necessity, as well as a right to bodily autonomy antagonistic to all government-sponsored violence.

### I. THE HOUSELESSNESS EPIDEMIC IN AMERICA

This Part contextualizes the houselessness epidemic, exploring the scope and causes of the recent sharp rise in houselessness, as well as the various police and nonpolice responses to houselessness and the activities defining being unhoused. This Part begins with an examination of the causes for the nation's sharp rise in houselessness, including a lack of affordable housing, untreated mental illness and addiction, discrimination and violence, and a rise in climate-fueled natural disasters. It then catalogues the primary enforcement mechanisms local governments use to address houselessness, including encampment "sweeps," quality-of-life criminalization, and forced psychiatric treatment.

#### A. THE SHARP RISE IN HOUSELESSNESS

The size of the unhoused population in the United States has risen steadily in the last decade.<sup>37</sup> Many states have experienced year-over-year double-digit percentage growth among this population.<sup>38</sup> And as recent federal statistics illustrate, houselessness is growing at an alarming rate among children, the fully employed, and those without criminal records or other exacerbating conditions commonly associated with houselessness.<sup>39</sup> In short, the nation is in the midst of an across-the-board houselessness epidemic.

HUD released its 2024 Annual Homeless Assessment Report (AHAR) in December 2024.<sup>40</sup> The report, utilizing a Point-in-Time (PIT) count to provide annual estimates of houselessness in the U.S., found that from 2023 to 2024, houselessness in the U.S. increased by 18%, with approximately 770,000 people experiencing houselessness during this period.<sup>41</sup> This jump comes on top of a 12% annual increase in houselessness in 2023 and represented the highest documented count of unhoused people since reporting began in 2007.<sup>42</sup> Experts agree this number likely represents an undercount because it does not account for those

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37. See HUD, *supra* note 2, at 16.

38. *Id.* at 21.

39. *Id.* at v.

40. *Id.* at i.

41. See *id.* at 3, 6; see also *What is a Point-in-Time Count?*, NAEH (Sep. 7, 2012), <https://endhomelessness.org/resource/what-is-a-point-in-time-count/> [<https://perma.cc/G2TA-EB3P>] ("A point-in-time count is an unduplicated count on a single night of the people in a community who are experiencing homelessness that includes both sheltered and unsheltered populations.").

42. See Picchi, *supra* note 3; HUD, *supra* note 2, at 2.

staying with friends or family or those in temporary hospitalization or detention settings during the PIT count.<sup>43</sup>

From 2023–2024, houselessness increased among nearly all populations, including individuals, people in families, and unaccompanied youth.<sup>44</sup> While individuals continue to comprise the majority of the unhoused,<sup>45</sup> people in families saw a 39% increase in homelessness (73,389).<sup>46</sup> The number of children experiencing houselessness increased to nearly 150,000, a 33% increase from 2023, including a 10% increase in the number of unaccompanied youths (38,170).<sup>47</sup>

People of color continue to be overrepresented among the houseless.<sup>48</sup> Black people represent 12% of the U.S. population but accounted for nearly 32% of all people experiencing houselessness in 2024.<sup>49</sup>

One-quarter of the entire U.S. houseless population is concentrated in New York and Los Angeles,<sup>50</sup> the nation’s two most populous cities, while Seattle, Denver, and San Diego each also recorded more than 10,000 unhoused residents, which for Seattle and Denver represented more than 1% of their total populations.<sup>51</sup> Houselessness also increased by double-digit percentages in rural areas.<sup>52</sup>

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43. See Jared Kofsky, Maia Rosenfeld & Jaclyn Lee, ‘*You Can’t Be Accurate*’: *Annual Count of US Homeless Population Misses Large Numbers of People, Experts Warn*, ABC NEWS (Feb. 3, 2024, at 05:09 ET), <https://abcnews.go.com/US/accurate-annual-count-us-homeless-population-misses-large-story?id=106671876> [<https://perma.cc/4XR5-S8PB>] (pointing to difficulties of locating people in the cold of January when the count is conducted and the fact that organizations across the country “gather the data in different ways, with some more prone to undercounting than others”); NAT’L L. CTR. ON HOMELESSNESS AND POVERTY, DON’T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA 6 (2025), <https://homelesslaw.org/wp-content/uploads/2018/10/HUD-PIT-report2017.pdf> [<https://perma.cc/35F2-2HUS>] (“The PIT counts also exclude people in some institutions such as hospitals and jails; this may result in a disproportionate undercounting of racial and ethnic minorities, who are overrepresented in incarcerated populations.”).

44. See HUD, *supra* note 2, at vi; Daniel Soucy & Andrew Hall, *7 Takeaways from 2024 Point-in-Time Count Data on Homelessness*, NAEH (Jan. 7, 2025), <https://endhomelessness.org/resource/7-takeaways-from-2024-point-in-time-count-data-on-homelessness/> [<https://perma.cc/UML2-VKEA>].

45. HUD, *supra* note 2, at 3.

46. *Id.* at 36.

47. *Id.* at v, 38.

48. *Id.* at 17. Racial minorities have long been overrepresented among the unhoused in the United States, especially African Americans. See *Racial Inequalities in Homelessness, by the Numbers*, NAEH (June 1, 2020), <https://endhomelessness.org/resources/sharable-graphics/racial-inequalities-homelessness-numbers/> [<https://perma.cc/3LHV-6CPY>] (showing that from 2008 to 2019 African Americans comprised approximately forty percent of the unhoused population).

49. HUD, *supra* note 2, at v, 6.

50. Matthew Adkins, *Homelessness in America: Statistics, Analysis, and Trends*, SECURITY.ORG (Sep. 26, 2024), <https://www.security.org/resources/homeless-statistics/> [<https://perma.cc/3C2T-62VC>].

51. See Steven Ross Johnson, Julia Haines & Jaclyn Jeffrey-Wilensky, *The 25 Major U.S. Cities With the Largest Homeless Populations*, U.S. NEWS (Jan. 8, 2025), <https://www.usnews.com/news/best-states/slideshows/cities-with-the-largest-homeless-populations-in-the-u-s> (reporting Seattle’s unhoused population at 16,868, Denver’s unhoused population at 14,281, and San Diego’s unhoused population at 10,605); *Largest U.S. Cities By Population 2025*, WORLD POPULATION REV., <https://worldpopulationreview.com/us-cities> [<https://perma.cc/2KP4-WG87>] (last visited Jan. 30, 2026) (listing New York and Los Angeles as the two largest cities by population, Seattle’s population at 764,753, Denver’s population at 715,891, and San Diego’s population at 1,389,672).

52. HUD, *supra* note 2, at 13.

The 2024 PIT count also revealed the highest ever number of people experiencing chronic houselessness, defined as “continuously experiencing homelessness for one year or more” or experiencing “at least four episodes of homelessness in the last three years where the combined length of time experiencing homelessness on those occasions is at least 12 months.”<sup>53</sup> One in three individuals experiencing houselessness (152,585) reported experiencing chronic patterns of houselessness, and nearly two-thirds of them were in unsheltered locations—“places not meant for human habitation.”<sup>54</sup> The vast majority of chronically houseless people suffered from some combination of untreated physical disability, mental health disorder, or drug addiction.<sup>55</sup>

While chronic houselessness continues to rise, so too do the numbers of people experiencing houselessness for the first time.<sup>56</sup>

#### B. CAUSES, CONDITIONS, AND EXACERBATING FACTORS

The causes of the houselessness crisis are as varied as they are complex, including “volatile housing markets, uncertain social safety nets, colonialism, slavery, and discriminative housing practices.”<sup>57</sup> A decades-long failure to invest in solutions to static conditions increasing houselessness risks—illness, addiction, disability, poverty, discrimination—has been exacerbated since 2020 by factors overburdening an already underfunded social safety apparatus.<sup>58</sup> This Section explores the primary causes, conditions, and exacerbating factors contributing to the recent sharp rise in houselessness: housing shortages, untreated mental illness and addiction, discrimination and violence, and climate-fueled natural disasters.

##### 1. Housing Shortage and Affordability Crisis

One of the most important factors contributing to the houselessness epidemic is that there simply are not enough houses available at affordable rates. As one housing expert has remarked, a “nationwide shortage of deeply affordable housing drives homelessness.”<sup>59</sup> The National Low Income Housing Coalition reports that just thirty-four affordable units are available for every 100 low-income renters.<sup>60</sup> As a result, 74% of extremely low-income renters pay more than 50% of

53. *Id.* at ix, 59.

54. *Id.* at vi, 59.

55. See *Who Experiences Homelessness?: People with Unaddressed Health Conditions*, NAEH, <https://endhomelessness.org/people-with-unaddressed-health-conditions/> [https://perma.cc/MGE6-S2YT] (last visited Jan. 30, 2026).

56. Daniel Soucy, Andrew Hall & Joy Moses, *State of Homelessness: 2025 Edition*, NAEH (Sep. 4, 2025), <https://endhomelessness.org/state-of-homelessness/> [https://perma.cc/S826-PWWX] (defining “people experiencing homelessness for the first time” as those who “either never [have] been homeless or have not experienced homelessness for 2 or more years at the time of their most recent experience of homelessness”).

57. *City of Seattle v. Long*, 493 P.3d 94, 113 (Wash. 2021).

58. See *id.*

59. Daniel Soucy, Makenna Janes & Andrew Hall, *State of Homelessness: 2024 Edition*, NAEH (Aug. 5, 2024), <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/> [https://perma.cc/6GSX-MVRD].

60. See *id.* (defining low-income renters as those making less than thirty percent of their area’s median income).

their income on rent alone,<sup>61</sup> a budgeting reality closely correlated with housing insecurity.<sup>62</sup>

This affordable housing shortage has been exacerbated by a growing shortage of all kinds of housing: “[T]here’s a massive shortage of homes—somewhere between 4 and 7 million.”<sup>63</sup> Director of Pew Housing’s Policy Initiative Alex Horowitz explained, “[w]e’re short on all homes. Full stop. There just aren’t enough of them. And that means that existing homes are getting bid up because we see high income households competing with low-income households for the same residences since just not enough are getting built.”<sup>64</sup> Restrictive zoning laws preventing high-density affordable housing construction and successful lobbying efforts by “NIMBY” coalitions defeating proposals to relax these laws contribute to this shortage.<sup>65</sup> The shortages affect more than just the impoverished; in 2024, for the first time half of all renters “were spending 30% or more of income on rent.”<sup>66</sup>

The link between high housing costs and homelessness cannot be overstated. The U.S. Government Accountability Office found that when median rents increased as little as \$100 a month, homelessness rates rose by about 9%.<sup>67</sup> This startling statistic illustrates just how precarious and unstable life is for millions of housed Americans, who may be one rent raise away from homelessness. From 2001 to 2022, median rents increased 21% after adjusting for inflation, compared with inflation-adjusted wage growth of only 2% during the same period.<sup>68</sup>

61. *Id.*

62. See RACHEL BOGARDUS DREW, WORSENING RENTAL AFFORDABILITY LINKED TO HIGHER RATES OF HOMELESSNESS 8 (2025), <https://www.enterprisecommunity.org/sites/default/files/2025-03/Research-Brief-Worsening-RA-Linked-to-Homelessness.pdf> [<https://perma.cc/R5KW-BKX6>] (“[I]n a given year, changes in the number of severely burdened renters alone can explain nearly 75% of the change in the observed count of people experiencing homelessness the following year.”); see also Press Release, U.S. Census Bureau, Nearly Half of Renter Households are Cost-Burdened, Proportions Differ by Race (Sep. 12, 2024), <https://www.census.gov/newsroom/press-releases/2024/renter-households-cost-burdened-race.html> [<https://perma.cc/3FR8-SXXL>] (“Households spending more than 50% of their income on housing costs are considered severely cost-burdened.”).

63. Mary Louise Kelly, Mia Venkat, Kathryn Fink & William Troop, *Housing Experts Say There Just Aren’t Enough Homes in the U.S.*, NPR (Apr. 23, 2024, at 16:04 ET), <https://www.npr.org/2024/04/23/1246623204/housing-experts-say-there-just-arent-enough-homes-in-the-u-s> [<https://perma.cc/88GL-XAJE>].

64. *Id.*

65. See Kody Glazer, *Overcoming NIMBY Opposition to Affordable Housing*, NAT’L LOW INCOME HOUS. COAL. (last visited Jan. 30, 2026), [https://nlihc.org/sites/default/files/AG-2024/2-9\\_Overcoming-NIMBY-Opposition-to-Affordable-Housing.pdf](https://nlihc.org/sites/default/files/AG-2024/2-9_Overcoming-NIMBY-Opposition-to-Affordable-Housing.pdf) [<https://perma.cc/NBH3-ZQCD>] (defining Not In My Backyard Syndrome (NIMBYism) in the context of affordable housing as “objections to new housing development made for reasons such as fear and prejudice”); Atlantic Marketing Team, *How to Beat Affordable Housing’s NIMBY Problem*, THE ATLANTIC: RE:THINK, <https://www.theatlantic.com/sponsored/fannie-mae-2019/how-to-beat-affordable-housings-nimby-problem/3190/> [<https://perma.cc/W8FX-97Q2>] (last visited Jan. 30, 2026) (describing ten-year battle in Minneapolis to change zoning laws to allow duplexes and triplexes to be constructed in every city neighborhood).

66. Kelly et al., *supra* note 63.

67. U.S. GOV’T ACCOUNTABILITY OFF., HOMELESSNESS: BETTER HUD OVERSIGHT OF DATA COLLECTION COULD IMPROVE ESTIMATES OF HOMELESS POPULATION 30 (2020), <https://www.gao.gov/products/gao-20-433> [<https://perma.cc/2TMV-LW3T>].

68. Sophia Wedeen, *High Housing Costs Are Consuming Household Incomes*, JOINT CTR. FOR HOUS. STUD. HARV. UNIV. (June 12, 2024), <https://www.jchs.harvard.edu/blog/high-housing-costs-are-consuming-household-incomes> [<https://perma.cc/HCR6-VZ9P>].

Rapidly increasing rents, relatively stagnant wages, and significant inflationary pressures across all economic sectors in recent years have resulted in a significant formally employed houseless population: “More than half of people residing in homeless shelters in the United States had formal earnings in the same year they were homeless . . . . Among unhoused individuals who were not in shelters, about 40% had earnings from formal employment.”<sup>69</sup>

## 2. Mental Illness and Drug Addiction

Not surprisingly, affordability issues impacting the working poor generally disproportionately affect those suffering from illnesses that create barriers to long-term, high-wage-earning employment. Significant mental health disorders and substance abuse adversely affect the unhoused and housing insecure at greater rates than the rest of the population.<sup>70</sup> A 2024 study in *JAMA Psychiatry* found that two-thirds of all people experiencing houselessness suffered from some form of mental illness, including substance use disorders, personality disorders, and major depression.<sup>71</sup> These illnesses can contribute to periods of houselessness due to limited healthcare access or difficulties “reintegrating [with society] after mental health treatment.”<sup>72</sup> While many focus on mental illness and addiction as causes of houselessness, it is important to remember that houselessness itself can contribute significantly to poor mental health and substance abuse.<sup>73</sup> As many as half of unhoused people in the U.S. struggle with substance abuse or addiction.<sup>74</sup>

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69. *Employment Alone Isn't Enough to Solve Homelessness, Study Suggests*, U. CHI. NEWS (June 29, 2021), <https://news.uchicago.edu/story/employment-alone-isnt-enough-solve-homelessness-study-suggests> [<https://perma.cc/4R72-DQ3D>].

70. See Stacy Mosel, *Substance Abuse and Homelessness: Statistics and Rehab Treatment*, AM. ADDICTION CTRS. (Apr. 1, 2025), <https://americanaddictioncenters.org/rehab-guide/addiction-statistics-demographics/homeless> [<https://perma.cc/J7QV-26KR>] (“[S]ubstance abuse is more prevalent in people who are homeless than in those who are not.”); Lenni Marcus, Cameron Johnson & Danna Ramirez, *The Complex Link Between Homelessness and Mental Health*, PSYCH. TODAY (May 21, 2021), <https://www.psychologytoday.com/us/blog/mind-matters-menninger/202105/the-complex-link-between-homelessness-and-mental-health> (“An estimated 20 to 25 percent of the U.S. homeless population suffers from severe mental illness, compared to 6 percent of the general public.”); see also Thomas Coombs et al., *Understanding Drug Use Patterns Among the Homeless Population: A Systematic Review of Quantitative Studies*, EMERGING TRENDS IN DRUGS, ADDICTIONS, AND HEALTH, Dec. 2024, at 1 (“Homelessness and substance use are often described as intricately related. There is a widely accepted view that substance use has been regarded as both a cause and consequence of homelessness.” (citation omitted)).

71. See Emily Harris, *Two-Thirds of Unhoused People Have Mental Health Disorders*, 331 JAMA 1795, 1795 (2024); see also Ernie Mundell, *Most Homeless Americans Are Battling Mental Illness*, U.S. NEWS (Apr. 17, 2024, at 11:00 ET), <https://www.usnews.com/news/health-news/articles/2024-04-17/most-homeless-americans-are-battling-mental-illness> (“Two-thirds of homeless people are experiencing some form of mental health disorder.”).

72. Mundell, *supra* note 71.

73. See Ing-Wei Khor, *Psychological Causes and Effects of Homelessness*, EBSCO (2024), <https://www.ebsco.com/research-starters/psychology/psychological-causes-and-effects-homelessness> [<https://perma.cc/SST2-KUFB>] (“The lack of stable housing can lead to a downward spiral exacerbating existing mental health issues, as many homeless individuals struggle to access necessary mental health care due to financial, social, and systemic barriers.”).

74. See Krystina Murray, *Homelessness and Addiction*, ADDICTION CTR. (Mar. 5, 2025), <https://www.addictioncenter.com/addiction/homelessness/> [<https://perma.cc/5HAE-FXQ2>] (“Between 25–

Some dispute these high figures, however, claiming that the inflated percentages fuel an inaccurate “avatar of homelessness in the American mind [of] a person with mental illness and a drug problem who has lived outside for years. In reality, all those categories are minorities . . . Fewer than 1 in 5 are severely mentally ill; fewer than 1 in 7 have addiction issues.”<sup>75</sup> Homelessness advocates often point to these statistics to diminish the power of this predominant avatar.<sup>76</sup> Some of the statistical variance can be explained by different categorical definitions, such as “mentally ill” versus “severely mentally ill.”<sup>77</sup> What no one disputes, however, is that mental illness and addiction affect the unsheltered unhoused at higher rates than sheltered unhoused individuals and the general population.<sup>78</sup> And homelessness advocates agree that more can and should be done for these populations.<sup>79</sup>

In this sense, a more accurate “cause” of homelessness is not mental illness or drug addiction itself, but inadequate treatment and recovery services for those in greatest need. Particularly for the mentally ill, policy decisions to fund the War on Drugs and broken windows policing in lieu of outpatient clinical supports resulted in unhoused mentally ill persons languishing in jails.<sup>80</sup> The idea that

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50% of the homeless population in the US suffer from a substance use disorder . . .”); *see also* Mosel, *supra* note 70 (“Most research shows that around 1/3 of people who are homeless have problems with alcohol and/or drugs, and around 2/3 of these people have lifetime histories of drug or alcohol use disorders.”).

75. Henry Grabar, *A Harsh New Era for America’s Homeless People*, SLATE (Jan. 22, 2025, at 11:00 ET), <https://slate.com/business/2025/01/homelessness-america-increase-affordable-housing-solutions-encampments-shelters.html> [<https://perma.cc/L4A8-ZSX8>].

76. *See, e.g.*, Brateil Aghasi, *Myth #1: Most Homeless People Are Either Mentally Ill or Have a Substance Use Disorder*, UNITED TO END HOMELESSNESS, <https://unitedtoendhomelessness.org/blog/myth-most-homeless-people-are-either-mentally-ill-or-have-a-substance-use-disorder/> [<https://perma.cc/M8RH-H2V8>] (last visited Jan. 30, 2026) (“There are a lot of assumptions surrounding the topic of ‘why people become homeless’ . . . I often hear people cite mental illness or substance use disorders as the primary cause of homelessness . . . [But] [t]he top two causes were finding a job that paid a sustainable wage, and finding housing that’s affordable . . . These are difficult realities to acknowledge – it brings the issue of homelessness closer to our doorstep and forces us to realize that these are situations our family, friends, or even ourselves could end up in.”).

77. *Compare* Harris, *supra* note 71 (referring to mental illness broadly and reaching the two-thirds number), *with* Marcus et al., *supra* note 70 (focusing on those with “severe mental illness” and finding that only 20 to 25% of unhoused individuals fall into that more restrictive category).

78. Jessica Richards & Randall Kuhn, *Unsheltered Homelessness and Health: A Literature Review*, AJPM FOCUS, Oct. 2022, at 1.

79. *See, e.g.*, Faraaz Mahomed, *Addressing the Problem of Severe Underinvestment in Mental Health and Well-Being from a Human Rights Perspective*, 22 HEALTH HUM. RTS. J. 35, 35–36 (2020); Lydia McFarlane, *Money and Mental Health: Experts, Lawmakers Say Lack of Funding Is Limiting Access*, THE HILL (Oct. 18, 2023, at 13:47 ET), <https://thehill.com/policy/healthcare/4262836-money-and-mental-health-limited-access/> [<https://perma.cc/N5K3-BSDN>] (quoting lawmakers from both parties calling for increased funding); Theresa Gaffney, *Since 988 Launch, Mental Health Crisis Services Have Faltered*, STAT NEWS (Jan. 29, 2025), <https://www.statnews.com/2025/01/29/988-mental-health-crisis-services-faltered-since-2022-launch/> [<https://perma.cc/D43E-W3KF>] (“Study shows the nationwide system is falling well short of its potential, while funding issues loom.”).

80. Bruce Western, Jaclyn Davis, Flavien Ganter & Natalie Smith, *The Cumulative Risk of Jail Incarceration*, PROC. NAT’L ACAD. SCIS., Apr. 2021, at 1 (describing “rabble management” and other broken windows policing tactics aimed at the homeless: “Recent policing studies report on the use of arrest to keep the transient poor away from centers of tourism and business in a contemporary form of

minor social disorder like a broken window requires an aggressive police response is particularly unproductive for the mentally ill unhoused.<sup>81</sup> Los Angeles and its second largest unhoused population has long served as the poster child for this approach.<sup>82</sup> The Los Angeles County Sheriff's Department once famously referred to its Twin Towers Correctional Facility as the "nation's largest mental health facility."<sup>83</sup> The description is apt; today, 43% of the 14,000 inmates in Los Angeles are mentally ill; 25% of these inmates are houseless.<sup>84</sup> Many of these inmates might be ineligible for housing vouchers or other public assistance upon their release, making it harder to find housing on their own, thus perpetuating the cycle of houselessness and incarceration.<sup>85</sup>

### 3. Discrimination and Violence

Factors tied to identity and circumstances can also increase risks of houselessness. Members of the LGBTQIA+ community, especially queer youth, find themselves without housing at higher rates than the average population.<sup>86</sup> Likewise, youth aging out of the foster care system often face challenges finding stable, affordable housing.<sup>87</sup> Victims of violence, including survivors of domestic violence and gender-based violence, often must flee their homes without adequate housing alternatives.<sup>88</sup> Likewise, people exiting the criminal legal system face collateral consequences of conviction, including the inability to secure employment and housing vouchers, making reentry into society with stable housing more difficult.<sup>89</sup> For its part, the Trump Administration has attempted

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'rabble management.' Research on criminal justice, healthcare, and homelessness points to the same group of individuals who simultaneously account for a large proportion of jail admissions, emergency room visits, and shelter stays." (citations omitted)).

81. See SHAWN E. FIELDS, *THE NEW PUBLIC SAFETY: POLICE REFORM AND THE LURKING THREAT TO CIVIL LIBERTIES* 22 (2025) ("A major reason why this aggressive policing strategy does not work is precisely that so many of the people engaged in low-level petty social disturbances are struggling with mental illness, homelessness, and drug addiction, issues that cannot be addressed effectively with a badge and a gun, much less with handcuffs and expensive prison stays.").

82. See Johnson et al., *supra* note 51; see also Alisa Roth, *The Truth About Deinstitutionalization*, *THE ATLANTIC* (May 25, 2021), <https://www.theatlantic.com/health/archive/2021/05/truth-about-deinstitutionalization/618986/> [<https://perma.cc/VL6A-A3HP>].

83. Meg O'Connor, *Los Angeles Is Locking Up More People with Mental Illness than Ever Before. Why?*, *CTR. FOR HEALTH JOURNALISM* (Oct. 14, 2022), <https://centerforhealthjournalism.org/our-work/insights/los-angeles-locking-more-people-mental-illness-ever-why> [<https://perma.cc/DL3F-NR78>].

84. *Id.*  
85. See *Are Applicants with Felonies Banned from Public Housing or Any Other Housing Funded by HUD?*, *HUD EXCH.* (Jan. 2022), <https://www.hudexchange.info/faqs/4078/are-applicants-with-felonies-banned-from-public-housing-or-any-other/> [<https://perma.cc/AFS9-RK4X>] (individuals convicted of some methamphetamine-related offenses and sex offenses are categorically prohibited from receiving federal housing vouchers) [hereinafter HUD EXCH.].

86. See *Homelessness Among the LGBTQ Community*, *NAT'L COAL. FOR THE HOMELESS*, <https://nationalhomeless.org/lgbtq-homelessness/> [<https://perma.cc/AE7Z-Q5F4>] (last visited Jan. 30, 2026).

87. See *id.*; Cheryl Zlotnick, *What Research Tells Us About the Intersecting Streams of Homelessness and Foster Care*, 79 *AM. J. ORTHOPSYCHIATRY* 319, 320 (2009).

88. See *ACLU, DOMESTIC VIOLENCE AND HOMELESSNESS 1* (2025), <https://www.aclu.org/sites/default/files/pdfs/dvhomelessness032106.pdf> [<https://perma.cc/3APC-4R2J>] ("For years, advocates have known that domestic violence is a primary cause of homelessness for women and families.").

89. See Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, *PRISON POL'Y INITIATIVE* (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html> [<https://>

explicitly to exacerbate these problems by restricting HUD housing grants and other “grant funding for organizations serving survivors of domestic and sexual violence, LGBTQ youth, and unhoused populations.”<sup>90</sup>

Each of these groups face their own types of violence contributing to housing insecurity, reinforced by housing and employment discrimination experienced as a result of their identities and circumstances. Discrimination in the rental market against domestic violence survivors,<sup>91</sup> those with criminal convictions,<sup>92</sup> and queer individuals<sup>93</sup> further restricts the number of units to which these groups have access. Employment discrimination and experiences of trauma can also limit their ability to earn incomes. Already suffering cycles of violence or incarceration, they often also struggle with related cycles of homelessness as a result.<sup>94</sup>

#### 4. Natural Disasters

Climate-fueled natural disasters have contributed to recent spikes in homelessness, and experts expect this trend to continue.<sup>95</sup> HUD found that many communities that “reported the largest increases in sheltered homelessness, report that

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perma.cc/2UQK-FDCW] (“[F]ormerly incarcerated people are almost 10 times more likely to be homeless than the general public.”); HUD EXCH., *supra* note 85.

90. Christopher Kane, *Court Blocks Trump’s Anti-LGBTQ Restrictions on Grants in Health and Housing*, MSN (July 28, 2025), <https://www.msn.com/en-us/politics/government/court-blocks-trump-s-anti-lgbtq-restrictions-on-grants-in-health-and-housing/ar-AA1JqR4r?ocid=BingNewsSerp> [https://perma.cc/T7K2-7FM8].

91. See Memorandum from Sara K. Pratt, HUD Deputy Assistant Sec’y for Enf’t and Programs to Fair Hous. and Equal Opportunity (FHEO) Off. Dirs. & FHEO Reg’l Dirs. 1 (Feb. 9, 2011), <https://www.nhlp.org/wp-content/uploads/2017/09/Housing-Discrimination-Against-Victims-of-DV-2011.pdf> (“Survivors of domestic violence often face housing discrimination because of their history or the acts of their abusers.”); Kristen M. Ross, *Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 HASTINGS WOMEN’S L.J. 249, 249 (2007).

92. See Deborah Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 175 (2019).

93. See Alaina Richert, *Sexual Orientation, Gender Identity, and Homelessness Post-Bostock*, 56 U. MICH. J.L. REFORM 217, 222, 224–25 (2022) (detailing housing and employment discrimination against the queer community); Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act after Bostock v. Clayton County*, 69 U. KAN. L. REV. 409, 411–13 (2021).

94. See Anita S. Hargrave et al., *The Impact of Intimate Partner Violence on Homelessness and Returns to Housing: A Qualitative Analysis from the California Statewide Study of People Experiencing Homelessness*, 40 J. INTERPERSONAL VIOLENCE 1248, 1249 (2025); see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN L. REV. 1241, 1246 n.13 (1993) (stating that one shelter serving women of color found that nearly 85% of clients returned to abusive relationships because of their difficulties finding housing and employment).

95. See Claudia Boyd-Barrett, *As Wildfires Grow, So Does California’s Housing and Homelessness Crisis. Here Are Some Solutions*, CAL. HEALTH REP. (Aug. 3, 2022), <https://www.calhealthreport.org/2022/08/03/as-wildfires-grow-so-does-californias-housing-and-homelessness-crisis-here-are-some-solutions/> [https://perma.cc/VFD5-W9ZT] (“Researchers and those who work with disaster victims said there is insufficient government assistance to help the most vulnerable wildfire survivors find long-term, stable housing.”); see also Tik Root, *Kerr County’s Tragic Flood Wasn’t an Outlier. It Was a Preview.*, GRIST (July 21, 2025), <https://grist.org/extreme-weather/kerr-countys-tragic-flood-wasnt-an-outlier-it-was-a-preview/> [https://perma.cc/TGH3-D898] (“Mounting evidence shows no state is safe from the flooding that ravaged the Texas Hill Country. Your community could be next.”).

they experienced an increase from people who were displaced from natural disasters,” including the Maui Fire.<sup>96</sup> According to the National Coalition for the Homeless:

Extreme weather events are a very common cause of homelessness, especially when insurance and other rebuilding resources are limited . . . .

But as an outreach worker in Houston says, “help for the homeless, often hard to come by under normal circumstances, like will be even more challenging in the storm’s aftermath.” Moreover, people living on fixed incomes, working poor families, and those who are homeless often do not have the resources to evacuate or even collect needed supplies.<sup>97</sup>

As climate change increases the frequency and intensity of flooding along densely populated coastlines and wildfires in densely populated regions of the west coast, climate and housing experts agree that “more people [will be] losing their homes and facing long-term displacement and instability, including homelessness.”<sup>98</sup> Southern California, already with high houseless rates, appears acutely poised for the dual impacts of climate natural disasters and resulting houselessness.<sup>99</sup> The devastating wildfires in Los Angeles in January 2025 affected both affluent areas like Pacific Palisades and working-class neighborhoods like Altadena,<sup>100</sup> highlighting how no one is immune from climate-fueled disasters and resulting housing insecurity. Yet some fear these and other disasters will create climate gentrification where people of means will move into lower-income communities at lower risk of fire and flood and displace those already there, exacerbating the existing affordable housing crisis.<sup>101</sup>

96. HUD, *supra* note 2, at xiv, 10.

97. *Natural Disasters and Homelessness*, NAT’L COAL. FOR HOMELESS, <https://nationalhomeless.org/natural-disasters/> [<https://perma.cc/2QBK-JWHJ>] (last visited Jan. 30, 2026).

98. Boyd-Barrett, *supra* note 95; see Mark Nevitt, *The Legal Crisis Within the Climate Crisis*, 76 STAN. L. REV. 1051, 1062 (2024) (“[T]he increase in the frequency and extent of high tide flooding due to climate-driven sea level rise threatens to destroy large swaths of the U.S. coastal property market and ‘increasingly disrupt and damage critical infrastructure and property, labor productivity, and the vitality of our communities.’” (quoting U.S. GLOBAL CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: VOLUME II: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: REPORT-IN-BRIEF 12, 17 (2018))).

99. See Boyd-Barrett, *supra* note 95.

100. See Sean Greene, *Mapping the Damage From the Eaton and Palisades Fires*, L.A. TIMES (Jan. 27, 2025, at 21:03 PT), <https://www.latimes.com/california/story/2025-01-16/mapping-los-angeles-damage-from-the-eaton-and-palisades-fires-altadena-pasadena> [<https://perma.cc/X4F4-84FD>] (“The Eaton and Palisades fires now rank as the second- and third-most-destructive wildfires in California history, with an estimated economic loss of \$250 billion.”).

101. See Alicia Wallace, *What Replaces a Community That Has Been Burned Down? Further Gentrification*, CNN (Jan. 23, 2025, 6:01 EST), <https://www.cnn.com/2025/01/23/economy/urban-wildfires-colorado-los-angeles-affordable-housing/index.html> [<https://perma.cc/WR7C-5A3T>]; Jo Walker, *Climate Gentrification and Its Effects on Vulnerable Populations*, UNIV. OF MICH. SCH. FOR ENV’T AND SUSTAINABILITY (Jan. 26, 2024), <https://seas.umich.edu/news/climate-gentrification-and-its-effects-vulnerable-populations> (“[W]ealthy coastal residents are moving inland to higher elevations and away from the beachfront in an effort to escape threats from sea-level rise and erosion. Many of these

The recent wildfires have also reinvigorated debate over public safety threats posed not just to the unhoused but by the unhoused.<sup>102</sup> Cities have long sought to limit large houseless encampments because of impacts on public waterways and the risk of disease and environmental hazards from drug use.<sup>103</sup> More recently, San Diego and Los Angeles have sounded the alarm about houseless individuals starting fires in an effort to keep warm.<sup>104</sup> Numerous small brush fires started in houseless encampments erupted in San Diego two weeks after the Palisades Fire in Los Angeles.<sup>105</sup> The San Diego fire department estimates that twenty-five fires in San Diego “likely” originated in encampments in January 2025 alone—“which could end up being an improvement over last January when there were 95.”<sup>106</sup> Climate change has extended wildfire season deep into the coldest parts of winter.<sup>107</sup> As a result, “an easy antidote to the chill – build a fire – has perhaps never been more dangerous.”<sup>108</sup>

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inland refuge areas were once deemed ‘less desirable’ places where low-income communities have generational roots and have endured decades of disinvestment. Now they are threatened once again . . . by gentrification and displacement.”)

102. See, e.g., Joel Grover, *Up in Flames: Rising Number of Homeless Fires Threatens LA Neighborhoods*, NBC4 L.A. (May 9, 2024, at 18:19 PDT), <https://www.nbclosangeles.com/investigations/la-homeless-encampment-fires-electrical-supply-wires/3408775/> (“There were 13,909 homeless fires started in Los Angeles in 2023, almost double the number of such fires in 2020, according to LAFD data. Some of these fires are apparently caused by homeless people tapping into city electrical wires under the sidewalk . . .”); Madeline Leesman, *We Now Know How Several of the California Wildfires Started*, TOWNHALL (Feb. 2, 2025, at 10:30 PST), <https://townhall.com/tipsheet/madelineleesman/2025/02/02/california-wildfires-started-in-homeless-camps-n2651462> [<https://perma.cc/G4MC-YRQ4>].

103. See, e.g., Jane Kim, *Escondido Declares Local Emergency at Homeless Encampment*, ABC 10 NEWS S.D. (Dec. 16, 2024, at 7:13 PST), <https://www.10news.com/news/north-county/escondido/escondido-declares-local-emergency-at-homeless-encampment> [<https://perma.cc/3LBH-SZVZ>] (describing sweep of encampment due to “water quality test results show[ing] multiple forms of bacteria at unsafe levels” in a nearby creek); *Riverside All of Us or None v. City of Riverside*, No. 23-cv-01536, 2023 WL 7751774, at \*2 (C.D. Cal. Nov. 14, 2023) (quoting declaration of police captain: “Several large fires have started within the Santa Ana River and have extended into the outlying communities causing evacuations and damage . . . The homeless encampments . . . are riddle[d] with trash debris, drug needles, solar panels, and batteries, buckets of feces, and other potentially infectious materials and waste.”).

104. See Blake Nelson, *Fires as Homeless Encampments Are Under the Spotlight as San Diego Fights to Keep Blazes at Bay*, S.D. UNION-TRIB. (Jan. 27, 2025, at 5:50 PST), <https://www.sandiegouniontribune.com/2025/01/27/fires-at-homeless-encampments-are-under-the-spotlight-as-san-diego-fights-to-keep-blazes-at-bay/> [<https://perma.cc/9JCL-BWfy>]; Stan Greene, *Homeless Start 17,000 Fires in Los Angeles City Annually, Says LA Fire Department*, SANTA MONICA OBSERVER (Mar. 7, 2025, at 20:43 PST), <https://www.smobserved.com/story/2025/03/10/news/homeless-start-17000-fires-in-los-angeles-city-annually-says-la-fire-department/8825.html> [<https://perma.cc/RS4T-33N7>].

105. See Leesman, *supra* note 102 (stating that three brush fires started in San Diego between January 21 and 23, 2025); Greene, *supra* note 100 (“Early in the evening of Jan. 7, Altadena and Pasadena residents saw flames in the distance at Eaton Canyon . . .”).

106. See Nelson, *supra* note 104; see also Pat Mueller, *Arson Investigators Confirm Rancho Bernardo Brush Fire Sparked from Homeless Encampment*, 10 NEWS (Jan. 30, 2025, 11:54 PST), <https://www.10news.com/news/local-news/update-arson-investigators-confirm-rancho-bernardo-brush-fire-sparked-from-homeless-encampment> [<https://perma.cc/DM56-XSZX>].

107. See Nicole Karlis, *Why Wildfire “Season” May No Longer Be a Thing*, SALON (Jan. 15, 2025, 5:30 EST), <https://www.salon.com/2025/01/15/why-wildfire-season-may-no-longer-be-a-thing/> [<https://perma.cc/RQ8M-6XHQ>].

108. Nelson, *supra* note 104.

One solution could be to provide temporary beds and transitional housing options to bring the unhoused in from the cold. Instead, hostility toward the unhoused has led to citizen calls for more draconian enforcement measures; as one angry Pacific Palisades resident opined, without evidence, shortly after the Palisades Fire began:

As officials investigate what caused Los Angeles' devastating wildfires, I know the answer. It was the homeless. The LA Fire Department reports that 54% of fires in 2023 were caused by the homeless . . . .

If LA simply put the [anti-camping] ban back in place, and enforced it, the homeless problem would go away . . . .<sup>109</sup>

As a result, rather than provide temporary beds and transitional options to unhoused individuals seeking relief from the cold, cities across the country have instead taken more punitive approaches.<sup>110</sup>

### C. POLICING HOUSELESSNESS

If “the old canard about mayors is that the job is to shovel snow, pick up trash, and fill potholes,” 2025 has “add[ed] one more responsibility to the mix: managing the country’s increasingly visible crisis of affordable housing.”<sup>111</sup> These mayors, and a growing number of governors, have turned to visibly punitive impulses to solve the crisis.

#### 1. Encampment “Sweeps”

The most visible and an increasingly common tactic of local governments addressing unsheltered houselessness is the encampment “sweep.”<sup>112</sup> “Housing shortages have contributed to homelessness and a surge of tent communities across major American cities, including New York, Los Angeles, and Seattle . . . .”<sup>113</sup>

109. James Breslo, *I Lived in Pacific Palisades and I Know Who Caused the Fire*, CAL. GLOBE (Jan. 12, 2025, at 18:00 PST), <https://californiaglobe.com/fr/i-live-in-pacific-palisades-and-i-know-who-caused-the-fire/> [https://perma.cc/XSK8-W5Q7]. As of October 8, 2025, authorities had arrested Jonathan Rinderknecht for arson for deliberately starting the Palisades Fire. Rinderknecht was not homeless. Kelli Johnson, *Jonathan Rinderknecht: What We Know About the Man Accused in the Palisades Fire*, FOX 11 L.A. (Oct. 8, 2025, at 10:12 PDT), <https://www.foxla.com/news/who-is-accused-of-starting-the-palisades-fire> [https://perma.cc/X9T4-EKA4].

110. Grabar, *supra* note 75.

111. *Id.*

112. See Adam Mahoney, *Black Unhoused Communities Targeted After Supreme Court Ruling*, CAP. B NEWS (Oct. 22, 2024), <https://capitalbnews.org/supreme-court-ruling-encampment-sweeps-homelessness/> [https://perma.cc/FL3C-C3VE]; see also Adhiti Bandlamudi, *Protesters in SF, Oakland, LA Denounce Rise in Encampment Sweeps*, KQED (Dec. 17, 2024), <https://www.kqed.org/news/12018466/protesters-sf-oakland-la-denounce-rise-encampment-sweeps> [https://perma.cc/S38B-Z2QW].

113. Morgan, *supra* note 33, at 1395.

Communities “[a]ngered by often dangerous and dirty tent camps . . . especially in Western states . . . have been enforcing bans on camping.”<sup>114</sup> However, in two cases—*Martin v. City of Boise*<sup>115</sup> and *Johnson v. City of Grants Pass*<sup>116</sup>—the Ninth Circuit held that these Western states could not punish individuals for sleeping outside in encampments if there existed a lack of adequate shelter beds for all of a city’s residents.<sup>117</sup> Mayors and governors—including progressives like San Francisco Mayor London Breed and California Governor Gavin Newsom—felt these rulings unfairly “tied their hands” and prevented them from solving an emerging public health crisis.<sup>118</sup> Many of them openly supported the attempt to overturn *Grants Pass* at the Supreme Court.<sup>119</sup> The bipartisan desire<sup>120</sup> to turn police on the unhoused and forcibly remove them from public view provides further evidence of the systematic barriers to adequately addressing this epidemic.

The Supreme Court obliged, holding that criminalizing sleeping in public and other basic life functions did not criminalize status or constitute cruel and unusual punishment.<sup>121</sup> This ruling acted as “an accelerant” for punitive antihouselessness impulses, allowing over a hundred jurisdictions to enact draconian bans prohibiting sleeping, lying down, or camping in public under threat of criminal arrest.<sup>122</sup> Within days of the ruling, Governor Newsom alerted California cities and towns that they must clear encampments or risk losing funding.<sup>123</sup> Following *Grants Pass* and pressures from state lawmakers in California and elsewhere, “[c]ities have responded punitively and violently to unsheltered communities residing in

114. *Homelessness Surged 18% to a New Record in 2024 Amid a Lack of Affordable Housing Across the U.S.*, CBS NEWS (Dec. 27, 2024, at 10:27 ET), <https://www.cbsnews.com/news/homelessness-record-level-2024-up-18-percent-housing-costs-migrants/> [<https://perma.cc/F59M-4ZUP>].

115. 902 F.3d 1031 (9th Cir. 2018), *overruled by City of Grants Pass v. Johnson*, 603 U.S. 520 (2024).

116. 50 F.4th 787 (9th Cir. 2022), *rev’d*, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024).

117. *Id.* at 813.

118. Jeanne Kuang, *Supreme Court Will Hear Case About Homeless Encampments, with Huge Implications for California*, LONG BEACH POST (Jan. 13, 2024), <https://lbpost.com/news/supreme-court-martin-v-boise-homeless-encampments/> [<https://perma.cc/5QUK-A6CX>] (“The situation has led city officials – and Gov. Gavin Newsom – to complain that the Boise ruling has tied their hands from addressing the state’s sprawling encampments, arguing they need to sweep camps both for health and safety reasons and for the well-being of encampment residents.”); *see* Irvin Dawid, *Supreme Court to Reconsider Martin v. Boise*, PLANETIZEN (Jan. 15, 2024, 8:00 PST), <https://www.planetizen.com/news/2024/01/127052-supreme-court-reconsider-martin-v-boise>.

119. *See* Dawid, *supra* note 118.

120. Lynn La, *Why California Legislators of Both Parties Want to Ban Homeless Encampments*, OBSERVER (Feb. 7, 2024), <https://sacobserver.com/2024/02/why-california-legislators-of-both-parties-want-to-ban-homeless-encampments/> [<https://perma.cc/G69V-PW4K>]; Ludden, *supra* note 11 (“The new [anticamping] laws are in rural, urban and suburban towns and cities – both Republican-led and Democratic – and span every region, including in places not known for homelessness, like West Virginia, New Hampshire and Wyoming.”).

121. *See Grants Pass*, 603 U.S. at 546–47.

122. Grabar, *supra* note 75; Ludden, *supra* note 11.

123. *See* Grabar, *supra* note 75; Tran Nguyen, *California Governor Vows to Take Away Funding from Cities and Counties for Not Clearing Encampments*, ASSOCIATED PRESS (Aug. 9, 2024, at 7:06 EDT), <https://apnews.com/article/california-gavin-newsom-homeless-sweeps-funding-bdaf5719847e11daf8cca06c62737994>.

public spaces, conducting ‘sweeps’ and citing and arresting individuals for any number of quality-of-life offense violations.”<sup>124</sup> Think tanks like the Cicero Institute have lobbied to enact statewide anti-camping bans and couple them with an end to “housing first” initiatives, claiming that “the housing delivery system is too expensive and that ‘states should pursue minimally viable shelter options’” instead.<sup>125</sup>

Such legislation has been enacted. In Florida, a new law prohibits counties and cities from allowing camping or sleeping on public property and empowers private citizens and business owners to sue if their local officials fail to comply with the law.<sup>126</sup> In Kentucky, which criminalized camping on certain private and public property statewide, property owners recently gained the right to use deadly force against those who are illegally camping on their property.<sup>127</sup>

Many cities conduct sweeps with a mix of police and nonpolice “homeless outreach,” or “HOT” teams, though many HOT teams appear less concerned with providing shelter and wraparound services than with supporting police enforcement actions.<sup>128</sup> As of 2024, 59% of these teams were empowered to enforce civil or criminal infractions or quality of life crimes.<sup>129</sup> Nearly half of these teams state as an objective the removal of encampments, which includes entering encampments and citing unhoused individuals for illegal housing violations.<sup>130</sup>

Some cities employ a “progressive enforcement” encampment sweep model, whereby police break down encampments and destroy property but offer services and transportation to shelter as a first option before issuing citations and making arrests.<sup>131</sup> These offers are sometimes rejected by those with prior traumatic experiences in dangerous temporary shelters and can be illusory as cities regularly lack available beds.<sup>132</sup> Instead of connecting people with services and shelter,

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124. Morgan, *supra* note 33, at 1395.

125. Grabar, *supra* note 75.

126. See Nicole Santa Cruz, *U.S. Supreme Court Ruling Will Allow More Aggressive Homeless Encampment Removals*, PROPUBLICA (June 29, 2024, at 6:00 EDT), <https://www.propublica.org/article/us-supreme-court-grants-pass-homelessness> [<https://perma.cc/8GHW-S94H>].

127. See *id.*; Divya Karthikeyan, *Safer Kentucky Act, Which Punishes Homelessness, Will Take Effect Soon*, LOUISVILLE PUB. MEDIA (July 11, 2024, at 6:00 ET), <https://www.lpm.org/news/2024-07-11/safer-kentucky-act-which-punishes-homelessness-will-take-effect-soon> [<https://perma.cc/SH37-5VZC>].

128. See ALISA DEWALD, KATHERINE LEVINE EINSTEIN & CHARLEY E. WILLISON, *POLICING AND THE PUNITIVE POLITICS OF LOCAL HOMELESSNESS POLICY* 1–2, 4–5 (2023), <https://community.solutions/wp-content/uploads/2023/05/Policing-and-Punitive-Politics-of-Local-Homelessness-Policy-Brief.pdf>.

129. See *id.* at 1.

130. *Id.* at 1–2, 5.

131. See, e.g., SAN DIEGO POLICE DEP’T, *NEIGHBORHOOD POLICING DIVISION, CITY OF S.D.* (2020), [https://www.sandiego.gov/sites/default/files/2020\\_neighborhood\\_policing\\_division\\_report.pdf](https://www.sandiego.gov/sites/default/files/2020_neighborhood_policing_division_report.pdf) [<https://perma.cc/XB5P-SWY9>] (summarizing “compassionate yet firm” four-step approach that includes “[e]ducation of the law,” “[i]nfractio[n] citation,” “[m]isdemeanor citation,” and “[p]otential for arrest”).

132. See Rick Paulas, *This Is Why Homeless People Don’t Go to Shelters*, VICE (Feb. 24, 2020, at 12:48 ET), <https://www.vice.com/en/article/this-is-why-homeless-people-dont-go-to-shelters/> [<https://perma.cc/6B7Y-LNLH>]; Robbie Sequeira, *Many More U.S. Cities Ban Sleeping Outside Despite a Lack of Shelter Space*, N.J. MONITOR (Jan. 27, 2025, at 6:43 ET), <https://newjerseymonitor.com/2025/01/27/many-more-u-s-cities-ban-sleeping-outside-despite-a-lack-of-shelter-space/> [<https://perma.cc/3VU6-6KGF>].

these progressive enforcement sweeps instead disrupt active social networks, disconnect unhoused people from their families and caseworkers, and exacerbate untreated mental illness—all while leaving houselessness numbers essentially unchanged.<sup>133</sup> Critics of sweeps claim they merely shuffle populations around and placate the most vocal home and business owners.<sup>134</sup> In San Diego, with the nation’s sixth largest houseless population,<sup>135</sup> “encampments are much less noticeable in some areas — such as downtown, in the city’s main park, and around certain schools — [but] they’re just as prevalent, if not more so, near freeways and along the banks of the San Diego River.”<sup>136</sup> These unhoused residents congregate in what few places remain available to them, but even freeway underpasses and remote riverbanks do not protect them from arrest for simply existing in public, as the next subsection explains.

## 2. Quality-of-Life Criminalization

Together with citations or arrests for illegally camping in public, cities have long punished the unhoused for conducting basic life functions in public that housed individuals have the luxury of conducting in private: sleeping, lying down, urinating, and defecating.<sup>137</sup> Other ordinances prohibit specific life functions in specific places, such as sleeping on benches or washing in fountains.<sup>138</sup> Supporters of such restrictions claim they are not meant “to oppress the homeless or diminish their liberty, but to reduce annoyance, to provide a fair basis on which

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133. See Hart, *supra* note 13; NAT’L HEALTH CARE FOR HOMELESS COUNCIL, IMPACT OF ENCAMPMENT SWEEPS ON PEOPLE EXPERIENCING HOMELESSNESS (2022), <https://nhhc.org/wp-content/uploads/2022/12/NHCHC-encampment-sweeps-issue-brief-12-22.pdf> [<https://perma.cc/H3R8-H2WJ>] (“Sweeps damage health, well-being, and connections to care . . . compromise personal safety and civil trust . . . undermine paths to housing and financial stability . . . [and] create unnecessary costs for local communities.”); Marisa Kendall, *Backers of California Homeless Camp Ban Cite ‘Successful’ San Diego Law. But Is It?*, CAL. LOC. (Apr. 11, 2024, at 15:30 PDT), <https://californialocal.com/localnews/statewide/ca/article/show/130208-backers-of-california-homeless-camp-ban-cite-successful-san-diego-law-but-i/> [<https://perma.cc/JB7T-LGQA>] (noting that there is “no evidence the city’s overall homeless population has decreased in the eight months since enforcement started”).

134. See Hart, *supra* note 13; Roshan Abraham, *Sweeps Aren’t Outreach—Policing Homelessness Still Doesn’t Work* (June 30, 2023), <https://shelterforce.org/2023/06/30/sweeps-arent-outreach-policing-homelessness-still-doesnt-work/> [<https://perma.cc/2P89-SU46>].

135. Johnson et al., *supra* note 51.

136. *Id.*

137. See NAT’L. HOMELESSNESS L. CTR., HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT 5, 7, 9 (2021), <https://homelesslaw.org/wp-content/uploads/2021/11/2021-HNH-State-Crim-Supplement.pdf> [<https://perma.cc/YE8N-HUHS>] (pre-*Grants Pass* study finding that 48 states and 187 cities have at least one law restricting conduct of people experiencing homelessness); Hochbaum, *supra* note 9, at 208, 210.

138. See, e.g., BEVERLY HILLS, CAL., CODE § 5-6-1310 (2007) (“No person shall bathe, wash or make other contact with the water in a public fountain, other than a drinking fountain. No person shall use any city-owned public restroom to wash any portion of their body other than their arms, neck and face.”); Joe Hendricks, *Ordinance Prohibits Sleeping in Public Places*, ANNA MARIA ISLAND SUN (Dec. 23, 2024), <https://amisun.com/ordinance-prohibits-sleeping-in-public-places/> [<https://perma.cc/4HH9-HQME>] (discussing existing ordinance language that states that “sleeping on park benches at any time is prohibited”).

all citizens could make use of the public spaces of their city.”<sup>139</sup> Such bans dehumanize and criminalize the unhoused who have no voluntary choice but to engage in human biological functions in public.<sup>140</sup>

While these quality-of-life ordinances may aim to create a safer and more enjoyable public plaza, they do so by all but outlawing the presence of undesirable unhoused individuals from that plaza. These ordinances significantly contribute to disparate interactions with the criminal legal system; unhoused individuals are eleven times more likely to be arrested than housed individuals and are then “disadvantaged at every stage of the legal process.”<sup>141</sup> These types of laws also perpetuate what abolitionists Andrea Ritchie and Mariama Kaba call society’s impulse to put certain people “Somewhere Else” out of sight, be it the jail, the interstate underpass, or the psychiatric hospital.<sup>142</sup>

### 3. Forced Psychiatric Treatment

Among the most significant attempts to put houseless individuals “somewhere else” is the increasing reliance on involuntary civil commitment and forced psychiatric treatment for houseless persons experiencing mental illness. In November 2022, New York City Mayor Eric Adams announced plans to force people into treatment who “were a danger to themselves, even if they posed no risk of harm to others,” claiming a “moral obligation” to do so.<sup>143</sup> The initiative, which relies on police to assess and involuntarily commit houseless people for treatment, lowered the standard authorizing confinement from imminent risk of harm to self or others to a merely foreseeable future risk of an inability to care for oneself.<sup>144</sup> The city now averages 148 involuntary hospitalizations of unhoused individuals per week.<sup>145</sup> California has devoted hundreds of millions of dollars on

139. Jeremy Waldron, *Homelessness and Community*, 50 U. TORONTO L.J. 371, 373 (2000).

140. See also *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (“[S]o long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters], the jurisdiction cannot prosecute homeless individuals for ‘involuntarily sitting, lying, and sleeping in public’ . . . on the false premise they had a choice in the matter.” (quoting *Jones v. City of Los Angeles*, 44 F.3d 1118, 1138 (9th Cir. 2006)) (second and third alterations in original); *City of Grants Pass v. Johnson*, 603 U.S. 520, 563 (2024) (Sotomayor, J., dissenting) (“Sleep is a biological necessity, not a crime.”)).

141. MADELINE BAILEY, ERICA CREW & MADZ REEVE, *NO ACCESS TO JUSTICE: BREAKING THE CYCLE OF HOMELESSNESS AND JAIL 1* (2020), <https://vera-institute.files.svcdn.com/production/downloads/publications/no-access-to-justice.pdf> [<https://perma.cc/9RQ4-V9PW>].

142. KABA & RITCHIE, *supra* note 31, at 162.

143. Andy Newman & Emma G. Fitzsimmons, *New York City to Involuntarily Remove Mentally Ill People from Streets*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/11/29/nyregion/nyc-mentally-ill-involuntary-custody.html>.

144. See *id.* New York Governor Kathy Hochul proposed in January 2025 to expand the new standard statewide. Rebecca C. Lewis, *Hochul Says 2025 Is the Year to Change Involuntary Commitment Laws*, CITY & STATE N.Y. (Jan. 3, 2025), <https://www.cityandstateny.com/policy/2025/01/hochul-says-2025-year-change-involuntary-commitment-laws/401948/> [<https://perma.cc/LL88-6NHB>] (“Hochul said her proposal would expand [the] definition of harm to cover more people.”).

145. See Maya Kaufman & Katelyn Cordero, *City Hall Reveals Data on Involuntary Hospitalizations*, POLITICO (Feb. 3, 2025, at 10:00 ET), <https://www.politico.com/newsletters/weekly-new-york-health-care/2025/02/03/city-hall-reveals-data-on-involuntary-hospitalizations-00202021>.

CARE Court (Community Assistance, Recovery, and Empowerment), an entirely new court system devoted solely to placing mentally ill Californians in involuntary psychiatric treatment.<sup>146</sup> Like New York City’s initiative, the CARE Court program authorizes involuntary treatment on the foreseeability of potential future grave disability, such as “schizophrenia spectrum and other psychotic disorders” rather than an imminent risk requirement.<sup>147</sup> Unhoused individuals lacking regular shelter or food access may more easily meet this lower standard.<sup>148</sup>

Psychiatric treatment for the unhoused may appear different from and preferable to “policing” houselessness. But policing remains a central feature of these forced psychiatric evaluations in many cities where uniformed officers must accompany mental health responders and may arrest unhoused individuals at any time.<sup>149</sup> And even if the unhoused individual does not end up in a jail cell, critics have recognized the significant liberty deprivations of forced psychiatric treatment,<sup>150</sup> the “prison-like” conditions of treatment centers,<sup>151</sup> and the rampant abuse by providers and fellow patients that unfortunately also mirror many imprisonment experiences.<sup>152</sup> “Forced psychiatric

146. See *The 2024-25 California Spending Plan: Judiciary and Criminal Justice*, CAL. LEG. ANALYST’S OFF. (Sep. 10, 2024), <https://lao.ca.gov/Publications/Report/4924> [<https://perma.cc/MT4H-DFVC>]; Jaclyn Cosgrove & Thomas Curwen, *L.A. County Is Launching CARE Court. Here’s What to Expect*, L.A. TIMES (Nov. 30, 2023, at 14:40 PT), <https://www.latimes.com/california/story/2023-11-30/l-a-county-launches-gov-newsom-care-court>.

147. Michelle Charness, W. CTR. ON L. & POVERTY NEWSROOM (Mar. 6, 2024), <https://wclp.org/care-court-or-scare-court-the-california-care-court-system-allows-for-involuntary-mental-health-treatment/> [<https://perma.cc/7HYA-BP3N>]. Statutes utilizing the imminent risk standard require a showing that an individual is at imminent risk of harming themselves or others and that they have the means and the plan to carry out the dangerous activity, an important guardrail against unwarranted liberty intrusions. See, e.g., CAL. WELFARE & INSTS. CODE § 5150.

148. See Sam Levin, *California Proposal Would Force Unhoused People into Treatment*, GUARDIAN (Mar. 3, 2022, at 20:22 EST), <https://www.theguardian.com/us-news/2022/mar/03/california-proposal-forced-unhoused-treatment> [<https://perma.cc/3TYM-8PLF>]; Jerel Ezell, *California’s New Plan to Treat the Mentally Ill May End Up Violating Their Rights*, TIME (Nov. 29, 2023, at 7:30 EST), <https://time.com/6340526/california-care-courts-homeless-mentally-ill/> (describing CARE Court as a “completely logical, if not desperate, solution for a state with America’s largest homeless population”).

149. FIELDS, *supra* note 81, at 56.

150. See *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) (“The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.”); *Washington v. Harper*, 494 U.S. 210, 229 (1990) (“The forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (transferring a person to a mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); *Pino v. Higgs*, 75 F.3d 1461, 1468 (10th Cir. 1996) (stating that a seizure for the purposes of an emergency health evaluation “raises concerns that are closely analogous to those implicated by a criminal arrest”); Levin, *supra* note 148 (“Subjecting unhoused people to forced treatment is extremely draconian, and it would take us back to the bad old days of confinement, coercive treatment and other deprivations of rights . . . .” (quoting Eve Garrow, policy analyst and advocate at the ACLU of Southern California)).

151. FIELDS, *supra* note 81, at 89 (“Once placed in the involuntary hold, patients are subjected to significant force against their will, including through the use of round-the-clock restraints, forced medication, and powerful chemical sedation.”).

152. See Madeline M. Atwell, *The Madness They Endured: A Biocultural Examination of Women’s Experiences of Structural Violence Within 20th-Century Missouri State Mental Hospitals*, 39 INT’L J. PALEOPATHOLOGY 75, 76–78 (2022) (describing public commitment hospitals as “known for egregious neglect and abuse”).

interventions” have been deemed “torture” by the United Nations, which urges a ban of the practice.<sup>153</sup> “People forced into psychiatry are overwhelmingly innocent people, [and] very few are criminals, yet these law abiding people lose more human rights than even a convicted criminal loses in a super-max prison.”<sup>154</sup> Those forcibly medicated lose the right to control their own body, with survivors describing the experience “as a kind of biological rape.”<sup>155</sup> Inpatient “hospitalization[s were] found to induce significant fear, which eventually acted as a deterrent to seeking future mental healthcare services.”<sup>156</sup> But for the unhoused in the crosshairs of an increasingly impatient, punishment-minded citizenry, that avoidance may prove difficult.

The rise of camping bans, encampment sweeps, quality-of-life citations and arrests, and forced psychiatric treatment reflects a growing and troubling desire to respond to a public health and safety emergency with criminal sanction. Doing so relies on aggressive enforcement by police against the unhoused, something that police can pursue with relative impunity given the weakness of Fourth Amendment protections as they apply to the unhoused. It is to this discussion we now turn.

## II. THE FOURTH AMENDMENT AND THE UNHOUSED

The Fourth Amendment is the primary source of legal regulation for and restraint on police investigative activity.<sup>157</sup> But that restraint provides little practical resistance to the newly empowered officer commanded to enforce camping bans against the unhoused, break down illegal encampments, and arrest the offending individuals. Current conceptions of Fourth Amendment privacy protect only those fortunate enough to have a lawful place to retreat out of public view. For the unhoused, in contrast, their bodies are physically exposed and thus legally unprotected, their houses are themselves evidence of criminality, their biological functions provide probable cause for arrest, and their meager possessions become fodder for suspicionless searches incident to arrest or by virtue of consent granted under duress. And if all this fails, the officer can conduct a “special needs search” and commit the offending houseless person for involuntary psychiatric evaluation.

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153. Hum. Rts. Council, Rep. of the Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc A/HRC/22/53 (2013), ¶ 32; see Jan Eastgagge, *New UN Report Exposes Psychiatric Abuses, Urges End to Forced Treatment Worldwide*, CITIZENS COMM’N ON HUM. RTS. INT’L (Feb. 28, 2025), <https://www.cchrint.org/2025/02/28/new-un-report-exposes-psychiatric-abuses-end-forced-treatment/>.

154. *Fighting Back Against Human Rights Abuses in the Mental Health System*, MINDFREEDOM (Apr. 5, 2024), <https://theabuseofpsychiatry.co.uk/fighting-back-against-human-rights-abuses-in-the-mental-health-system/> [<https://perma.cc/LV2L-GWAJ>].

155. *Id.*

156. Nourredine Jina-Pettersen, *Fear, Neglect, Coercion, and Dehumanization: Is Inpatient Psychiatric Trauma Contributing to a Public Health Crisis?*, 9 J. PATIENT EXPERIENCE, 2022, at 1.

157. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552 (1999) (“[T]he larger purpose for which the Framers adopted the text [was] to curb the exercise of discretionary authority by [police] officers.”).

## A. “KNOWINGLY EXPOSED”: EXPECTATIONS OF PRIVACY

The Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>158</sup> “Implicit in this language is the notion that the Amendment applies to a limited range of governmental conduct.”<sup>159</sup> “[T]he [F]ourth [A]mendment cannot be triggered simply because a person is acting on behalf of the government”—it only applies if the conduct in question can fairly be characterized as a “search” or “seizure.”<sup>160</sup> If an officer’s conduct does not constitute a search or seizure, the Fourth Amendment does not apply and the officer is free to act as arbitrarily as she sees fit, subject to the minimal safeguards of due process.<sup>161</sup>

For most of the Amendment’s history a “search” was defined with reference to concepts of property law and physical trespass; if a police officer did not physically touch or enter a citizen’s private property, no search occurred.<sup>162</sup> In *Katz v. United States*,<sup>163</sup> the Supreme Court supplemented this search definition to include not just physical trespass but also investigative tactics that infringed upon a person’s “reasonable expectation of privacy.”<sup>164</sup> The Court explained that, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>165</sup>

The majority opinion did little to articulate how to identify such privacy expectations,<sup>166</sup> but Justice Harlan’s concurrence provided what has become the dominant two-pronged test for determining what constitutes a reasonable

158. U.S. CONST. amend. IV.

159. *United States v. Attson*, 900 F.2d 1427, 1429 (9th Cir. 1990).

160. *Id.*; *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 924 (9th Cir. 2001) (citing *Attson*, 900 F.2d at 1429, 1424).

161. *See, e.g.*, Moylan, *supra* note 22, at 76; *Jardines v. State*, 73 So. 3d 34, 49 (Fla. 2011) (“[I]f government agents can conduct [activity] . . . without any prior evidentiary showing of wrongdoing, there is simply nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on the whim and fancy, at the home of any citizen.”); Jacob S. Sherkow, Natalie Ram & Carl A. Gunter, *Familial Searches, the Fourth Amendment, and Genomic Control*, 96 S. CAL. L. REV. POSTSCRIPT 1, 4 (2022) (“If the conduct at issue does not constitute a search or seizure, Fourth Amendment scrutiny simply does not apply.”); Brad Turner, *When Big Data Meets Big Brother: Why Courts Should Apply United States v. Jones to Protect People’s Data*, 16 N.C. J.L. & TECH. 377, 416 (2015) (“If the government conduct does not constitute a ‘search’ or ‘seizure’ within the meaning of the Fourth Amendment, then the Fourth Amendment does not apply to the government’s conduct, even if reasonable Americans would think of that conduct as a search or seizure.” (citing *Kyllo v. United States*, 533 U.S. 27, 31 (2001))).

162. *See Boyd v. United States*, 116 U.S. 616, 627 (1886) (“Every invasion of private property, be it ever so minute, is a trespass.”); 1 JOSHUA DRESSLER, ALAN C. MICHAELS & RIC SIMMONS, *UNDERSTANDING CRIMINAL PROCEDURE* 66–67 (7th ed. 2017) (“Under *Boyd*, the Fourth Amendment did not apply in the absence of a physical intrusion—a trespass—by government agents.”).

163. 389 U.S. 347 (1967).

164. *Id.* at 360–61. (Harlan, J., concurring).

165. *Id.* at 351–52 (majority opinion) (citations omitted).

166. James J. Tomkovicz, *Beyond Secrecy for Secrecy’s Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 650–51 (1985) (describing the *Katz* majority opinion as an “efficient dismantler, but neglectful reconstructor”).

expectation of privacy: “[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>167</sup> If both prongs are met, then the subject citizen has a reasonable expectation of privacy and any police investigative activity infringing upon that expectation constitutes a search and is presumptively unreasonable absent probable cause and a warrant.

Pulling these opinions together, courts have applied what at first blush appears to be a sensible approach to search law. If one knowingly exposes something to the public—be it a marijuana plant in plain view in a living room window,<sup>168</sup> an illegally possessed firearm visible on their waistband,<sup>169</sup> or their physical presence in a public glass telephone booth<sup>170</sup>—they have not manifested a subjective expectation of privacy because they have taken no affirmative steps to “preserve as private” this information.<sup>171</sup> And it would be objectively unreasonable to require passersby, including police, to avert their eyes to something openly exposed in public view.<sup>172</sup>

However, as has become clear in an increasingly technologically interdependent society, it takes very little to “knowingly expose” troves of sensitive, private information.<sup>173</sup> Every number dialed on a telephone, every email sent, every private social media message, and every financial transaction involves exposure to the companies providing these services, a fact which we all *know* to be true even if we did not *intend* to divulge this information to anyone else.<sup>174</sup> Indeed, in most of these examples, one might fairly be taking subjective, affirmative steps to preserve as private their information through data encryption or two-factor authentication, and it might be information society thinks is reasonable to preserve as private. And yet, the standard remains that a “knowing,” even if unintentional, exposure destroys any reasonable expectation of privacy and is fair game for police surveillance outside Fourth Amendment guardrails.

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167. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

168. *See United States v. Whaley*, 779 F.2d 585 (11th Cir. 1986).

169. *United States v. Luckey*, 515 F. Supp. 3d 870, 874 (N.D. Ill. 2021).

170. *See Katz*, 367 U.S. at 352.

171. *See id.* at 351; *see also* Tonja Jacobi & Dustin Stonecipher, *A Solution for the Third-Party Doctrine in a Time of Data Sharing, Contact Tracing, and Mass Surveillance*, 97 NOTRE DAME L. REV. 823, 874 (2022) (“The *Katz* Court is essentially saying that even though *Katz* knew that it was possible to be seen in a glass phone booth, a reasonable person would not expect that to translate into him having made his externally inaudible speech public.”).

172. *See* Elizabeth De Armond, *Tactful Inattention: Erving Goffman, Privacy in the Digital Age, and the Virtue of Averting One’s Eyes*, 92 ST. JOHN’S L. REV. 283, 296 (2018).

173. *See* Jacobi & Stonecipher, *supra* note 171, at 874 (“[W]hen a person sends an email . . . they have knowingly transmitted [it] through a third party.”); *Carpenter v. United States*, 585 U.S. 296, 315 (2017) (recognizing that cell phones automatically transmit to third parties sensitive location information without any meaningful voluntary choice by the phone’s owner).

174. *Smith v. Maryland*, 442 U.S. 735, 744 (1979); *cf.* Jacobi & Stonecipher, *supra* note 171, 874–75 (stating that for people who send emails, “they may know that they are using a platform such as Gmail, but the reasonable person would not expect that to translate into having no privacy in the correspondence, because they have not knowingly made the content public. . . . ‘Exposure’ is . . . an active verb”).

Critics have long decried this knowingly exposed standard as protecting far less sensitive information than is objectively reasonable or than the Fourth Amendment was designed to protect, particularly with respect to electronic data.<sup>175</sup> But these concerns have particular salience for the decidedly low-tech experiences of the houseless knowingly but not truly voluntarily exposing information to the public. Unsheltered houseless individuals live their entire lives in public. They erect their shelters in public (often on public property), they maintain their belongings in public, and they engage in all of life's necessary functions in public. In short, their “persons, houses, papers, and effects”—the very things designed for protection from government surveillance by the Fourth Amendment—are all in public at all times. These houseless individuals know they are exposing their entire lives to the public, and so this knowing exposure eliminates virtually all aspects of their lives from Fourth Amendment protection.<sup>176</sup>

Of course, this is how Fourth Amendment search law applies to all of us in public. All of us have reduced expectations of privacy when we appear in public.<sup>177</sup> But there exist at least three reasons why this diminished protection creates oppressive and unjustifiable privacy intrusions for the unhoused.

First, while virtually all individuals with permanent housing voluntarily choose when to appear in public and what “papers and effects” to expose when in public, the unhoused have no truly voluntary choice in the matter. Despite what may be affirmative desires to preserve privacy, most houseless individuals simply lack the ability to access long-term affordable housing. This lack of voluntary choice puts the unhoused on similar footing with those who fall prey to vast, dragnet-style suspicionless snooping via the third-party doctrine: By knowingly exposing information to someone even though they did not affirmatively intend to do so, they have automatically lost all privacy protections in that information.<sup>178</sup> Indeed, the classic Orwellian critique of *Katz*—that none of us can subjectively expect privacy in a world where we know Big Brother is always watching—has increasing salience for the unhoused, as more police departments install street cameras with facial recognition capabilities at every city intersection and deploy drones and other “Eye-in-the-Sky” technology to record every second of public life at 192-megapixel quality.<sup>179</sup>

175. *United States v. White*, 401 U.S. 745, 770 (Harlan, J., dissenting) (disclaiming the “knowingly exposed” standard, because it has been “documented in careful detail the numerous devices that make technologically feasible the Orwellian Big Brother” scenario); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 600 (1989) (claiming the third-party doctrine “smacks of Orwell’s Big Brother, protection from which is the essence of the Fourth Amendment”).

176. See *Simmons*, *supra* note 25, at 249–50; cf. *McCray v. State*, 581 A.2d 45, 48 (Md. 1990) (“Generally, one walking along a public sidewalk or standing in a public park cannot reasonably expect that his activity will be immune from the public eye or from observation by the police.”).

177. See, e.g., *Young v. State*, 849 P.2d 336, 342 (Nev. 1993) (“By engaging in sexual activity in the doorless stalls of a public park restroom, appellants’ expectation of privacy was unreasonable.”); *Commonwealth v. Rodriguez*, 925 N.E.2d 21, 29 (Mass. 2010) (“No one has a reasonable expectation of privacy in items retrieved from the ground on a public park.”).

178. Serr, *supra* note 175, at 600.

179. See JAY STANLEY, ACLU, EYE-IN-THE-SKY POLICING NEEDS STRICT LIMITS 1, 3 (2023), <https://www.aclu.org/documents/eye-in-the-sky-policing-needs-strict-limits> [<https://perma.cc/T858-65KR>]; see, e.g., Luis Gomez, *Cameras on Nearly 3,000 Street Lights All Over San Diego, Police Take Interest in Video*, S.D. UNION-

Second, because the houseless have virtually no reasonable expectations of privacy, police can target and investigate them with virtual impunity because these actions do not constitute a “search” and therefore do not implicate the Fourth Amendment.<sup>180</sup> As a consequence, police need not obtain a warrant nor develop probable cause or reasonable suspicion to target, invade the privacy of, and even harass the unhoused. Subject to the minimal “arbitrary and capricious” and “shocks the conscience” standards of the Fourteenth Amendment’s Due Process Clause,<sup>181</sup> police operating outside the strictures of the Fourth Amendment have no constitutional guardrails.<sup>182</sup> This fact is true for all of us but creates real threats for the unhoused, whose living situations creates greater potential for violations of vague and ambiguous “loitering” ordinances and other vestiges of unconstitutional vagrancy laws.<sup>183</sup> Indeed, these sorts of laws investing unfettered enforcement discretion in police officers lead to officers disproportionately targeting young people, poor people, and Black people, three demographic groups that also happen to be overrepresented in the houseless population.<sup>184</sup>

Third, public exposure by the unhoused carries far greater criminal risks than that of the general population. For the houseless living in public, their very presence has been criminalized in hundreds of cities. Thus, their physical location, including the presence and location of their belongings and shelters, are evidence of criminal activity. Similarly, many jurisdictions criminalize basic, automatic life functions conducted in public.<sup>185</sup> Despite the lack of any voluntary choice in succumbing to the biological functions defining human existence, the houseless knowingly expose these actions to the public, subjecting them to citation or arrest.<sup>186</sup>

#### B. “FIRST AMONG EQUALS”: WHEN THE HOME IS THE EVIDENCE

While diminished privacy protections in public spaces—both physical and digital—remains the norm, it also remains true that Fourth Amendment privacy

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TRIB. (Mar. 20, 2019, at 13:00 PDT), <https://www.sandiegouniontribune.com/2019/03/19/cameras-on-nearly-3000-street-lights-all-over-san-diego-police-take-interest-in-video/>.

180. See Moylan, *supra* note 22, at 76.

181. See Shawn E. Fields, *(Non)police Brutality*, 110 CORN. L. REV. 101, 150 (2025) (“[T]he threshold for a violation of [the Fourteenth Amendment] is much higher than the Fourth Amendment’s . . . tests. To truly ‘shock the conscience,’ a government actor’s conduct must be ‘beyond the pale,’ and it must leave no doubt about the egregious wrongness of the action.” (citations omitted)).

182. See, e.g., Tierney v. Davidson, 133 F.3d 189, 199 (2d Cir. 1998) (stating that government conduct that is not a seizure is governed by the Due Process Clause rather than the Fourth Amendment); Johnson v. Newburgh, 239 F.3d 246, 252 (2d Cir. 2001) (due process claims require “conscience-shocking” behavior).

183. See Coal. on Homelessness v. City & County of San Francisco, 90 F.4th 975, 987–89 (9th Cir. 2024) (discussing history of anti-vagrancy laws as precursors to anti-loitering and anti-camping bans); Joel D. Berg, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 CHI.-KENT L. REV. 461, 463 (1993) (explaining the nexus between vagrancy and loitering).

184. See Archer, *supra* note 92, at 206 (“[Z]ero-tolerance policing has made public spaces hazardous for people of color by criminalizing conduct that is not a threat to public safety and is routinely ignored in affluent or White communities, such as loitering, jaywalking, or playing loud music.”).

185. See *supra* Section I.C.2.

186. Parr, *supra* note 31, at 998 (“[T]he ability to sleep, urinate, or defecate in the privacy of one’s own home is what saves housed people from . . . criminal sanctions.”).

protections are strongest inside the home. “[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”<sup>187</sup> The Fourth Amendment exists in large part because “eighteenth-century colonists were primarily angered by officials’ use of general warrants and writs to physically search their homes.”<sup>188</sup> Whatever it might have originally been intended to protect, no one doubts that the Framers “intended to prohibit physical searches of residences pursuant to general warrants.”<sup>189</sup>

Today, despite the Supreme Court’s command that the Fourth Amendment “protects people, not places,”<sup>190</sup> the Court also has acknowledged that, “[w]hen it comes to the Fourth Amendment, the home is first among equals.”<sup>191</sup> Warrantless searches of homes and curtilages “have been found unconstitutional both because they occur in a constitutionally protected area (houses), and because they violate the resident’s reasonable expectation of privacy.”<sup>192</sup> The home thus retains insulation from prying government eyes along both property-based and privacy-based models of Fourth Amendment search law. In contrast, the Court has expressly carved out exceptions to the warrant requirement for searches of cars and other moving vehicles, which for many unhoused individuals serve as their home.<sup>193</sup>

Fourth Amendment scholars have long debated whether the legal definition of “home” protects marginalized groups like the unhoused.<sup>194</sup> Indeed, “the law’s continued focus on the physical home as the legal ‘firm line’ between protected and unprotected spaces risks legitimating a hierarchy of privacy protections, reinforcing racialized surveillance, and further entrenching . . . racial, economic,

187. *Payton v. New York*, 445 U.S. 573, 585–86 (1980) (quoting *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972)); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1975) (The home is “ordinarily afforded the most stringent Fourth Amendment protection.”).

188. *Gus*, *supra* note 21, at 773–74 (stating also that “[t]he Framers were troubled that middle- and upper-class Americans had to allow lowly officers to search their homes, and these concerns were sometimes expressed to the courts. Searches of poor homes . . . would likely not have yielded the same resentment.”).

189. David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1063 (2004). A colonial Massachusetts trial involving the Crown’s use of general warrants included the famous proclamation by attorney James Otis that “one of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle; and whilst he is quiet, he is well guarded as a prince in his castle.” Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1000–01 (2011) (quoting 2 THE WORKS OF JOHN ADAMS 524–26 (Charles Francis Adams ed., 1850)). John Adams heard this speech as a spectator in the courtroom, which influenced his drafting of the Massachusetts Declaration of Rights search and seizure provision, which the Fourth Amendment replicates. *Id.* at 981, 1002.

190. *Katz v. United States*, 389 U.S. 347, 351 (1967); see also *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (“But the extent to which the Fourth Amendment protects people may depend upon where those people are.”).

191. *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

192. *Gus*, *supra* note 21, at 777.

193. See *infra* notes 215–19 and accompanying text.

194. See, e.g., Kate Weisburd, *The Carceral Home*, 103 B.U. L. REV. 1879, 1884 (2023); Slobogin, *supra* note 21, at 400; Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1290 (2014); Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism and the Fourth Amendment*, 95 CORN. L. REV. 905, 923 (2010); Simmons, *supra* note 25, at 249–50.

disability, and gender inequities.”<sup>195</sup> By “tying search protection to the physical home,” residents of nonaffixed structures find themselves subject to warrantless search and seizure in ways people residing within fixed dwellings can largely avoid.<sup>196</sup>

Most courts today agree that the Fourth Amendment protects “all houses, independent of their appearance or apparent value.”<sup>197</sup> In so holding, courts quote William Pitt’s 1763 House of Commons declaration that:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!<sup>198</sup>

One court explained that all persons expect some subjective level of privacy in their homes, “even if it is a temporary structure like a tent, travel trailer, or [a] hooch.”<sup>199</sup> They are “the sort of closed-off space that typically shelters the intimate and discrete details of personal life” that is protected.<sup>200</sup>

While tents and other makeshift shelters clearly fall within the Fourth Amendment’s definition of “houses,” anti-camping ordinances have ensured these makeshift shelters do not receive “first among equals” treatment. Cases considering the Amendment’s interaction with such shelters have nearly all found that unhoused individuals lose their reasonable expectations of privacy in their temporary homes when illegally on public property.<sup>201</sup> This reasoning appears to impermissibly conflate pre-*Katz* property-based models of search law with privacy-based reasonable expectations of privacy, when the Court has made clear that both search law models operate side by side.<sup>202</sup>

This incompatibility is on full display in a number of important cases involving the unhoused. In *Amezquita v. Hernandez-Colon*,<sup>203</sup> the First Circuit found that “a trespasser who places his property where it has no right to be has no right of privacy as to that property,” because the trespassing unhoused person had no legal property interest in the land and thus had no reasonable expectation of property in the privacy of their makeshift shelters.<sup>204</sup> Thus, police did not violate the

195. Weisburd, *supra* note 194, at 1885–86.

196. Stern, *supra* note 194, at 923.

197. Gus, *supra* note 21, at 796 & n.177.

198. See, e.g., *Miller v. United States*, 357 U.S. 301, 307 (1958); *Payton v. New York*, 445 U.S. 573, 601 n.54 (1980); *McClish v. Nugent*, 483 F.3d 1231, 1255 (11th Cir. 2007) (Anderson, J., concurring specially).

199. *Idaho v. Pruss*, 181 P.3d 1231, 1236 (Idaho 2008).

200. *State v. Pippin*, 403 P.3d 907, 915 (Wash. Ct. App. 2017). Following this logic, it is not impossible to imagine that a “houseless” person for purposes HUD may not in fact be “houseless” under the Fourth Amendment.

201. *People v. Thomas*, 38 Cal. App. 4th 1331, 1336–40 (1995); *State v. Cleator*, 135 A.3d 514, 520–24 (Me. 2016).

202. *United States v. Jones*, 565 U.S. 400, 406–07 (2012).

203. 518 F.2d 8 (1st Cir. 1975).

204. *Id.* at 11 (quoting *State v. Pokini*, 367 P.2d 499, 509 (1961)).

privacy rights of houseless individuals when they “pok[ed] through the homes of some of the plaintiffs without a search warrant or judicial authorization of any kind,” because the unhoused plaintiff had no legal property interest in the land.<sup>205</sup> Similarly, in *People v. Thomas*,<sup>206</sup> the California Court of Appeals found that police did not violate a houseless man’s Fourth Amendment rights when they searched the box he was living in on a public sidewalk, reasoning that he had no reasonable expectation of privacy in the interior of his shelter as he was illegally occupying public property.<sup>207</sup> In *United States v. Ruckman*,<sup>208</sup> the Tenth Circuit upheld the search of a cave on public property that an unhoused man had converted to his house, having constructed a wall and door and furnished the cave with a bed, stove, and lantern.<sup>209</sup> The court reasoned that, because he was trespassing on public property, the man lacked any reasonable expectation of privacy in either the cave or the contents concealed within his constructed walls.<sup>210</sup> Following the Supreme Court’s 2024 decision in *City of Grants Pass v. Johnson* and the subsequent rise of anti-camping ordinances, cases like these are sure to increase.

These cases tying reasonable expectations of privacy to positive property ownership appear to ignore how *Katz* changed Fourth Amendment search law analysis. *Katz* significantly expanded the definition of a “search” to include not just places over which a citizen had legal property interests but over places and things in which the individual could reasonably expect some level of privacy—even in public.<sup>211</sup> Indeed, *Katz* himself neither owned nor asserted any property interest in the public telephone booth; instead, he manifested some subjective intent to keep the contents of his conversation private,<sup>212</sup> much like a houseless individual concealing items inside a zipped tent. The fact that this manifestation took place on public property did not diminish that expectation. While the Court did not consider whether *Katz* would have retained reasonable expectations of privacy in his conversation had he somehow been illegally occupying the phone booth, a simple application of Justice Harlan’s two-prong test suggests both a subjective and objective expectation that private phone conversations would remain exactly that—private. Indeed, “searches and seizures may be ‘unreasonable’ within the Fourth Amendment even though the government asserts a superior property interest at common law.”<sup>213</sup>

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205. *Id.* at 10.

206. 45 Cal. Rptr. 2d 610 (Cal. Ct. App. 1995).

207. *Id.* at 613.

208. 806 F.2d 1471 (10th Cir. 1986).

209. *See id.* at 1475 (McKay, J., dissenting).

210. *See id.* at 1473 (majority opinion).

211. *United States v. Hall*, No. 19-CR-75-FL-1, 2020 WL 6439833, at \*4 (E.D.N.C. May 11, 2020) (“In *Katz*, the Supreme Court held that a search is not defined only by property interests, but it is also conduct ‘that violate[s] the privacy upon which [a person] justifiably relied.’” (quoting *Katz v. United States*, 389 U.S. 347, 353 (1967))).

212. *Katz*, 389 U.S. at 351–52.

213. *United States v. Ruckman*, 806 F.2d 1471, 1477 (10th Cir. 1986) (McKay, J., dissenting) (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967)).

The much larger challenge for unhoused persons sheltering illegally on public property is the fact that the shelter itself is evidence of a crime sitting in plain view of the police. In this sense, the judicial and scholarly debate over whether an unhoused person retains home-like privacy expectations in shabbily constructed homes misses the point. Even if we granted that a houseless person has a subjective and objective expectation of privacy in a makeshift tent illegally erected on public property, the tent itself provides the arresting officer with probable cause that a crime has been committed. And that tent is itself a fruit or instrumentality of that crime, sitting in plain view.<sup>214</sup> Under traditional Fourth Amendment doctrine, then, we can grant both that an officer's prying into an illegally erected tent constitutes a search because it infringes upon a reasonable expectation of privacy and is a reasonable search because there exists probable cause of a crime, as evidenced by an item in plain view, and thus subject to immediate seizure: the tent. This conclusion contrasts with fixed structure homes that may contain evidence of a crime, but which are rarely themselves the evidence of a crime and thus cannot be entered and searched without a warrant.<sup>215</sup>

An additional complication comes from the Court's "automobile exception" to the warrant requirement. While police generally may not search a constitutionally protected area without probable cause *and* a warrant, the Court excepts from this warrant requirement cars and other vehicles that are "readily mobile" on the rationale that they can be moved quickly to evade officers and allow their occupants to destroy evidence.<sup>216</sup> This mobility rationale has allowed officers to warrantlessly search wheeled mobile homes parked on streets, recreational vehicles, and other "readily mobile" places clearly used by their occupants as a home.<sup>217</sup> This exception almost certainly applies to the thousands of houseless individuals living in their cars.<sup>218</sup> It also likely applies to tents, tarps, and other makeshift structures that

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214. See *United States v. Parks*, No. 08-CR-291-1, 2009 WL 541389, at \*6 (M.D.N.C. Mar. 4, 2009) ("The incriminating character of an item is 'immediately apparent' when the police have probable cause to believe that the object is a fruit, instrumentality, or evidence of a crime.") (citing *United States v. Wells*, 98 F.3d 808, 810 (4th Cir. 1996)).

215. Notably, all identified cases involving fixed, permanent houses illegally constructed on public property were litigated through a property law lens and resolved with transfers of wealth and grants of easements; they did not result in arrests and convictions for trespass, though they could have. See, e.g., *Rose Nulman Park Found. ex rel. Nulman v. Four Twenty Corp.*, 93 A.3d 25, 30 (R.I. 2014); *Asociación de Dueños de Casas Veraniegas de la Parguera v. Comisión Servicio Público de Puerto Rico*, 5 P.R. Offic. Trans. 298, 309 (P.R. 1976).

216. See *Chambers v. Maroney*, 399 U.S. 42, 50–51, 51 n.9 (1970); *California v. Carney*, 471 U.S. 386, 390 (1985).

217. See *Carney*, 471 U.S. at 386, 390, 394; *United States v. Houck*, 888 F.3d 957, 961 (8th Cir. 2018) (upholding warrantless search of an RV despite "evidence that the RV was being used as a temporary residence," because "the RV had fully inflated tires, could have been mobile within 30 minutes, and was parked on a driveway with ready access to a roadway"); Marc C. McAllister, *Go Tiny or Go Home: How Living Tiny May Inadvertently Reduce Privacy Rights in the Home*, 69 S.C. L. REV. 265, 279–80 (2017).

218. See *The Reality of Living in a Vehicle*, HOMEMORE PROJECT (Jan. 12, 2023), <https://thomemoreproject.org/the-reality-of-living-in-a-vehicle/> [<https://perma.cc/7BR2-Q23G>] (quoting Seattle University School of Law Homeless Rights Advocacy Project director Sarah Rankin, stating

can, and often are, packed up and moved at a moment's notice.<sup>219</sup> While the automobile exception requires probable cause and thus recognizes privacy expectations in these mobile housing structures,<sup>220</sup> its application again reflects the two-tiered system of protection for the makeshift "homes" of the unhoused.

One potential hope for unhoused residents in encampments stems from the so-called "acquiescence theory" of search law adopted by at least one court. For example, in *State v. Dias*,<sup>221</sup> the Supreme Court of Hawaii held that police officers' warrantless search of an unhoused person's temporary shelter was unconstitutional despite its illegal presence on public land.<sup>222</sup> The court reasoned that, because the government had long allowed the "'Squatters' Row' . . . to exist," the government's "long acquiescence . . . ha[d] given rise to a reasonable expectation of privacy on the part of the defendants, at least with respect to the interior of the building itself."<sup>223</sup> This logic appears to suggest that governments can confer expectations of privacy to trespassers over time, which, while helpful to houseless encampment occupants, continues to rely on conflated notions that expectations of privacy remain tied to possessory property interests.

### C. PROBABLE CAUSE OF LIFE FUNCTIONS

Even if a court finds that an unhoused individual in public has a reasonable expectation of privacy sufficient to trigger Fourth Amendment scrutiny, quality of life criminal codes virtually guarantee an officer's ability to meet the Amendment's probable cause standard to effectuate an arrest upon observation of a violative biological life function. "Probable cause for a warrantless arrest exists when all of the facts known by a police officer are sufficient for a reasonable person to conclude that the suspect has committed, or was in the process of committing, an offense."<sup>224</sup> Probable cause "is not a high bar."<sup>225</sup> "A 'fair probability' that the suspect has committed a crime is enough to establish probable cause. The likelihood that he has done so 'need not reach [even] the fifty percent mark.'"<sup>226</sup>

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"[t]hose living in cars are the fastest-growing segment of the United States' homeless population" with "about 100,000 individuals currently liv[ing] in a vehicle").

219. One online houseless survival advocate emphasizes the importance of "[b]e[ing] [r]eady to [r]eposition at a [m]oment's [n]otice," emphasizing that "remaining mobile is paramount." Tom Marlowe, *10 Homeless Survival Skills You Should Practice*, SURVIVAL SULLIVAN (Aug. 27, 2023), <https://www.survivalsullivan.com/homeless-survival-lessons/> [<https://perma.cc/BMX4-DXLM>] (last updated Aug. 27, 2023).

220. *State v. Cohen*, 296 A.3d 480 (N.J. 2023) (explaining that, pursuant to the automobile exception to the warrant requirement, "'when the police have probable cause to believe that [a] vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous,' law enforcement may search the vehicle without first obtaining a warrant" (quoting *State v. Witt*, 126 A.3d 850 (2015))).

221. 609 P.2d 637 (Haw. 1980).

222. *See id.* at 640–41.

223. *See id.*; *see also* Gus, *supra* note 21, at 801.

224. *Espinal v. City of Houston*, 96 F.4th 741, 745 (5th Cir. 2024) (quoting *Loftin v. City of Prentiss*, 33 F.4th 774, 780 (5th Cir. 2022) (internal quotation marks omitted)).

225. *Kaley v. United States*, 571 U.S. 320, 338 (2014).

226. *Espinal*, 96 F.4th at 745 (citations omitted).

For the unsheltered unhoused, who have no meaningful choice but to carry out their essential life functions in public, they provide passing police more than “fair probability” for probable cause.<sup>227</sup> Over 100 jurisdictions have enacted camping bans since *Grants Pass* criminalizing sleeping in most public spaces.<sup>228</sup> These bans supplement quality of life codes criminalizing engaging in other basic life functions in public including urinating and defecating.<sup>229</sup> Jurisdictions also ban the public consumption of alcohol outside designated areas like bars or sporting events, an act that, while not an essential life function, remains functionally legal only for those with permanent housing within which to imbibe.<sup>230</sup> Some cities have criminalized sharing food in public<sup>231</sup> in an apparent attempt to deter the unhoused from supporting each other and Good Samaritans from providing critical assistance to their needy neighbors. Doing any of these things in public view of a police officer clearly provides adequate probable cause to issue a citation or effectuate an arrest.

One might find this fact unexceptional. If someone commits a crime in public—say, selling illicit drugs or assaulting someone—and a police officer witnesses it, then the officer has acquired the basis of knowledge and veracity necessary for probable cause and to conduct a warrantless arrest.<sup>232</sup> The same is true for a jaywalker, a speeding motorist, or an unhoused person sleeping on a sidewalk.

This personal observation–probable cause–warrantless arrest paradigm disparately impacts the houseless in two important ways. First, would-be criminals

227. *State v. Barnhill*, 601 S.E.2d 215, 217 (N.C. 2004) (explaining that “[p]robable cause is ‘a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity,’” and can be established “based on [the officer’s] personal observation” of unlawful activity (quoting *State v. Wilson*, 574 S.E.2d 93, 97–98 (N.C. Ct. App. 2002)); cf. *Bruce v. Guernsey*, 777 F.3d 872, 876 (7th Cir. 2015) (the Fourth Amendment standard for probable cause does not require personal observation “even if there must be personal observation according to a state statute” (quoting *Chathas v. Smith*, 884 F.2d 980, 987 (7th Cir. 1989))).

228. Ludden, *supra* note 11 (“The spike reflects widespread frustration over record-high rates of homelessness, along with drug use and mental breakdowns in public spaces . . . The new laws are in rural, urban and suburban towns and cities—both Republican-led and Democratic—and span every region, including in places not known for homelessness . . .”); see also Marisol Bello, *Report: More Cities Pass Laws That Hurt the Homeless*, USA TODAY (July 16, 2024, at 18:20 ET), <https://www.usatoday.com/story/news/nation/2014/07/16/criminalizing-homeless-no-camping-laws/12723745/> [<https://perma.cc/YGX9-P49P>].

229. See generally Taunya Lovell Banks, *The Disappearing Public Toilet*, 50 SETON HALL L. REV. 1061 (2020) (discussing the lack of publicly available toilets and the criminalization of public urination and defecation).

230. See Joe Satran, *The Secret History of the War on Public Drinking*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/public-drinking-laws\\_n\\_4312523](https://www.huffpost.com/entry/public-drinking-laws_n_4312523) [<https://perma.cc/F57S-YLQS>] (“Decades of evidence suggest that laws against public drinking are enforced unequally and capriciously, disproportionately hurting the most downtrodden members of society.”).

231. See Bello, *supra* note 228 (“More cities have passed bans on . . . sharing or giving away food in public places, which affects food banks and churches that give food to the homeless on the street.”); Jordan Bailey, *Food-Sharing Restrictions: A New Method of Criminalizing Homelessness*, 23 GEO. J. ON POVERTY L. & POL’Y 273, 280 (2016).

232. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”).

with permanent housing have at least the option of hiding their illicit activities from snooping and increasingly omnipresent government eyes.<sup>233</sup> Whether we value the privacy of criminals or merely want to admit that privacy protections like the Fourth Amendment include protection for private criminal activity the fact remains that the unhoused again are deprived of this option by virtue of their status. This inability for the houseless to conceal what the state has criminalized perpetuates the unequal distribution of criminal sanction along class and race lines, fuels ineffective vestigial War on Drug policies on the backs of the poor and entrenches the unhoused in cycles of poverty and homelessness.

Second, the personal observation of criminal activity unique to unhoused communities creates a separate class of “probable cause of life functions”—investigative powers for police aimed squarely and only at the houseless. A majority of the Supreme Court believes that criminalizing certain acts that are “‘involuntary,’ [in that] some homeless persons cannot help but do what the law forbids” neither criminalizes status nor frustrates the *mens rea* requirement of criminal offenses.<sup>234</sup> The majority may also believe that such laws do not criminalize status because they apply equally to the unhoused and the drunken football fan urinating in the stadium bushes.<sup>235</sup> But many of these quality-of-life criminal sanctions are enforced against the houseless who, unlike the football fan, have no meaningful choice but to break the law.<sup>236</sup> It appears that the primary purpose of these codes is to punish the unhoused.<sup>237</sup> This deliberate animus raises serious Equal Protection concerns considering that drunken college students and adventurers camping without required wilderness permits violate these ordinances yet avoid sanction because they are not among the undesirable class targeted by these laws. The criminal enforcement of this separate class of crimes aimed consciously at this separate class of unhoused

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233. See Bennett Capers, *Policing, Technology, and Doctrinal Assists*, 69 FLA. L. REV. 723, 740 (2017) (cataloguing the surveillance camera capabilities of police departments in major cities); Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 MINN. L. REV. 1105, 1110–19 (2021) (discussing police facial recognition capabilities via public surveillance cameras); STANLEY, *supra* note 179 (“Already there are over 1,400 police departments in the United States using drones” for purposes ranging from “[s]uspect surveillance” to “[r]outine patrols of an entire city.”).

234. *City of Grants Pass v. Johnson*, 603 U.S. 520, 547 (2024).

235. See *id.* at 548; cf. Natalie Shure, *The Politics of Going to the Bathroom*, THE NATION (May 23, 2019), <https://www.thenation.com/article/archive/toilet-urination-disability-access/> [<https://perma.cc/TRS7-QW82>] (“[S]ome 20 to 30 percent of homeless respondents had been cited or arrested for public urination . . .”); *Galvin v. Trs. of Boston Coll.*, 1996 Mass. Super. LEXIS 236, \*6–7 (Oct. 4, 1996) (summarizing plaintiffs homeowners’ allegations that, after Boston College football games, they were forced to endure “increased traffic, littering, public intoxication, and public urination”).

236. *Grants Pass*, 603 U.S. at 563 (Sotomayor, J., dissenting) (“[A] biological necessity [is] not a crime.”).

237. See Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URB. AFFS. REV. 41, 41 (2017) (“Proponents argue that such ‘quality of life’ laws will encourage homeless people to move off the streets and into services.”); see, e.g., Ludden, *supra* note 11 (stating that San Joaquin County, California supervisor Tom Patti “spearheaded an ordinance to make it ‘uncomfortable’ for people to camp outside” and which “requires people living outside to move at least 300 feet every hour”); *Joyce v. City & County of San Francisco*, 846 F. Supp. 843, 847 (N.D. Cal. 1994) (observing that quality of life codes, at least as enforced by the police, appear “calculated to punish the homeless”).

people gives rise to yet another Fourth Amendment police power disproportionately impacting the unhoused: the search incident to lawful arrest.

#### D. ARRESTS, CITATIONS, AND SEARCHES INCIDENT

The Supreme Court is quick to repeat its refrain from *Katz* that all searches conducted without a warrant “are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”<sup>238</sup> Any criminal procedure student who spends weeks studying these exceptions can come away with the distinct impression that they are neither few nor well-delineated, and perhaps that these exceptions have “swallowed the rule.”<sup>239</sup> One of the broadest such exceptions is known as the search incident to lawful arrest, or SILA, exception.

The SILA exception authorizes an officer to conduct a search as part of an arrest of “the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”<sup>240</sup> Courts regularly construe this “lunge area” to include any space within six to eight feet of the arrestee.<sup>241</sup> SILA searches are automatic and suspicionless, meaning that an officer need not have probable cause or reasonable suspicion that weapons or evidence will be found.<sup>242</sup> Unlike *Terry* frisks,<sup>243</sup> SILA searches are not limited to finding weapons or protecting the officer, but may include looking for and seizing any fruit, instrumentality, or evidence of a crime.<sup>244</sup> SILA searches, like the automobile exception, have a logical rationale. Where the automobile exception recognizes the risk of losing evidence contained in readily movable vehicles, SILA searches recognize the risk of harm to officers effectuating an arrest.<sup>245</sup> But despite the logic of the exception, SILA searches create unique privacy risks for the unhoused.

SILA searches threaten the unhoused with far more invasive privacy intrusions than they do the general population. For the average arrestee, lunge area SILA searches are limited to a nearby bag, a portion of a room in a house, or the glovebox

238. *Katz v. United States*, 389 U.S. 347, 357 (1967); *see, e.g., Mitchell v. Wisconsin*, 588 U.S. 840, 864 (2019); *Birchfield v. North Dakota*, 579 U.S. 438, 480–81 (2016); *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015).

239. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1898 (2015).

240. *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

241. *See State v. Sanders*, 2005 WI App 38, ¶¶ 4, 13 (Wis. Ct. App. 2005).

242. *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment . . . and a search incident to the arrest requires no additional justification.”).

243. *Terry v. Ohio*, 392 U.S. 1 (1968).

244. *Robinson*, 414 U.S. at 235 (explaining that officers need not present any reasons “supporting the authority for a search of the person incident to a lawful arrest”); *Gant*, 556 U.S. at 343 (Scalia, J., concurring) (The rule “automatically permit[s] a search when [a person] is arrested”).

245. *Chimel*, 395 U.S. at 763 (describing the rationale of a search incident to a lawful arrest as officer safety).

and other compartments of a car.<sup>246</sup> But many houseless persons keep their few belongings with them at all times, either in a shopping cart or similar transportable container.<sup>247</sup> Some unsheltered, unhoused individuals express reluctance to part with their belongings lest they be seized by authorities as “abandoned” property.<sup>248</sup> Thus, while SILA searches may subject housed arrestees to minimal investigations of a small and discrete part of their personal property, they often give police the power to probe the entirety of a houseless person’s property, a far more significant intrusion. Similarly, if the arrest occurs in or near a houseless person’s tent or other makeshift shelter, that entire home becomes subject to an automatic and suspicionless search by virtue of its small size.<sup>249</sup> Unlike the in-home arrestee whose “lunge area” may only encompass a part of the living room but not the kitchen or upstairs rooms,<sup>250</sup> the lunge area of a houseless person may easily include their entire home. Here again, the Fourth Amendment and its various protections and exceptions protect the housed and those with means over the houseless and impoverished.

Most quality-of-life codes give police the discretion to arrest or issue a citation.<sup>251</sup> Despite the absurdity of issuing citations with monetary fines to impoverished houseless individuals, cities may prioritize issuing quality-of-life citations over making arrests,<sup>252</sup> which would not authorize a SILA search, because there exists no “search incident to citation” exception.<sup>253</sup> But when an unhoused individual fails to pay the fine or appear in court to contest the citation, the failure to

246. See, e.g., *Arizona v. Gant*, 556 U.S. 332, 360 (allowing search of the passenger compartment incident to arrest if “it is within the arrestee’s reach at the time of the search . . .”); cf. *State v. Lamay*, 103 P.3d 448, 448–49 (Idaho 2004) (suppressing evidence seized from a backpack because it was “not within [the arrestee]’s area of ‘immediate control’”).

247. See Nicole Santa Cruz, *Albuquerque Throws Away Belongings of Houseless People, Violating Court Order*, TRUTHOUT (May 16, 2024), <https://truthout.org/articles/albuquerque-throws-away-belongings-of-houseless-people-violating-court-order/> [<https://perma.cc/Y96P-AK7D>] (“People who are living unsheltered told *ProPublica* that the city’s campaign has made them afraid to leave their belongings to run errands.”).

248. *Id.*

249. See, e.g., *United States v. Robinson*, 414 U.S. 218 (1973) (upholding suspicionless search incident to arrest for driving on a revoked license that uncovered heroin in the arrestee’s shirt pocket). To the extent a court viewed an unhoused person’s tent or other shelter a “home” deserving of special Fourth Amendment protection, it is unclear whether such a traditionally protected space would nonetheless be entirely subject to a SILA search. Cases authorizing a SILA search of an arrestee on the curtilage to move inside the home without a warrant suggest that they would be.

250. See, e.g., *State v. McGrane*, 733 N.W.2d 671, 677 (Iowa 2007) (finding the upstairs area of house not within arrestee’s immediate control if arrest took place in the downstairs kitchen of the house).

251. See Debra A. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 593 (1997); see also *Blake v. City of Grants Pass*, No. 18-cv-01823, 2020 U.S. Dist. LEXIS 129494, at \*11 (D. Or. July 22, 2020).

252. See, e.g., Suhail Bhat, *NYPD Quality-of-Life Crackdown Sends Thousands to Criminal Court, Undoing Landmark Reforms*, CITY (Sep. 12, 2023, at 21:50 ET), <https://www.thecity.nyc/2023/09/12/nypd-quality-of-life-crackdown-enforcement-skyrockets-criminal-court/> [<https://perma.cc/74JW-3W8C>] (describing 2016 law directing officers to issue civil citations instead of criminal summons or arrests for public urination, open alcohol containers, and other quality of life issues).

253. *Knowles v. Iowa*, 525 U.S. 113, 118–19 (1998).

appear before a judge can lead to a bench warrant being issued for the individual's arrest.<sup>254</sup> That arrest carries with it the power to conduct a SILA search. And with the recent punitive approach to houselessness, this progressive enforcement model is being increasingly eschewed in favor of direct arrests—and the SILA searches that accompany them.<sup>255</sup>

#### E. REASONABLE SUSPICION, MENTAL ILLNESS, AND ADDICTION

Another “exception” to the Fourth Amendment’s warrant requirement has become less an exception than an “entire rubric of police conduct”<sup>256</sup>: the stop and frisk. In *Terry v. Ohio*, the Supreme Court held that police could temporarily seize an individual and investigate further in the absence of a warrant or probable cause so long as they had “reasonably . . . conclude[d] that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous.”<sup>257</sup> If, during the stop, the officer develops reasonable suspicion that the suspect is “armed and presently dangerous,” the officer may conduct a limited pat-down for weapons.<sup>258</sup> While *Terry* stops are designed to be brief, courts have upheld stops lasting up to ninety minutes.<sup>259</sup> *Terry* stops and frisks have become a ubiquitous part of on-the-street public policing, which disproportionately affects the unhoused who spend nearly their entire lives in public.

The reasonable suspicion standard is “less demanding than . . . probable cause.”<sup>260</sup> The “level of suspicion” required “is considerably less than proof of wrongdoing by a preponderance of the evidence.”<sup>261</sup> Instead, only “‘some minimal level of objective justification’ for making the stop” must be established,<sup>262</sup> the officer must point only to some “specific and articulable facts” of suspicious activity.<sup>263</sup> An “inchoate and unparticularized ‘hunch’”<sup>264</sup> will not suffice, though entirely innocent conduct may form the basis for reasonable suspicion.<sup>265</sup>

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254. See Sylvia Goodman, *Houseless Kentuckians Facing Arrest After Failing to Appear for ‘Unlawful Camping’ Citations*, WKMS (Dec. 3, 2024, at 16:00 CST), <https://www.wkms.org/2024-12-03/houseless-kentuckians-facing-arrest-after-failing-to-appear-for-unlawful-camping-citations> [https://perma.cc/Y6AR-RUZV]; Editorial, *Stop Hanging Bench Warrants Over the Heads of L.A.’s Homeless*, L.A. TIMES (Aug. 28, 2018, at 04:10 PT), <https://www.latimes.com/opinion/editorials/la-ed-homeless-bench-warrants-20180828-story.html> [https://perma.cc/EYD4-AKQT].

255. Grabar, *supra* note 75; Bhat, *supra* note 252.

256. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

257. *Id.* at 30.

258. *Minnesota v. Dickerson*, 508 U.S. 366, 370–71, 373 (1993) (quoting *Terry*, 392 U.S. at 24) (authorizing seizure of evidence during *Terry* pat-down if it is immediately apparent by “plain feel” that it is contraband or evidence of a crime).

259. See *United States v. Reedy*, 989 F.3d 548, 554 (7th Cir. 2021).

260. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

261. *Id.*

262. *Id.* (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984)).

263. *Terry*, 392 U.S. at 21.

264. *Id.* at 27.

265. See *Rodriguez v. United States*, 575 U.S. 348, 369 (2015) (Thomas, J., dissenting).

While this low standard appears objective, the history of *Terry* stops tells a story of a “disturbingly formless and potentially permissive” standard<sup>266</sup> based on little more than an officer’s “training and experience”-informed “Spidey sense.”<sup>267</sup> Courts have upheld *Terry* stops based on little more than a collection of innocent conduct that nonetheless constitute “articulable facts” for reasonable suspicion: nervousness,<sup>268</sup> lack of nervousness or unusual calmness,<sup>269</sup> making eye contact,<sup>270</sup> looking away,<sup>271</sup> unusual travel plans,<sup>272</sup> sweating,<sup>273</sup> and even being “too law abiding.”<sup>274</sup>

This formless permissiveness has particularly deleterious and dangerous consequences for the mentally ill and drug addicted. Many mental health disturbances or signs of drug withdrawal, including episodes for which police are called to respond, involve the kind of unusual or erratic behavior “indicative of mental illness [but] that a trained criminal investigator perceives first and foremost as suspicious behavior indicative of criminal activity.”<sup>275</sup> For example, those suffering from schizophrenia often hallucinate or express disorganized thoughts in confusing or slurred speech, which may appear to be symptoms of criminal drug use. Officers trained to ferret out criminal behavior often enter a mental health emergency with a “jaundiced eye,” interpreting anything out of the ordinary as suspicious, and leveraging the formless and permissive reasonable suspicion standard to initiate stops and, far too often, use unnecessary force.<sup>276</sup> Most state police

266. Thomas Y. Davies, *The Supreme Court Giveth & The Supreme Court Taketh Away*, 100 J. CRIM. L. & CRIMINOLOGY 933, 988 (2010).

267. *Meekins v. State*, 340 S.W.3d 454, 467 (Tex. 2011) (observing that officers may ask occupants of a vehicle to exit the car during a traffic stop because the officer’s “training and experience caus[es] [their] ‘Spidey sense’ to tingle”).

268. *See, e.g., United States v. Mouscardy*, 722 F.3d 68, 76 (1st Cir. 2013) (upholding *Terry* stop due in part to excessive nervousness).

269. *See State v. Price-Williams*, 973 N.W.2d 556, 580 (Iowa 2022) (Appel, J., dissenting) (“Some courts have found that ‘unusually calm’ demeanor can also support reasonable suspicion.”).

270. Andrew Husband, *Cop Pulls Over Driver Because He “Made Direct Eye Contact With Me,”* MEDIAITE (Aug. 28, 2015, 16:35 ET), <https://www.mediaite.com/media/tv/dayton-cop-to-black-driver-you-made-direct-eye-contact-with-me/> [<https://perma.cc/XXH8-23RJ>].

271. *See State v. Canty*, 736 S.E.2d 532, 536 (N.C. Ct. App. 2012) (“Refusal to make eye contact has also been considered in determining whether there was reasonable suspicion . . .”).

272. *United States v. Pettit*, 785 F.3d 1374, 1381 (10th Cir. 2015) (“We have consistently held that ‘[i]mplausible travel plans can contribute to reasonable suspicion.’” (quoting *United States v. Santos*, 403 F.3d 1120, 1129 (10th Cir. 2005))).

273. *United States v. Burrus*, 845 Fed. Appx. 187, 190 (3d Cir. 2021) (affirming court’s reasonable suspicion finding because, among other factors, officer observed that defendant “was sweating heavily and would not make eye contact with him”).

274. *See also* SHAWN FIELDS, *NEIGHBORHOOD WATCH: POLICING WHITE SPACES IN AMERICA* 71 (2022) (citing Florida Highway Patrol manual cautioning officers to be suspicious of “scrupulous obedience of traffic laws”).

275. FIELDS, *supra* note 81, at 17 (collecting cases involving police stops of mentally ill individuals based on unspecified “erratic” behavior); Lauryn P. Gouldin, *Crimes of Suspicion*, 72 EMORY L.J. 1429, 1442–45 (2023) (discussing formless basis for stops based on erratic or unusual behavior).

276. *Cf.* Charles L. Becton, *The Drug Courier Profile: “All Seems Infected that th’ Infected Spy, As All Looks Yellow to the Jaundic’d Eye”*, 65 N.C. L. REV. 417, 437 (1987) (describing tendency of DEA agents to modify drug courier profile to fit any traveler they deem suspicious); *see, e.g.,* Hurubie Meko, *He Was Mentally Ill and Armed. The Police Shot Him Within 28 Seconds*, N.Y. TIMES (Mar. 30, 2023), <https://www.nytimes.com/2023/03/30/nyregion/nypd-shooting-mental-health.html>.

academies require eight hours or less of cadet training in how to identify and handle issues arising from mental illness.<sup>277</sup> Not surprisingly, “stories abound of the police shooting and killing schizophrenic or mentally disabled people.”<sup>278</sup>

The unjustified use of reasonable suspicion to stop and use excessive force against the mentally ill and drug addicted disproportionately affects the homeless. While the unhoused population is more diverse than the avatar of a mentally ill or drug addicted unhoused person, it remains true that this population disproportionately suffers from mental illness and substance use disorders as compared to the general population.<sup>279</sup> But rather than deploying substance abuse and mental health counselors to work with this population, most cities continue to rely on police to “adjudicate conflicts between people experiencing homelessness and people annoyed by those people’s presence.”<sup>280</sup> Cities thrust police into this role as “‘frontline workers for urban homelessness,’ even though ‘officers aren’t adequately trained to deal with the issues that those people are dealing with.’”<sup>281</sup>

The natural result of this mismatch between need and experience goes far beyond unjustified *Terry* stops. As many as half of all the people killed by American police had registered disabilities,<sup>282</sup> and at least twenty percent of all victims suffered from mental illness.<sup>283</sup> People with untreated mental illness are sixteen times more likely to be shot and killed by police during an encounter,<sup>284</sup> and that number likely increases for African Americans with mental illness.<sup>285</sup> Given the disproportionate rates of addiction and serious mental illness among

277. See Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 982 (2021).

278. Derek Thompson, *Unbundle the Police*, THE ATLANTIC (June 11, 2020, 11:20 ET), <https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/>.

279. Harris, *supra* note 71, at 1795.

280. FIELDS, *supra* note 81, at 17; see also *id.* at 16–17 (“Well over half of all the nontraffic contacts police have with individuals involve someone with a diagnosed or presenting mental illness. As many as 25 percent of those encounters end in arrest for a low-level offense when a medical or mental health intervention would have been more appropriate. This reality itself is an uneasy fit for a crime-fighting force constituted and trained to enforce criminal laws. Why? Because of ‘the obvious (but seemingly elusive) point that mental illness is not a crime; it’s a disease.’”); Friedman, *supra* note 277, at 940 (“Studies suggest between one-fifth and two-thirds of homeless people have been arrested one or more times in their adult lives.”).

281. Shawn E. Fields, *The Fourth Amendment Without Police*, 90 U. CHI. L. REV. 1023, 1038 (2023) (quoting Thompson, *supra* note 278).

282. Marti Hause & Ari Melber, *Half of People Killed by Police Have a Disability: Report*, NBC NEWS (Mar. 14, 2016, at 21:13 EDT), <https://www.nbcnews.com/news/us-news/half-people-killed-police-suffer-mental-disability-report-n538371> [<https://perma.cc/7PHP-R489>] (“Police have become the default responders to mental health calls . . .” (quoting DAVID M. PERRY & LAWRENCE CARTER-LONG, THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY 8 (2016))).

283. LEGAL DEF. FUND & JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, END POLICE VIOLENCE AGAINST BLACK PEOPLE WITH DISABILITIES WITH COMMUNITY-BASED SERVICES 2 (2025).

284. See Andrew Selsky & Leah Willingham, *‘Tragic Outcomes’: Mentally Ill Face Fatal Risk with Police*, ASSOCIATED PRESS (Sep. 1, 2022, 16:47 EDT), <https://apnews.com/article/health-police-oregon-mental-salem-a5a933c76760a8d3929595f846876bb0> [<https://perma.cc/TV85-EYCD>].

285. See LEGAL DEF. FUND & JUDGE DAVID BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 282, at 2.

the unhoused, particularly among the chronically unsheltered unhoused, these populations face a greater threat of hunch-based *Terry* stops turning into violent and potentially deadly encounters.

Reasonable suspicion standards and *Terry* stops unfairly oppress the unhoused in other ways that do not involve mental illness or addiction. When “reasonable suspicion” becomes synonymous with “out of sorts” or “out of the ordinary,” virtually all of an unhoused person’s life becomes fair game. It certainly is “out of the ordinary” to do things in public that most of us do in private: bathing, sleeping, changing clothes. Even if these activities are not themselves subject to quality-of-life sanction, they nonetheless raise eyebrows and thus suspicion.

#### F. NONSEIZURE FORCED DISPERSALS

While much of the discussion so far has focused on how Fourth Amendment search law disproportionately impacts the privacy interests of houseless individuals, the Supreme Court’s narrow definition of “seizure” also creates significant risks for houseless individuals subject to police violence, particularly in the context of encampment sweeps. These sweeps often involve physical force, verbal commands, and other shows of authority by police to force the unhoused to disperse.<sup>286</sup> Yet these violent acts do not trigger Fourth Amendment scrutiny, because they are not considered “seizures.”

An unreasonable seizure “acts as the constitutional hook giving rise to civil rights police brutality claims.”<sup>287</sup> But “the issue of whether police conduct constitutes a seizure is a matter of threshold significance.”<sup>288</sup> Unless the action in question is a “seizure,” the Fourth Amendment simply does not apply.<sup>289</sup> Thus, “the question of what constitutes a ‘seizure’ is of paramount importance.”<sup>290</sup>

An arrest of a suspect constitutes a seizure of that person.<sup>291</sup> The Supreme Court has held that circumstances short of an arrest can also constitute a seizure, “if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”<sup>292</sup> A person “is seized by the police . . . when the officer, ‘by means of physical force or a show of authority,’ terminates or restrains [the person’s] freedom of movement ‘*through means intentionally applied.*’”<sup>293</sup>

On its face, this language could apply equally to restraint by means of submission or restraint by means of repelling someone from an area. In both cases the person’s “freedom of movement” is restrained. But in the protest context, when

286. See *supra* Section I.C.1.

287. Shawn E. Fields, *Protest Policing and the Fourth Amendment*, 55 U.C. DAVIS L. REV. 347, 359 (2021).

288. *Id.* (quoting DRESSLER ET AL., *supra* note 162, at 109).

289. Fields, *supra* note 287, at 359.

290. *Id.* at 360.

291. *Henry v. United States*, 361 U.S. 98, 101 (1959).

292. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion).

293. *Brendlin v. California*, 551 U.S. 249, 254 (2007) (citations omitted) (quoting *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989)).

an officer seeks to disperse a crowd of demonstrators and uses force to do so, their “intent often is not to make the protester succumb to the officer’s grasp, but to disperse a crowd and make the protester go away.”<sup>294</sup> Thus, it would seem this type of forceful restraint on liberty does not trigger the Fourth Amendment, as “a restraint on movement only constitutes a Fourth Amendment seizure if that restraint renders someone not ‘free to leave’ as opposed to being not ‘free to stay.’”<sup>295</sup>

In *Dundon v. Kirchmeier*,<sup>296</sup> the District of North Dakota dismissed excessive force claims against police brought by people protesting construction of the Dakota Access Pipeline through indigenous lands.<sup>297</sup> One night, police used water cannons, rubber bullets, concussion grenades, and bean bag projectiles to force protestors to leave, injuring 200 people in the process.<sup>298</sup> The court held that “the Fourth Amendment did not apply at all to any of the police conduct,”<sup>299</sup> because police sought “to disperse [the] activists rather than to detain them.”<sup>300</sup> Likewise, in *Edrei v. City of New York*,<sup>301</sup> a case involving the violent dispersal of demonstrators protesting the death of Eric Garner, the court declined to apply the Fourth Amendment to police use of long-range acoustic devices to force protestors to leave, finding that a “seizure” only takes place when police use “force intentionally to restrain a person and gain control of [their] movements.”<sup>302</sup>

This reluctance to find a seizure in violent dispersal contexts has important implications for the unhoused affected by encampment sweeps.<sup>303</sup> In many cities, police enter encampments unannounced, notify residents of their violation of a camping ban, break down any dwellings, and force residents to disperse, typically through verbal commands or physical force that traditionally would satisfy the “means intentionally applied” element for Fourth Amendment seizure purposes. Confirming their “free to leave but not free to stay” intent, officers may fence off the area before a sweep to prevent reentry.<sup>304</sup> Cases considering Fourth Amendment challenges to these sweeps have considered whether a “seizure”

294. Fields, *supra* note 287, at 360.

295. *Id.* at 361.

296. No. 16-cv-406, 2017 WL 5894552 (D.N.D. Feb. 7, 2017), *aff’d*, 701 F.App’x 538 (8th Cir. 2017).

297. *Id.* at \*2–3.

298. *Id.* at 21–22; Karen Pita Loor, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 820 (2020).

299. Loor, *supra* note 298, at 839.

300. *Id.* at 823, 838.

301. 254 F. Supp. 3d 565 (S.D.N.Y. 2017).

302. *Id.* at 570–72, 574 (quoting *Salmon v. Blesser*, 802 F.3d 249, 255 (2d Cir. 2015)).

303. See *Paradis*, *supra* note 27, at 334.

304. See, e.g., Amy Romer, *City Fences off CRAB Park Encampment, Moves Ahead With Week-long ‘Clean Up’*, INDIGINEWS (Mar. 25, 2024), <https://indiginews.com/news/city-fences-off-crab-park-encampment-moves-ahead-with-week-long-clean-up> [<https://perma.cc/XY89-LJHN>]; Kayla McLean, *City Fences Off, Puts Concrete Blocks Down in Area Recently Cleared of Encampment*, GLOB. NEWS (Nov. 28, 2023), <https://globalnews.ca/video/10122660/city-fences-off-puts-concrete-blocks-down-in-area-recently-cleared-of-encampment/> [<https://perma.cc/4RF3-HFLV>]; *City Crews Start Clearing Fourth Camp Nenookaasi Site in Minneapolis*, MPR NEWS (Feb. 1, 2024, at 11:55 ET), <https://www.mprnews.org/story/2024/02/01/city-crews-start-clearing-camp-nenookaasi-in-minneapolis> [<https://perma.cc/9LZT-D8LV>].

took place with respect to personal property taken by police, but have not considered explicitly whether the forced dispersal of the individuals from their homes itself constituted a seizure.<sup>305</sup>

Despite the force used, the intent of police dispersing the unhoused from encampments appears indistinguishable from police dispersing protesters from a city street. In both cases, the officer uses force to make people leave, “rather than to detain and arrest them.”<sup>306</sup> Given courts’ reluctance to find a Fourth Amendment seizure in the protest policing context, it seems similarly unlikely that a court would find a seizure in the mass houseless displacement context. Thus, neither the forcible seizure of one’s home<sup>307</sup> (except in limited circumstances<sup>308</sup>) nor the forcible movement of an individual’s person—even, presumably, by brutal physical means—would give rise to a Fourth Amendment excessive force claim. Indeed, I have not identified any court that has yet found that a seizure has taken place when an unhoused individual is forcibly and involuntarily removed from their home or from a larger unhoused encampment, presumably because no such claim can survive under the Court’s current narrow definition of seizure.

#### G. CONDITIONED SERVICES AND COERCED CONSENT

Another “exception” to the Fourth Amendment’s warrant requirement—consent searches—raises particularly troubling questions for the unhoused. As a part of popular progressive enforcement models, police may offer to transport unhoused individuals to shelters or connect them to wraparound treatment services in lieu of arresting them, but only if they consent to turning over all of their belongings for search and seizure, including their homes and important documents and medication.<sup>309</sup> Under such circumstances, there appears little meaningful voluntary choice involved, raising questions about whether such searches are truly consensual or unlawfully coerced.

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305. See *Berry v. Hennepin County*, No. 20-cv-2189, 2022 WL 3579747, at \*6 (D. Minn. Aug. 19, 2022); *Prado v. City of Berkeley*, No. 23-cv-04537, 2024 WL 3697037, at \*12–17 (N.D. Cal. Aug. 6, 2024); *Smith v. Municipality of Anchorage*, No. 23-cv-00257, 2025 WL 2097457, at \*9–11 (D. Alaska July 24, 2025); *Coal. on Homelessness v. City & County of San Francisco*, No. 22-cv-05502, 2025 WL 1667130, at \*15 (N.D. Cal. June 12, 2025).

306. *Paradis*, *supra* note 27, at 334.

307. See, e.g., *Berry*, 2022 WL 3579747, at \*6 (“Individual Plaintiffs’ unlawful erection of tents on public land . . . establish that Individual Plaintiffs do not have an objectively reasonable expectation of privacy in their property such that they could not be subject to an encampment sweep that includes the seizure of their personal property.”).

308. Forced dispersal may not give rise to an unreasonable seizure claim, but destruction of property following a sweep may give rise to an unreasonable seizure claim in some limited circumstances. See, e.g., *Prado*, 2024 WL 3697037, at \*14 (finding unhoused residents stated a Fourth Amendment claim regarding City of Berkeley’s seizures and destruction of property without proper notice); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1026–27 (9th Cir. 2012) (holding an officer can only seize and destroy an unhoused person’s property without a warrant or an applicable exception if the official believes the property is abandoned or if it poses an immediate threat to public health or safety).

309. See, e.g., *Neighborhood Policing Division*, CITY OF S.D., <https://www.sandiego.gov/police/services/neighborhood-policing-division> [https://perma.cc/3NAV-RXLJ] (last visited Jan. 30, 2026).

Consent acts as an exception to the warrant requirement only when that consent is knowingly, meaningfully, and voluntarily given.<sup>310</sup> Police may conduct warrantless searches with consent, but whether that consent is voluntary or coerced depends upon the totality of the circumstances surrounding the search, including whether threats or force compelled the grant of consent.<sup>311</sup> Understanding these contours is critically important, as scholars have estimated that more than ninety percent of all warrantless police searches are conducted by consent.<sup>312</sup> However, the Supreme Court has declined to provide meaningful bright-line guidance beyond requiring a “careful sifting of the unique facts and circumstances of each case.”<sup>313</sup>

But one relevant consistent thread has emerged among lower courts: conditioning the grant of services or licenses on consent to invasive searches is not, by itself, coercive. For example, in *Hall v. Sweet*,<sup>314</sup> a daycare operator sought to challenge a search of her in-home business, arguing that it was conducted without a warrant or consent.<sup>315</sup> The court disagreed, finding that expressly conditioning the operator’s daycare license on consent to search was reasonable given the “state’s interest in protecting child safety.”<sup>316</sup> Likewise, in *Sanchez v. San Diego*,<sup>317</sup> the Ninth Circuit upheld warrantless searches of hundreds of “entire residence[s] for evidence of welfare fraud” based on the consent of the homeowners, even though the court admitted that “[r]efusal to consent could serve as a basis for terminating welfare benefits.”<sup>318</sup> Thus, police conditioning shelter housing access on a houseless individual’s consent to search likely appears valid.

Important distinctions exist between the consent rendered in *Hall* and *Sanchez* and houseless individuals being offered shelter on conditions to consent. First, the government actors in *Hall* and *Sanchez* were not police officers, which itself reduces the inherent coercive nature of the interactions. Second, the risk of refusing consent in these cases, while important, were loss of a work license and a government entitlement, not an arrest and possible criminal conviction. Third, the searches in those cases were conducted pursuant to a blanket, suspicionless administrative scheme serving broad governmental purposes (protecting child safety and protecting taxpayers from fraud), rather than individualized searches of specific individuals suspected of a crime. In this sense, *Hall* and *Sanchez* might be better viewed as “special needs” cases authorizing noncriminal administrative searches rather than traditional Fourth Amendment consent cases.<sup>319</sup> Yet in both

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310. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–27 (1973).

311. See *id.* at 227–28.

312. See Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 511 (2015); see also *State v. Carty*, 790 A.2d 903, 911 (N.J. 2002) (summarizing findings that ninety-five percent of motorists stopped by highway patrol consent to searches of their vehicles).

313. *Schneckloth*, 412 U.S. at 233.

314. 666 Fed. Appx. 469 (6th Cir. 2016).

315. *Id.* at 471–73.

316. *Id.* at 477.

317. 464 F.3d 916 (9th Cir. 2006).

318. *Id.* at 929–30.

319. See *id.* at 925 (“The County’s administration of its welfare system is a ‘special need.’”).

cases courts upheld the searches on consent grounds, at least suggesting that similar consent garnered through conditioned offers of access to government shelter would pass constitutional muster.

#### H. SPECIAL NEEDS AND FORCED PSYCHIATRIC TREATMENT

While *Hall* and *Sanchez* are cases about consent, they also relied on a broad and amorphous exception to the Fourth Amendment authorizing suspicionless searches for primarily noncriminal purposes when justified by a “special government need” beyond traditional law enforcement. These so-called “special needs searches” create a significant exception to traditional Fourth Amendment protections and have been leveraged against the unhoused in ways contrary to the purpose, design, and traditional function of this exception.

In a typical criminal investigation, where police pursue criminal evidence or suspects in a completed or in-progress crime, traditional Fourth Amendment restrictions apply. But in a noncriminal investigation, conducted either by nonpolice personnel or for noncriminal public welfare purposes, warrants and probable cause are “typically treated as irrelevant,” even if the conduct in question is a “search” or “seizure.”<sup>320</sup> Suspicionless, broad, and intrusive “searches and seizures are permitted in the ‘non-criminal’ realm.”<sup>321</sup> Thus, “the line between a traditional criminal investigation . . . and a search or seizure designed primarily to serve non-criminal law enforcement goals . . . is thin and, quite arguably, arbitrary.”<sup>322</sup> It is also “a line of considerable constitutional significance.”<sup>323</sup>

Courts have created an arguably arbitrary entire category of noncriminal searches and seizures that need not comport with traditional Fourth Amendment standards because of the “special need” to allow such suspicionless searches in the interest of public safety.<sup>324</sup> These special needs searches—ranging from TSA body scans at the airport and workplace safety inspections to employee drug tests and sobriety checkpoints—are designed to provide limited administrative authority to investigate for noncriminal purposes, though criminal evidence can be and often is found during the process.<sup>325</sup> Despite the intrusion and the possibility of a

320. DRESSLER ET AL., *supra* note 162, at 294; *Griffin*, 483 U.S. 868, 880 (1987) (“[S]pecial needs . . . beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”); cf. Gerald S. Reamey, *When “Special Needs” Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295, 299–300 (1992) (The Court’s special needs cases “are individually flawed for failing to adhere to their conceptual antecedents, and are collectively flawed by requiring that the Supreme Court interpret the [fourth] amendment in an ad-hoc and unprincipled fashion”).

321. See DRESSLER ET AL., *supra* note 162, at 294; see also *Pellegrino v. United States Transp. Sec. Admin.*, 937 F.3d 164, 176 (3d Cir. 2019) (recognizing the lawful yet “physically intrusive and ubiquitous nature of TSA searches,” which “involve invasive examinations of the physical person”).

322. DRESSLER ET AL., *supra* note 162, at 293.

323. *Id.*

324. *United States v. Scott*, 450 F.3d 863, 869–72 (9th Cir. 2006) (holding that the government must articulate a valid “special need” and the proposed administrative search must be justified in light of that “special need”).

325. See, e.g., *United States v. Aukai*, 497 F.3d 955, 958 (9th Cir. 2007) (airline scans); *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 309 (1978) (workplace safety inspections); *Skinner v. Nat’l Ry. Lab.*

law enforcement response, special needs searches receive “rational basis review,” the lowest possible standard of judicial review of government conduct.<sup>326</sup>

Courts have routinely considered the process of determining whether to subject someone to an involuntary psychiatric hold as a special need under the Fourth Amendment.<sup>327</sup> This is true, even though these holds require significant invasions of privacy and liberty and are preceded by searches that are not conducted pursuant to any administrative scheme, and are limited neither by time nor place.<sup>328</sup> As Northwestern Pritzker School of Law professor Jamelia Morgan observed in her article *Psychiatric Holds and the Fourth Amendment*, there are significant problems with analyzing involuntary commitment procedures as a special need. Most special needs searches are justified as an exception to the Fourth Amendment’s traditional requirements because of their limited nature. They include “discrete subpopulations in discrete locations subjected to limited suspicionless searches – airline passengers in an airport, children in a school, motorists at a sobriety checkpoint. But the mentally ill are not a discrete subpopulation in a discrete sensitive location justifying reduced privacy expectations.”<sup>329</sup>

Moreover, these patients “are subjected to far more invasive restrictions on their freedoms when being committed to a hospital than someone passing through a TSA bag machine or sobriety checkpoint.”<sup>330</sup>

These special needs holds, while targeted specifically at the mentally ill and not the unhoused, do and will continue to disparately affect the houseless. Because special needs psychiatric holds disproportionately affect the mentally ill and because the unhoused population contains a disproportionate number of individuals suffering from mental illness, psychiatric holds have always disproportionately been placed on the unhoused. States that previously authorized psychiatric holds only on a strict showing of imminent harm have relaxed their commitment standards precisely as a way to combat urban unsheltered houselessness.<sup>331</sup> Once the norm for psychiatric holds, only a small number of states now require a showing that danger to self or danger to others be imminent to qualify for hospitalization.<sup>332</sup> An increasing number of states permit involuntary treatment and forced medication merely on a finding of foreseeability that one might not be able to care for themselves in the

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Execs. Ass’n., 489 U.S. 602, 620 (1989) (drug testing railway employees); Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 447 (1990) (sobriety checkpoint).

326. See Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 256 (2011).

327. See, e.g., McCabe v. Life-Line Ambulance Serv., 77 F.3d 540, 546 (1st Cir. 1996).

328. Morgan, *supra* note 33, at 1427.

329. FIELDS, *supra* note 81, at 68.

330. *Id.* at 68.

331. See *supra* Section I.C.3.

332. See *Standards for Involuntary Commitment (Assisted Treatment) State-by-State (Source Treatment Advocacy Center)*, MENTAL ILLNESS POL’Y (last visited Jan. 30, 2026), <https://mentalillnesspolicy.org/national-studies/state-standards-involuntary-treatment.html> [https://perma.cc/6EC8-723P].

future due to mental illness.<sup>333</sup> This broader commitment standard sweeps in a far larger set of erratic but not dangerous behaviors and casts an ever-widening net of people subject to forced hospitalization. That net is being directed more and more at the undesirable unhoused, who the public increasingly wants to be placed “somewhere else” by “someone else,” out of sight of the viewing public.<sup>334</sup>

### III. THE FOURTH AMENDMENT RIGHT TO PUBLIC DIGNITY

This Article serves a primarily descriptive function, cataloguing the doctrinal failures of Fourth Amendment law to protect the unhoused from unjustified governmental intrusion. This final Part nonetheless offers solutions to many of the problems articulated in Part II. In particular, this Part provides a reframing of the bundle of negative Fourth Amendment rights to be free from unwarranted search and seizure as flowing from an independent right to inherent human dignity. Drawing upon philosophical conceptions of human worth and the Supreme Court’s observation that “the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State,”<sup>335</sup> I chart specific doctrinal modifications to expectations of privacy, warrant requirements, and seizure thresholds supported by existing case law and grounded in fundamental precepts of public dignity as a Fourth Amendment right.

#### A. THE DIGNITARY FOURTH AMENDMENT

Dignity as a distinct concept appears first in the writings of Cicero, who referred to *dignitas* as “a concept regarding human beings as having worth and an expectation of respect by virtue of being human.”<sup>336</sup> This entitlement to respect and recognition of human worth arose “independently of any particular social status,” but instead as a consequence of the ““superior minds”” of humans compared to nonhuman animals.<sup>337</sup> Thus, humans deserve dignity—respect and acknowledgment as worthy—simply because they are human. Kant later declared that humans should “[a]ct in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never simply as a means.”<sup>338</sup> Any violation of that rule amounted to a violation of human dignity, because “every individual has a right to be treated as an end, not as a means.”<sup>339</sup> Legal scholars have attempted to refine these definitions in the negative, claiming that dignity stands in contrast to “brutality, cruelty, torture,

333. See Newman & Fitzsimmons, *supra* note 143.

334. KABA & RITCHIE, *supra* note 31, at 118; see Sequeira, *supra* note 132.

335. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

336. John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 676 (2008).

337. *Id.* (quoting Mette Lebeck, *What is Human Dignity?*, 1 MAYNOOTH PHIL. PAPERS 3 (2004)).

338. *Id.* at 678 (quoting KATRIN FLIKSCHUH, *KANT AND MODERN POLITICAL PHILOSOPHY* 92 (Cambridge Univ. Press 2000)).

339. *Id.*

humiliation, uncivilized or barbarous behavior, harsh treatment, and various sorts of intrusion and privacy invasion.”<sup>340</sup>

Proposals to reform existing Fourth Amendment doctrines do their work within a fundamentally broken system. Fourth Amendment search law is a doctrinal mess. “Although privacy may have been a promising theory of the Fourth Amendment at one time, it has now lost much of its luster and utility. The Court has interpreted privacy to be a question of fact rather than a constitutional value.”<sup>341</sup> And it has interpreted these questions of fact in ways that make little practical sense, at least as to the plain meaning and understanding of words like “privacy” and “search.”<sup>342</sup> The bodily integrity doctrines of Fourth Amendment seizure law similarly seem divorced from the value of bodily safety and rely instead on artificial definitions that exclude from the analysis severely injurious, violent government conduct.

These failures of privacy and liberty doctrines stem at least in part from the failure to account for the third constitutional value protected by the Fourth Amendment: human dignity. The Supreme Court “has hinted at dignity’s place as a Fourth Amendment value, but has alternately conflated the dignitary interest with the privacy interest, or ignored the dignity interest altogether.”<sup>343</sup> In *Schmerber v. California*,<sup>344</sup> Justice Brennan boldly declared that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State,” but neither defined dignity nor relied on it as a basis for finding a Fourth Amendment violation.<sup>345</sup> Likewise, in *Winston v. Lee*,<sup>346</sup> the Court discussed the important “dignitary interests” of the Fourth Amendment, but did so in terms of personal privacy, bodily integrity, and personal security.<sup>347</sup> In contrast to these vague references to dignity as part of privacy or liberty, human dignity is both an important independent value protected by the Fourth Amendment and one distinctly applicable to the rights of the unhoused.

How, then, does dignity appear in the Fourth Amendment as an independent value? The two expressed constitutional powers articulated in the Fourth Amendment—to search and seize—involve some invasion of the autonomy and

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340. R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 S.D. L. REV. 528, 534 (2006); see also Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2125 (2001) (“[O]ffenses against dignity involve a failure to show people the respect and deference to which they are entitled by virtue of their intrinsic humanity.”).

341. Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 825 (1999).

342. See Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 238 (2019) (“If the Supreme Court can muster the will to cast aside the artificial complexity of the past fifty years, it will uncover a straightforward textual command. All the Court needs is a dictionary, a touch of history, and some common sense.”).

343. See Castiglione, *supra* note 336, at 675.

344. 384 U.S. 757 (1966).

345. *Id.* at 767.

346. 470 U.S. 753 (1985).

347. *Id.* at 761 (“Another factor [in the reasonableness of a search] is the extent of intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity.”).

“general right to immunity of the person.”<sup>348</sup> These powers cannot be invoked in a “reasonable” way if done in such a way as to humiliate, degrade, or fail to treat the target of those powers as having worth as a human. In this way, the three values of privacy (search), liberty (seizure), and dignity (reasonable) are related, but they are not synonymous. Because search and seizure powers are affirmative powers granted to government officials by the Fourth Amendment, their meanings must be specific, clear, and legally significant. It thus may be possible for a government agent to engage in a deeply invasive inquiry that technically is not a “search,” legally defined, but do so in a way that humiliates, degrades, or treats the human as a means to an end rather than an end in themselves. The same can be said for seizures. A forceful government action may fall outside the legal definition of seizure, but if it lacks dignity then it is unreasonable and violative of the protective value of the Fourth Amendment. Justice Robert Jackson espoused this ethos when he claimed that dignity disappears without the Fourth Amendment’s protections.<sup>349</sup>

Courts have acknowledged the importance of dignity, even if their analysis lacks necessary rigor.<sup>350</sup> For example, in *People v. Williams*,<sup>351</sup> the Supreme Court of Colorado acknowledged “the special insult to human dignity involved when police seek evidence in body apertures or bodily fluids,” because it merely treats the human body as a means to an end and not a being deserving of worth, respect, discretion, and autonomy.<sup>352</sup> Likewise, despite the mess of Fourth Amendment search law, the Court’s line-drawing between what a person exposes and what they do not respects at least the autonomy of humans to make choices about their own lives.

Dignity as an independent concept is sorely needed as an animating feature of the Fourth Amendment, and the experience of the unhoused is merely the most poignant example of that need. Claiming that a police officer has every lawful right to watch a houseless person urinate or defecate without infringing upon her privacy rights may technically accord with current Fourth Amendment search law conceptions, but it is certainly an unreasonable denial of human dignity, at least when that houseless person has literally nowhere else to go for privacy. Likewise, a houseless person may erect a tent on public property in violation of a camping ban, thus rendering the tent itself seizeable, searchable, and destructible.

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348. Cameron Cantrell, *A Dignitary Fourth Amendment Framework and Its Usefulness for Mobile Phone Searches*, 25 VA. J.L. & TECH. 241, 251 (2022) (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 207 (1890)).

349. *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting) (“[H]uman personality deteriorates and dignity and self-reliance disappear where homes, persons[,] and possessions are subject at any hour to unheralded search and seizure by the police.”).

350. *See, e.g., Commonwealth v. Lipscomb*, 2025 Va. Cir. LEXIS 213, at \*18–19 (Va. Cir. Ct. Aug. 22, 2025) (recognizing that “the United States Supreme Court and Virginia Court of Appeals have created, in the interest of human dignity and privacy, a heightened Fourth Amendment standard when analyzing intrusive bodily searches without a warrant”).

351. 192 Colo. 249 (Colo. 1976).

352. *Id.* at 257.

But independent of search and seizure conceptions, if the houseless person truly has no other refuge in the world within which to sleep, seek protection, and be alone, does it not offend human dignity to seize and search that structure, at least without a warrant detailing objectively the exacting need for such a barbarous intrusion?

Search and seizure doctrines treat concepts of privacy and bodily integrity as constitutional questions of fact that, while sometimes logically defensible, create inhuman, degrading, and humiliating results that are not defensible as a set of constitutional values. An independent “reasonable expectation of being treated with dignity” standard, independent of any unreasonable search or seizure, may well correct some of the least justifiable and most troubling results in Fourth Amendment law, particularly as it relates to the unhoused and other marginalized groups too often treated as subhuman means to an end.

#### B. SEARCH AND SEIZURE THROUGH A DIGNITY LENS

Legal definitions of search and seizure that exclude deeply invasive or injurious conduct that subjects people to cruelty, humiliation, or degrading behavior ought to be treated with deep skepticism, especially when such definitions do not include prying consistently into the very private activities of unhoused individuals, violently dispersing them from their homes, and destroying their property. Yet for the unhoused, current definitions of these Fourth Amendment lynchpins do just that. The following subparts confront that skepticism with doctrinal modifications grounded in conceptions of dignity and supported by existing precedent.<sup>353</sup>

##### 1. Voluntary Exposure

The “reasonable expectation of privacy” test for search law should require not just a knowing exposure to the public but a voluntary, intentional exposure. Current privacy rights extend only to those few parts of life one does not knowingly expose to another soul (or soulless corporation).<sup>354</sup> Anything knowingly exposed, whether intentionally or not, receives no Fourth Amendment privacy protection and can be gathered by police through personal observation or inquiry to third parties with whom one has shared information.<sup>355</sup> In this technologically saturated world, very little remains hidden. iPhones watch us. Telephones listen to us. Computers record our every keystroke.

For physical location specifically, practically nothing remains private. Between one’s family, friends, employer, and cell phone provider, someone is

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353. An independent right to human dignity may reside elsewhere in the Constitution as well, including in the Due Process Clause of the Fifth and Fourteenth Amendments. *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 409 (2022) (Kagan, J., dissenting) (describing loss of Due Process right to an abortion as an “immense” “loss of power, control, and dignity”). That discussion exceeds the scope of this Article. But the Fourth Amendment provides a more comfortable fit for a dignitary right for two reasons. First, the Amendment establishes two rights—privacy and bodily integrity—closely connected to values of worth, respect, and human autonomy. Second, the Fourth Amendment allows exclusion of illegally obtained evidence from a criminal trial, a remedy that treats people as an end to themselves rather than a means to the end of a successful prosecution.

354. *See supra* Section II.A.

355. *See id.*

likely to have a fair idea of where someone else is at all times. Of course, this does not give police free rein to follow us everywhere because we have no privacy expectations in our location. But they can freely ask others where we have been.<sup>356</sup> And while one's confidants or internet service providers might not run to the police with this information, they certainly could and we would have no recourse; we have knowingly exposed our location to someone, whether intentionally or not.<sup>357</sup>

This narrow concept of privacy raises questions about what, if any, information can truly remain private, outside of one's own thoughts. The song sung in the shower? The soap used? The (physical) book read, alone, in the woods? It also rests on a quite cynical view of the world, one in which everyone is a "false friend" trusted only at one's peril.<sup>358</sup> To the extent human dignity encompasses a respect for one's own autonomy, a privacy definition that precludes exercising that autonomy free from the possibility of snooping seems at odds with the reasonable expectation of being treated with dignity.

And this is the depressing reality for those fortunate to have a fixed, permanent home with luxuries like electronic equipment passively spying on them. For the unhoused, truly nothing is private as conceived by *Katz* and its progeny. Everything is shared openly, in public view for all to see: where one sleeps, sits, bathes, relieves oneself, what one eats, with whom one associates, what business one transacts, what one drinks or smokes or snorts or injects. It all becomes fair game for the wandering eyes of passersby, despite the lack of any truly voluntary choice to expose these intimacies of life with complete strangers. The indignities suffered by houseless people forced to live the mundane and profane in public strike at the heart of self-worth and respect. What more humiliation and degradation is there than being forced through lack of adequate shelter to piss or shit outdoors in full view of strangers? The only added humiliation is the legal one, whereby the constitutional provision expressly designed to protect privacy rights says you have none in those most intimate, embarrassing moments because you have "knowingly exposed" yourself to the public. And also, it's a crime.

Aside from recognizing and enforcing an independent right to reasonable expectations of dignity, what can be done to better protect privacy expectations under the Fourth Amendment for the unhoused? A reasonable starting point is the Supreme Court case opening the door to an alternative to the third-party doctrine: *Carpenter v. United States*.<sup>359</sup> Writing for a 5–4 majority, Chief Justice Roberts held that police procurement from a cell phone company of 127-days' worth of

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356. See *United States v. White*, 401 U.S. 745, 752 (1970) (explaining that anyone divulging information to another person "must realize and risk that his companions may be reporting to the police"). See generally Michael L. Rich, *Lessons of Disloyalty in the World of Criminal Informants*, 49 AM. CRIM. L. REV. 1493, 1500 (2012) (exploring the legal realities of informants).

357. See Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 141–42 (2002) ("[T]he Court viewed betrayal as an expected (if reprehensible) behavior among human beings . . . Nosy neighbors and pretend friends are not unheard-of phenomena. We trust such people . . . at our own risk.").

358. *Id.* at 139–40 n.84.

359. 585 U.S. 296 (2018).

cell site location information (CSLI) for one of its customers amounted to a search, because that amount of information infringed upon his reasonable expectation of privacy.<sup>360</sup> Recognizing that the ruling contradicted the longstanding rule that anything knowingly shared with another person retains no privacy protections—after all, Mr. Carpenter knowingly shared his location with his cell phone company each time he turned on his phone—Justice Roberts explained that such information “is not truly ‘shared’ as one normally understands the term”<sup>361</sup>:

In the first place, cell phones and the services they provide are “such a pervasive and insistent part of daily life” that carrying one is indispensable to participation in modern society. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections . . . . Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily “assume[] the risk” of turning over a comprehensive dossier of his physical movements.<sup>362</sup>

Replace “cell phone” with “human body,” and this passage almost perfectly describes the involuntary nature of life as an unsheltered unhoused individual. First, human bodies and the services they provide are such a pervasive and insistent part of daily life that carrying one is indispensable to participation in society. Second, an unhoused human body logs its location for the viewing public by dint of its operation, without any affirmative act on the part of the user—even without powering up! Virtually any activity by the body generates location information for passersby, and in fact provides much more information than just location. Unlike a cell phone, there is no way to disconnect the body from the network, and there is no way for an unhoused person in public to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the houseless person voluntarily assume the risk of turning over a comprehensive dossier of their physical movements.

If we grant the initial supposition that unsheltered unhoused people are in that position through no meaningful voluntary choice and have no alternative in a community with no accessible sheltered alternatives, their bodies, possessions and makeshift shelters automatically and persistently provide troves of location and other information to the public in much the same way that a cell phone automatically and persistently pings a tower.<sup>363</sup> In particular, the “biological function”

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360. *Id.* at 312, 315–16.

361. *Id.* at 298.

362. *Id.* at 315 (citations omitted).

363. Of course, let’s consider the scenario if we do not grant this assumption. Just as in *Carpenter*, where Chief Justice Roberts surmised that one could evade constant surveillance by “disconnecting the phone from the network,” perhaps an unhoused person in public could theoretically hide from view in an

parts of life that are necessary and cannot be stopped ought to be recognized for what they are—wholly involuntary, automatic, and persistent functions that may provide information knowingly exposed, but which is not “truly ‘shared’ as one normally understands the term.”<sup>364</sup>

This reframing of *Carpenter* for the human body does not suggest that all of us suddenly possess absolute privacy rights in everything our body automatically does. The critical distinction is the lack of voluntary choice in the matter of exposure for the unhoused, much like the lack of voluntary choice in whether Carpenter wanted his phone to share his location with his wireless carrier. This distinction is one that an amendment premised on value-laden, fact-intensive “reasonableness” calculations<sup>365</sup> can handle adequately. And to the extent this approach creates a greater zone of privacy for the unhoused compared to the rest of us, good. They are the ones most in need of legal privacy and dignity protection, given the lack of practical privacy society has afforded them. The Fourth Amendment’s current contrary position has the matter exactly backwards, reflecting the untethered nature of search law from dignity-informed privacy values.

In his important article *Conceptualizing Privacy*,<sup>366</sup> Professor Daniel Solove connected the notion of human dignity with the ability to conduct intimate biological functions in private, observing that:

[I]t is common knowledge that people urinate and defecate . . . Nevertheless, people currently take great strides to cloak their nude bodies and to urinate and defecate away from other people . . . [S]ocial practices have developed to conceal aspects of life that we find animal-like or disgusting as well as activities in which we feel particularly vulnerable and weak . . . Dignity is, in part, the ability to transcend one’s animal nature, to be civilized, to feel worthy of respect. Indeed, one form of torture is to dehumanize and degrade people by making them dirty, stripping them, forcing them to eliminate waste in public, and so on. When social practices relating to dignity are disrupted, the result can be a severe and sometimes debilitating . . . loss of self-esteem.<sup>367</sup>

This passage highlights the immorality of laws criminalizing homelessness for engaging in biological functions in public. We all desire as a matter of human dignity to have these vulnerable, animal-like moments in private. Our collective societal failure to house our fellow citizens has stripped the homeless of that

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unsafe drug house or with a dangerous violent ex-partner or could trespass into someone’s backyard to shield themselves from public view. These “alternatives” drive home the point that unsheltered unhoused individuals are in public through no meaningful voluntary choice.

364. *Carpenter*, 585 U.S. at 315.

365. *Fitzgerald v. State*, 837 A.2d 989, 1020 (Md. 2003) (acknowledging the “value-laden [nature of the] inquiry of whether the police behaved reasonably”); Fields, *supra* note 281, at 1083 (“[T]he two most important words in the Fourth Amendment—‘[un]reasonable’ and ‘probable’—are inherently flexible, require value and interest balancing, and thus are and should be more adaptable to changing societal standards.”).

366. 90 CAL. L. REV. 1087 (1990).

367. *Id.* at 1148–49.

dignity. But rather than afford them as much privacy as they can muster under the circumstances, we criminalize these involuntary acts because they disgust us, and we enforce those laws by somehow claiming they have no privacy rights in these most intimate, weak moments. We strip the houseless of their dignity and then punish them for it.<sup>368</sup>

## 2. Singular Sensitive Spaces

A second dignitary reframing of Fourth Amendment privacy rights involves the right to robust protections for the home and its contents, even if that home is evidence of a crime. The unhoused deserve as a matter of basic dignity and equal treatment under the Fourth Amendment “first among equals” privacy rights in their temporary structures, no matter where constructed.

Recognition of the independent constitutional value of human dignity, to be treated with worth and respect, supports strong temporary structure protections. At least one court has recognized that an unsheltered unhoused individual ought to “maintain[] a protected privacy interest in their temporary dwelling even if it is wrongfully on public property,” because that “tent-like temporary structure may be an unhoused individual’s ‘only refuge for privacy.’”<sup>369</sup> This sensible acknowledgement that all persons ought to have at least one place in this world safe from prying government eyes reflects a dignitary view that some basic human necessities ought to be protected. And in this country, in lieu of a bundle of positive social and economic rights to housing, the Fourth Amendment at least provides a bundle of negative constitutional rights to be left alone in whatever housing we can acquire.

There also exists some analytical framework for extending full warrant protections to temporary homes illegally occupying public lands. In *Riley v. California*,<sup>370</sup> the Court considered whether a cell phone found on an arrestee’s person pursuant to a properly executed SILA search could be opened and searched.<sup>371</sup> A clear line of case law held that searches of all items found on an arrestee’s person during a SILA search, including cigarette packages and other containers, could be opened and searched automatically.<sup>372</sup> As with the third-party doctrine in *Carpenter*, Justice Roberts emphasized the uniqueness of cell phones in distinguishing *Riley* and protecting the petitioner from the harsh edges of bright-line SILA doctrine:

Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears

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368. See Ben McJunkin, *The Negative Right to Shelter*, 111 CAL. L. REV. 127, 190 (2023) (observing that anticamping ordinances serve primarily “to remove unimaginable poverty from public view,” poverty which “neither generates harm nor violates strong moral norms,” but merely “generates strong feelings of disgust and discomfort”).

369. *Kitcheon v. City of Seattle*, No. 85583-2-I, 2024 WL 5040630, at \*1 (Wash. Ct. App. Dec. 9, 2024).

370. 573 U.S. 373 (2014).

371. See *id.* at 378.

372. See *id.* at 382–84 (discussing *Chimel v. California*, 395 U.S. 752 (1969) and *United States v. Robinson*, 414 U.S. 218 (1973)).

little resemblance to the type of brief physical search considered in *Robinson* . . . . [T]here is an element of pervasiveness that characterizes cell phones but not physical records.<sup>373</sup>

This passage reflects the *sui generis* quality of cell phones as efficient storage devices, placing all of a person's private information in one place. Notably, Roberts found that cell phones are so unique because of what they allow people to do: carry around "a cache of sensitive personal information with them as they [go] about their day," something people did not do before the digital age.<sup>374</sup>

That is, except for the unhoused. Many unsheltered unhoused individuals keep all of their belongings closely by their side, in their storage containers, or in the temporary houses at all times out of fear they will be taken or destroyed.<sup>375</sup> This includes their birth certificates, social security cards, immigration paperwork, prescriptions, medications, photo albums, and even their loved one's ashes, all things that have been destroyed by government workers during encampment sweeps in the last twelve months.<sup>376</sup> In short, for the unsheltered unhoused, the very quality that gives cell phones extra privacy protections also ought to provide extra privacy protections for houseless shelters—they "place vast quantities of personal information in one place," and contain a characteristic of "pervasiveness" relative to the possessions owned by the individual. Where cell phones have a "singular, sensitive quality" to them based on their technological capabilities, for the unhoused their temporary structures have a similar singular, sensitive quality to them based on their primacy in the lives of houseless individuals. Outside perhaps a houseless person's own cell phone, the tent or other shelter is the one refuge not only for the unhoused person, but for all of their information as well.

Having found that cell phones cannot be searched pursuant to SILA, the Court held that probable cause and a warrant were required.<sup>377</sup> The Court explained that "the degree to which [a warrantless search of a phone] intrudes upon an individual's privacy" simply outweighed "the degree to which it is needed for the promotion of legitimate governmental interests."<sup>378</sup> Similarly, even where a makeshift shelter erected in violation of a camping ban is itself evidence of a crime, the degree to which a search of that singular, sacred, sensitive space would intrude upon a houseless person's privacy simply outweighs any countervailing interest in the absence of a warrant.

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373. *Riley v. California*, 573 U.S. 373, 386, 395 (2014).

374. *Id.* at 395; see also Andrew Guthrie Ferguson, *The "Smart" Fourth Amendment*, 102 CORNELL L. REV. 547, 575 (2017) ("[T]he pervasiveness of digital technology threatens to invade 'the privacies of life,' as actions, thoughts, and patterns become reflected in digital form . . . Unfortunately, while the Court appeared to recognize that data is different, it did not provide any answer for how the Fourth Amendment should conceptualize data outside of the search incident to arrest context.").

375. Santa Cruz, *supra* note 247.

376. Talbot et al., *supra* note 13.

377. *Riley*, 573 U.S. at 401.

378. *Id.* at 385 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

### 3. Liberty Intrusions, Coming and Going

The Court's refusal to recognize Fourth Amendment protection from dispersal-motivated police brutality has created a dangerous zone of impunity for officers in protest and encampment settings and further highlights the denial of dignity in seizure analysis. The definition of a "seizure" acts as the constitutional hook for an excessive force claim. That word loses all meaning if it excludes from its reach water cannons and chemical munitions turned on peaceful, vulnerable people.<sup>379</sup>

According to current doctrine, force that makes the body stay is a seizure, while force that makes the body go is not. Recentering the right of bodily integrity, the relevant inquiry here should be whether a restraint on bodily liberty occurred, not the direction the force was designed to make the body go. A restraint on liberty theory of seizure would trigger Fourth Amendment scrutiny anytime a government actor intentionally uses force or a show of authority to restrain one's freedom of movement, whether that restraint results in submission or dispersal from an area. This expansive view of "seizures" not only promotes "the goal of deterring police misconduct,"<sup>380</sup> but more importantly accords with the fundamental liberty rationale underlying the Fourth Amendment. Where protection from unreasonable searches is premised on the fundamental precept of privacy from a snooping government, protection from unreasonable seizures is premised on the equally fundamental precept of liberty from a violent government in all its forms.

By refocusing seizures as restraints on liberty rather than total submission, any government-directed restraint on physical movement becomes a seizure, whether that restraint takes the form of a citizen unable to resist the bone-breaking grip of an officer or a mass of unhoused persons physically pushed out and unable to return to their homes. This reading of the Constitution "accords with the historical . . . understanding of a seizure separate and apart from any common law definition more akin to an arrest."<sup>381</sup> However, it will likely open "potentially large swaths of routine [government] conduct" to legal scrutiny.<sup>382</sup>

That is not necessarily a downside. Defining a larger scope of police conduct a "seizure" does not declare it unlawful; it merely subjects it to a constitutional reasonableness calculus.<sup>383</sup> Thus, declaring it a seizure when an officer commands a rubbernecking bystander away from a car accident or a houseless person away from a park does not diminish an officer's power to do so or open the floodgates of litigation. Instead, it asks the judiciary to review whether the officer's conduct was reasonable. Constitutional scrutiny of government force is needed, especially

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379. See *supra* Section II.F.

380. Loor, *supra* note 298, at 839.

381. Fields, *supra* note 287, at 373.

382. *Id.*

383. Tonja Jacobi, *Supreme Irrelevance: The Court's Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033, 2036 (2018) ("The Supreme Court has largely abdicated any role in regulating police stops that do not produce evidence of criminality.").

given how thoroughly the “Court . . . has ‘abdicated’ its responsibilities on that front.”<sup>384</sup> It also provides opportunities to reevaluate the types of force used to consider whether certain tactics and weaponry might categorically offend notions of dignity and the right to be free from cruel and degrading treatment.

#### CONCLUSION

The stigma of houselessness stings. People look at you with disgust at your failure, when they look at you at all. People assiduously avert their gaze.<sup>385</sup> Nearly three-quarters of a million unhoused people in America is a failure. Not an individual failure. A collective failure. We have failed our fellow humans.

This crisis has become larger, more visible, and thus, more uncomfortable. The willpower to invest in sustainable solutions escapes us, and so “the urgency to manage the crisis manifests in short-term cycles through shelters, hospitals, and jails—rearranging the tents on the *Titanic*.”<sup>386</sup> The ones tasked with doing the rearranging increasingly are police, newly empowered to destroy public encampments, fine and arrest the unhoused for living, and force them into potentially unnecessary and unhelpful psychiatric treatment. These enforcement actions are designed to push the unhoused further into the shadows, out of view. Ironically, the constitutional provision designed to protect their privacy from these oppressive actions has failed them across the board. There exist ways to reframe Fourth Amendment values and reinvigorate Fourth Amendment protections for the houseless, as explored in this Article. Courts can and should adopt them.

But this crisis will not abate until we reckon with the fact that houselessness is not a crisis of the “other.” Boston Globe reporter and formerly unhoused person Patrick Fealey observes that “many of you could be where we are—on the street—but for some simple and not uncommon twist of fate. This is part of your rejection, this fear that it could be you.”<sup>387</sup> It could be us. It could be you. It was me.

Fewer than one in four people currently experiencing houselessness have been unhoused for more than a year. Most have recently fallen on hard times. They have lost their place due to a layoff or a natural disaster or a rent increase or an abusive partner . . . At a time when tens of thousands of Americans have just had their homes destroyed by fire and flood, is it so hard to imagine ourselves in their shoes?<sup>388</sup>

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384. Fields, *supra* note 287, at 374; see also Jacobi, *supra* note 383, at 2036.

385. See generally Patrick Fealey, *The Invisible Man*, ESQUIRE (Nov. 14, 2024), <https://www.esquire.com/news-politics/a62875397/homelessness-in-america/> (“We see right through the unshowered soul living in a car by the beach, or by the Walmart, or by the side of the road. But he’s there, and he used to be somebody. He still is.”).

386. Grabar, *supra* note 75.

387. Fealey, *supra* note 385.

388. *Id.*

Indeed, we would all do well to consider that the insecurity of houselessness is closer to us than we might think. When we recognize that houselessness is not reserved for the severely sick or drug addicted, but that it is driven more by unforeseen calamity, the inability to find steady work, and ever-increasing housing, perhaps we can more readily imagine ourselves in their shoes, and then more urgently reimagine the laws and policies that have failed the unhoused for so long.