The New John Lawrence: An Analysis of the Criminalization of LGBTQ Homelessness

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"The rules and reasons the political system employs to enforce status relations of any kind, including racial hierarchy, evolve and change as they are challenged. The valiant efforts to abolish slavery and Jim Crow and to achieve greater racial equality have brought about significant changes in the legal framework of American society—new 'rules of the game,' so to speak. These new rules have been justified by new rhetoric, new language, and a new social consensus, while producing many of the same results."
--- Michelle Alexander, *The New Jim Crow* (2012)[1]

"The more things change, the more they remain the same."
--- Jean Baptiste Alphonse Karr (1848)[2]

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[1] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 21 (2010).

[2] JEAN BAPTISTE ALPHONSE KARR, LES GUÊPES, SER. 6, 278 (Nouvelle ed., Michel Lévy Frères eds., 1862).

I. HOMELESSNESS & CRIMINALIZATION – A PRIMER

Homelessness[3] is prevalent throughout many American cities—and, indeed, in cities around the world.[4] While quantifying the number of individuals experiencing homelessness poses a host of challenges,[5] according to the National Alliance to End Homelessness, on any given night over half a million people experience homelessness across the United States.[6] This represents a rate of 17 people experiencing homelessness on any given night per 10,000 people in the general population; and, while these numbers may seem high, this statistic actually represents the lowest rate of homelessness calculated since point-in-time data collection began.[7] It goes without saying that homelessness is undesirable, from an empathetic perspective as well as from a public health,[8] fiscal,[9] and political one. Criminalization—that is, the creation and enforcement of policies that cause

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[3] Homelessness is defined, under federal law, as "an individual or family who lacks a fixed, regular, and adequate nighttime residence" and/or "an individual or family with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, [etc.]." 42 U.S.C.A. § 11302(a)(1)–(2) (2018). It also encompasses those living in a "publicly or privately-operated shelter designated to provide temporary living arrangements (including hotels and motels paid for by Federal, State, or local government programs for low-income individuals or by charitable organizations, congregate shelters, and transitional housing)," as well as individuals facing eviction or those who "will imminently lose their housing." *Id.* at §11302(a)(3)-(a)(5)(A). There are other definitions of homelessness used in other federal laws, including (but not limited to) those used in federal education statutes—these wide-reaching federal definitions of homelessness are merely one of many factors making homelessness difficult to quantify and difficult to rectify.

[4] "[I]t's estimated that no less than 150 million people, or about 2 percent of the world's population, are homeless." Joseph Chamie, *As Cities Grow, So Do the Numbers of Homeless*, YALEGLOBAL ONLINE (July 13, 2017), https://yaleglobal.yale.edu/content/cities-grow-worldwide-so-do-numbers-homeless.

[5] "Homelessness can be quantified in two ways. One is to count the number of people who are homeless at a single point in time. The other is to estimate the number of people who have been homeless one or more times during a specific time period, such as the preceding year. Both methods are difficult to carry out and are subject to different types of error and biases." ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES (2014).

[6] Based on statistics from the January 2018 point-in-time count, the most recent national estimate of homelessness in the United States. NAT'L ALLIANCE TO END HOMELESSNESS, *State of Homelessness*, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/ (last visited Sept. 13, 2019).

[7] *Id*.

[8] *See* Shaun Donovan & Eric K. Shinseki, Editor's Choice, *Homelessness Is a Public Health Issue,* 103 AM. J. PUB. HEALTH S180 (2d Supp. 2013), https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301727.

[9] A 1992 article in the *Harvard Crimson* reported on local businesses in Cambridge being negatively affected by homeless individuals loitering nearby. "[A]lthough most businesses say they usually don't call the police or even ask people to leave unless they are disruptive to the clientele, they agree that homeless loitering definitely affects business," the article stated. Alessandra M. Galloni, *Businesses Worry About Effects of Homeless,* HARV. CRIMSON (May 6, 1992), https://www.thecrimson.com/article/1992/5/6/businesses-worry-about-effects-of-homeless/. One business owner interviewed for the piece, the managing general partner of the Charles Square Complex, stated that "It's devastating for people to be faced with homelessness when they are eating or shopping . . . [t]here's often a reaction of fear or disgust or avoidance." *Id*.

homeless individuals to get arrested (whether or not they are eventually prosecuted) for the commission of usually minor, misdemeanor offenses[10] which are oftentimes inadvertently committed, and only committed as a result of an individual's homeless status—is one common method that many cities have adopted to combat homelessness.

These statutes are problematic for several reasons. Pragmatically, they do not work – while it is true that these policies may reduce the *visibility* of homeless individuals in major cities, they do little to actually address any of the underlying issues[11] contributing to homelessness. Indeed, they often actually have a "boomerang effect," and make homelessness *worse* by creating new barriers between individuals experiencing homelessness and their ability to gain meaningful employment and permanent housing.[12] Theoretically and philosophically, they represent a continuation of "broken windows" policies that target signs of disorder—symbolized in the broken window, and extending to crimes like graffiti, fare-dodging, and (to some degree) nonviolent misdemeanor drug offenses—rather than focusing limited law enforcement resources on the suppression of major crimes only.[13] "Broken windows" offenses notoriously target and disproportionately impact minority communities, particularly people of color and those that are economically disadvantaged (including individuals experiencing homelessness).[14] Finally, legally some of these statutes have been deemed unconstitutional or otherwise unlawful. Indeed, courts in at

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[10] There are dozens of different statutes and ordinances that can be considered as laws that criminalize homelessness, including those prohibiting camping or sleeping in public, anti-panhandling ordinances, laws prohibiting loitering, loafing, or vagrancy, laws prohibiting living in cars or food sharing, and more. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 19–24, (2014), https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf (last visited Sept. 26, 2019) [hereinafter NO SAFE PLACE]. The prevalence of these statutes and ordinances varies by offense and by city, but they are relatively common across the board. For example, 76% of cities prohibit begging in particular public places, while 43% of cities prohibit sleeping in vehicles. *Id* at 8.

[11] While there are several root causes of homelessness, a lack of affordable housing has been one of the most impactful throughout recent American history. "The federal government's failure to recognize and remedy the affordable housing shortage . . . led to a homelessness crisis." Eila Savela, *Homelessness and the Affordable Housing Shortage: What Is to Be Done*, 9 LAW & INEQ. 279, 279–80 (1991).

[12] *See* NO SAFE PLACE, *supra* note 10, at 32.

[13] While the term "broken windows" was first coined by social scientists, it has been enhanced by police and policymakers over time. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982*,* https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

[14] To this point, one of the founders of "broken windows" theory—George L. Kelling—has remarked publicly on the problematic nature of the extension of his theory into various policies, and the way those policies disproportionately impact vulnerable populations. He stated that, "[t]here's been a lot of things done in the name of Broken Windows that I regret." Sarah Childress, *The Problem with "Broken Windows" Policing*, PBS: FRONTLINE (June 28, 2016), https://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing/.

least two major American cities—New York City[15] and Miami[16]—have found as such and ordered cities to revise their policies criminalizing homelessness to comport with federal, state, and local laws.

This paper will first briefly analyze how courts in New York and Miami have addressed homelessness in general as well as the criminalization of homelessness via the decisions of *Callahan v. Carey* and *Pottinger v. City of Miami*, respectively, in the next section. Section III will establish that LGBTQ individuals are disproportionately impacted by homelessness and briefly analyze potential explanations for that disproportionality, which makes LGBTQ people particularly vulnerable to being victimized by policies criminalizing homelessness. Section IV will draw several connections between the historical criminalization of LGBTQ individuals due to their LGBTQ status and the still-occurring criminalization of homeless individuals as discrimination based on status, utilizing the framework of status/act binaries discussed in *Robinson v. California* and *Powell v. Texas*; it will then discuss the criminalization of homelessness generally as a continuance of the historical criminalization of LGBTQ individuals. This paper will conclude with a bold proposal in Section V: that, in order to truly end the criminalization of LGBTQ people, lawyers and activists must focus their efforts on the criminalization of homelessness in general, considering criminalization of the latter to be one of the last vestiges of criminalization of the former and attacking it to ensure that full LGBTQ equality is one day realized.

II. A SEA CHANGE – CALLAHAN & POTTINGER

In 1979, civil rights activists in New York won a major victory when the New York State Supreme Court found that there was a constitutional right to shelter under the state constitution, ruling in favor of a class of homeless individuals and ordering that New York City and New York State provide shelter to homeless men.[17] In particular, the decision relied upon Article XVII of the New York State Constitution, which states that "[t]he aid, care, and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions . . . ,"[18] rights which are significantly broader than those granted by the federal constitution.[19] Two years later,

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[15] *See generally* Callahan v. Carey, No. 79-42582 (N.Y. Sup. Ct. Dec. 5, 1979).

[16] *See generally* Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

[17] *See* Callahan, No. 79-42582.

[18] N.Y. CONST. art. XVII, § 1; *see also The* Callahan *Legacy:* Callahan v. Carey *and the Legal Right to Shelter*, COALITION FOR HOMELESS, https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/.

[19] Lindsey v. Normet, 405 U.S. 56 (1972), is often cited as proof that there is no federal right to housing enshrined in the United States Constitution, although housing rights advocates argue that this ruling is far from dispositive. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, "SIMPLY

Callahan v. Carey was settled via the establishment of a consent decree, wherein the City and State of New York agreed to ensure that all men who were homeless "by reason of physical, mental, or social dysfunction," were provided shelter, which had to comply to minimal health and safety standards.[20] And, while aspects of the decision were specific to New York (and to protections provided by the New York State Constitution), the effects of the *Callahan* decision and consent decree eventually spread far beyond the boundaries of the Big Apple.

Indeed, several years after the completion of the *Callahan* consent decree, a similarly progressive consent decree was signed between the city of Miami and civil rights attorneys representing individuals experiencing homelessness.[21] The decree, signed in 1998, represented an uneasy truce between the parties, reached only after ten years of litigation.[22] Six years earlier, a federal court ruled that several statutes criminalizing homelessness violated the federal constitution.[23] Specifically, the court in *Pottinger v. City of Miami* found that the city's practice of arresting homeless individuals for committing "life-sustaining" misdemeanors—such as sleeping or standing on sidewalks, benches, or parks—violated the Eighth Amendment right to travel.[24] In addition, the court also found that the city's practice of seizing (and at times, destroying)[25] the property of homeless individuals violated the Fourth Amendment.

This ruling led to the creation of a consent decree in 1998, which provided (among other things) for sensitivity and pragmatic training of law enforcement personnel in their interactions with individuals experiencing homelessness.[26] Specifically, the consent decree adopted a protocol for law enforcement officers in their treatment of homeless individuals wherein if an officer witnessed a homeless individual participating in "life sustaining conduct" misdemeanors (including eating, sleeping, sitting, congregating, or walking in public), the officer should ask the homeless individual to stop the conduct, and offer them a spot in an available shelter.[27] If the person accepted this assistance, no arrest could be made—and, it is only if there is available shelter, and the individual experiencing homelessness and

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UNACCEPTABLE": HOMELESSNESS AND THE HUMAN RIGHT TO HOUSING IN THE UNITED STATES 27–28 (2011), https://nlchp.org/wp-content/uploads/2018/10/Simply_Unacceptable.pdf.

[20] *See* COALITION FOR THE HOMELESS, *supra* note 18.

[21] *See generally* Settlement Agreement, Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992) (No. 88-2406-CIV-ATKINS).

[22] *Id.*

[23] *See generally* Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

[24] *Id.*

[25] *Id.* at 1555–56. ("In April 1990, plaintiffs filed their Second Application for Preliminary Injunction after two burning incidents in Lummus Park in which City police officers awakened and handcuffed class members, dumped their person possessions—including personal identification, medicine, clothing and a Bible—into a pile, and set the pile ablaze.")

[26] *See* Settlement Agreement, *Pottinger*, 810 F. Supp. 1551 (No. 88-2406-CIV-ATKINS).

[27] *See id.* at 8.

participating in a "life sustaining conduct" misdemeanor *refuses* the shelter, that that individual could be arrested.[28] While the *Pottinger* decision has prevented the arrests of countless homeless individuals in Miami, its future as of the time of writing is uncertain. In February 2019, federal Judge Federico Moreno[29] terminated the *Pottinger* consent decree, leaving homeless individuals in Miami vulnerable to unnecessary arrests[30] and detrimental treatment from police once more[31]—treatment that, at its worst, may be deadly.[32] Despite this recent ruling (which may be appealed) and the questionable future of the *Pottinger* rights, the approximately twenty years that the consent decree has been in place have been revolutionary for the rights of homeless individuals in Miami, in the same way that the *Callahan* consent decree has altered the treatment of homeless individuals in New York. And, while of course not every state has adopted these sorts of protections for homeless individuals, it is inarguable that the *Pottinger* and *Callahan* decisions and consent decrees served as vital lodestars in the legal movement against the criminalization of homelessness.[33]

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[28] *Id.* at 9.

[29] *See* Jerry Iannelli, *Judge Invalidates Miami's Landmark Homeless-Protection Order from 1998*, MIAMI NEW TIMES (Feb. 15, 2019, 3:16 PM), https://www.miaminewtimes.com/news/miami-judge-throws-out-pottinger-homeless-protection-law-11087371.

[30] There are many statutes on the books in Miami that can lead to the arrest of homeless individuals, particularly with the *Pottinger* protections no longer in place. Some of these statutes include: Miami Ordinance § 22-6 (which outlaws littering); § 37-3 (which outlaws sleeping "on any of the streets, sidewalks, public places or upon the private property of another without the consent of the owner thereof"); § 37-4 (which outlaws living, sleeping, cooking, bathing, or housekeeping inside of one's car); § 37-6 (which prohibits "aggressive" begging or obstructing pedestrian or vehicular traffic while begging); §37-8 (which prohibits panhandling of all types in certain locations, many of which are in downtown where there is a significant homeless population); § 37-11 (which outlaws public urination and defecation); § 38-3 (which prevents individuals from being present in city parks and playgrounds from 10:00 PM to 7:00 AM daily) and § 54-2 (which prohibits "the obstruction of free passage over, on or along a street, sidewalk, or public right-of-way, whether such obstruction results from the manner in which a person or number of persons shall stand, loiter, walk, sit, lie, or camp on said street, sidewalk, or public right-of-way"). MIAMI, FLA. CODE OF ORDINANCES §§ 22-6, 37-3, 37-4, 37-6, 37-8, 37-11, 38-3, 54-2 (2019), available at https://library.municode.com/fl/miami/codes/code_of_ordinances?nodeId=10933.

[31] According to the reasoning employed by Judge Moreno, it seems that the *Pottinger* consent decree is a victim of its own success. "Miami has become the best city in the country in dealing with the homeless," he wrote, before finding that the public health and safety concerns connected to life-sustaining misdemeanors outweighed the civil rights interests of homeless individuals and terminating the consent decree. Pottinger v. City of Miami, 359 F. Supp. 3d 1177, 1181 (S.D. Fla. 2019).

[32] Part of the argument of the civil rights attorneys was that Miami police were clearly still violating *Pottinger*, which is why it had to be strengthened (or, at least, upheld) rather than terminated. The most egregious of these violations is exemplified by the arrest of Tabitha Bass for "[o]bstructing the sidewalk" in March 2018, after she was found sleeping on the street with her boyfriend. Bass, who was ill at the time of her arrest, spent three days in jail without access to medical care, and died weeks later. *See* Tarpley Hitt, *Police Broke Rules While Arresting Homeless Woman Who Later Died, Activists Say,* MIAMI NEW TIMES (May 18, 2018, 8:00 AM), https://www.miaminewtimes.com/news/amid-miamis-homeless-crackdown-police-break-the-rules-and-a-woman-dies-10359984.

[33] Notably, the *Pottinger* case was cited in a recent Ninth Circuit opinion, finding that prosecuting homeless individuals for sleeping outside on public property violated the Eighth Amendment's prohibition on cruel and unusual punishment. *See* Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018).

III. A PERFECT STORM – LGBTQ YOUTH AND HOMELESSNESS

Homelessness does not affect all populations equally; thus, neither does the criminalization of homelessness. According to one report, youth in general have a significant risk of experiencing homelessness[34]—the study found, in fact, that one out of every 30 "youth ages 13-17 experienced a form of homelessness over a 12-month period," as did one out of every 10 young adults ages 18-25.[35] LGBTQ youth[36] are disproportionately impacted; indeed, this report found that LGBTQ "youth have a 120% higher risk of reporting homelessness compared to youth who identify as heterosexual and cisgender."[37] The Human Rights Campaign echoed these findings, noting that "[e]stimates show that LGBTQ youth comprise up to 40 percent of the total unaccompanied homeless youth population," despite making up just "five to 10 percent of the overall youth population."[38] There are several reasons why LGBTQ youth are disproportionately affected by homelessness, and are thus more vulnerable to being impacted by the various policies which criminalize homelessness. Many of these reasons have to do with the intersectionality between LGBTQ populations and other disadvantaged populations. For example, one of the most influential factors leading to homelessness is a low socioeconomic status[39] —and, LGBTQ

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[34] M.H. MORTON ET AL., CHAPIN HALL AT THE UNIV. OF CHI., MISSED OPPORTUNITIES: YOUTH HOMELESSNESS IN AMERICA (2017), http://voicesofyouthcount.org/wp-content/uploads/2017/11/ChapinHall_VoYC_NationalReport_Final.pdf; Richard A. Hooks Wayman, *Homeless Queer Youth: National Perspectives on Research, Best Practices, and Evidence-based Interventions*, 7 SEATTLE J. FOR SOC. JUST. 587, 590–91 (2009) (footnotes omitted) *(*"Homeless youth are typically defined as unaccompanied persons, aged twelve to twenty-four, who do not have familial support and who are living in shelters, on the streets, in a range of places not meant for human habitation (cars, abandoned buildings), or in others' homes for short periods under circumstances that make the situation highly unstable ("couch surfing" or highly mobile youth). The age range was established to correspond to the years of adolescent brain development, which current research shows is not primarily completed until the early twenties.")

[35] MORTON ET AL., *supra* note 34, at 2, 5.

[36] The term "LGBTQ youth" generally refers to young adults that identify as lesbian, gay, bisexual, transgender, queer, questioning, intersex, or asexual. For additional explanation of the LGBT/LGBTQ acronym and the various identities it can encompass, see Bill Daley, *Why LGBT Initialism Keeps Growing,* CHI. TRIB. (June 2, 2017, 11:00 AM), https://www.chicagotribune.com/lifestyles/sc-lgbtqia-letters-meaning-family-0606-20170602-story.html.

[37] *See* MORTON ET AL., *supra* note 34, at 12-13.

[38] *New Report on Youth Homeless Affirms that LGBTQ Youth Disproportionately Experience Homelessness,* HUM. RTS. CAMPAIGN: BLOG (Nov. 15, 2017), https://www.hrc.org/blog/new-report-on-youth-homeless-affirms-that-lgbtq-youth-disproportionately-ex.

[39] One factor which may contribute to many LGBTQ individuals existing in a fairly low socioeconomic class is the various challenges that LGBTQ students face within education. These factors, when combined, create an unfriendly educational environment for LGBTQ students, which can lead to disproportionately high dropout rates (which can then, eventually, contribute to homelessness rates as well). *See* Mudasar Khan et al., *Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475 (2017); *see also* NEAL A. PALMER ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, EDUCATIONAL EXCLUSION: DROP OUT, PUSH OUT, AND SCHOOL-TO-PRISON PIPELINE AMONG LGBTQ YOUTH (2016), https://www.glsen.org/sites/default/files/Educational%20Exclusion_Report_6-28-16_v4_WEB_READY_PDF.pdf (finding that "LGBTQ students may be more likely to drop out of school due to hostile school climates they may face, in addition to potential other challenges outside of school caused by discrimination and stigma.").

individuals experience higher rates of poverty than non-LGBT people.[40] LGBTQ people are also significantly more likely to experience certain disabilities[41] (including HIV/AIDS[42] and various mental health issues)[43] than heterosexual individuals, which can also contribute to higher rates of homelessness[44] among these particular LGBTQ individuals. However, there is a singular, most impactful factor that leads to disproportionately high rates of LGBTQ homelessness, especially among youth: the coming out process and all of the fallout that is often associated with it.

According to a study by the Williams Institute, 46% of homeless LGBTQ youths "ran away because of family rejection of [their] sexual orientation or gender identity," while 43% were "forced out by parents . . ."[45] One study even found that approximately thirty percent of LGBTQ adolescents are physically abused as a result of coming out.[46] These reactions from parents or other family members often stem from religious belief; however, at times a parent will reject their LGBTQ child "to please their spouse or partner," or because they "think that an LGBT[Q] child

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[40] *See* Gary J. Gates, *LGBT Americans Report Lower Well-Being*, GALLUP (Aug. 25, 2014), https://news.gallup.com/poll/175418/lgbt-americans-report-lower.aspx (finding that LGBT Americans report lower overall financial well-being than non-LGBT individuals); *see also* TAYLOR N. T. BROWN ET AL., WILLIAMS INST., FOOD INSECURITY AND SNAP PARTICIPATION IN THE LGBT COMMUNITY 10 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-and-SNAP-Participation-in-the-LGBT-Community.pdf (finding that in 2016, 27% of LGBT adults experienced a time in the past year when they did not have enough money to feed themselves or their families—a rate that was over 1.5 times higher than that of non-LGBT adults).

[41] *See generally* 42 U.S.C. § 12102(1)(A) (2012).

[42] The risk of HIV/AIDS (and other sexually transmitted diseases) is enhanced for homeless youth, particularly those who identify as LGBTQ. A study published by the American Journal of Public Health found that more than twice as many LGBT youths as heterosexual youths reported they neglected to use protection during sex "all of the time." It also noted that homeless youths often participate in "risky sexual behavior, including prostitution and survival sex (sex in exchange for money, drugs, or shelter)." These factors, when combined, make LGBTQ homeless youth and adults incredibly vulnerable to HIV/AIDS and other sexually transmitted diseases. *See* Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 AM. J. PUB. HEALTH 773, 773–76 (2002).

[43] *See LGBTQ,* NAT'L ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/FindSupport/LGBTQ (last visited Sept. 3, 2019) (pointing to a study that found "LGB adults are more than twice as likely . . . as heterosexual adults" to experience a mental health disorder like major depression, generalized anxiety disorder, or post-traumatic stress disorder).

[44] *See* KAYA LURIE & BREANNE SCHUSTER, SEATTLE UNIV. SCH. OF LAW, HOMELESS RIGHTS ADVOCACY PROJECT, DISCRIMINATION AT THE MARGINS: THE INTERSECTIONALITY OF HOMELESSNESS & OTHER MARGINALIZED GROUPS vi (Sarah K. Rankin ed., 2015), https://digitalcommons.law.seattleu.edu/hrap/8/ (footnotes omitted) (citing a study that found, nationally, "[a]pproximately 30% of the homeless population has a mental disability. In some cities, 70% of the homeless population has a mental illness.").

[45] LAURA E. DURSO & GARY J. GATES, WILLIAMS INST. WITH TRUE COLORS FUND AND PALETTE FUND, SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICES PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS 4 (2012), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf.

[46] COLLEEN SULLIVAN ET AL., LAMBDA LEGAL DEF. & EDUC. FUND, YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ADOLESCENTS IN FOSTER CARE 11 (2001), available at https://www.lambdalegal.org/publications/youth-in-the-margins.

makes them look bad to their peers." [47] Regardless of motivations, the coming out process and its associated aftershocks often end with LGBTQ youth living on the streets,[48] contributing immensely to the LGBTQ homelessness epidemic in the United States.

LGBTQ youth, once homeless, will not necessarily live the remainder of their lives on the street.[49] There are certain resources for homeless individuals that are particularly earmarked to be allotted to youth, including those who have run away from home. The Runaway and Homeless Youth Act sets aside $115 million per year from the federal budget, spread across the pillars of a tripartite intervention strategy, to help homeless youth.[50] These three pillars include street outreach (which provides education, treatment, and referrals to vital services), basic centers (including the provision of temporary shelter, family reunification, and aftercare), and transitional living (usually consisting of long-term housing and support services).[51] But, while these efforts are admirable, they have not necessarily proven useful to LGBTQ youth specifically.

For example, while heterosexual homeless youth may be well served in a group home setting (or at least better served than they would have been on the street), LGBTQ youth particularly struggle in these group-care facilities, facing intolerance, abuse, and violence.[52] This population faces similar

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[47] Jaimie Seaton, *Homeless Rates for LGBT Teens Are Alarming, but Parents Can Make a Difference,* WASH. POST (Mar. 29, 2017), https://www.washingtonpost.com/news/parenting/wp/2017/03/29/homeless-rates-for-lgbt-teens-are-alarming-heres-how-parents-can-change-that/?noredirect=on.

[48] Negative reactions from family members after an LGBTQ youth's coming out are one of the main causes of LGBTQ homelessness—and, because of this, many LGBTQ homeless youth cannot be reunited with their families as a method of ending their homelessness (as certain other populations of youths can). This prompted Professor Jordan Blair Woods to propose a paradigm shift in child welfare law and policy that places a greater emphasis on non-family-centered approaches to serve vulnerable youth. This proposition focuses on building agency and autonomy within homeless youth and encouraging the creation of support systems outside of the traditional family structure to facilitate with the transition from homeless youth to housed adult. *See* Jordan Blair Woods, *Unaccompanied Youth and Private–Public Order Failures*, 103 IOWA L. REV. 1639 (2018).

[49] One particularly inspiring story is that of Halsey, an openly bisexual singer who was homeless after being kicked out of her home at the age of 19. In a recent speech, Halsey discussed how she considered sex work to "pay for [her] next meal" while homeless in New York—she is now a certified platinum recording artist and advocate to end LGBT youth homelessness. *See* Corinne Heller, *Halsey Reveals She Considered Having Sex for Money When She Was Homeless,* E! NEWS (Apr. 7, 2019, 11:05 AM), https://www.eonline.com/news/1030430/halsey-reveals-she-considered-having-sex-for-money-when-she-was-homeless.

[50] H.R. 5339, 115th Cong. (2018) (reauthorizing the Runaway and Homeless Youth Act). *See* 34 U.S.C. § 11280 (2018), for the amended appropriations authorization for this Act.

[51] Fact Sheet of *Runaway and Homeless Youth Act (RHYA)(P.L.110-378): Reauthorization 2013,* NAT'L NETWORK FOR YOUTH, available at https://www.nn4youth.org/wp-content/uploads/NN4Y-RHYA-Fact-Sheet-2013.pdf (last visited Sept. 20, 2019).

[52] *See* Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. 774, 794 (2006). ("Studies document instances of staff in group-care settings belittling and mistreating LGBTQ youth based on their sexual orientation or gender identity and failing to intervene to stop harassment and abuse of LGBTQ youth by their peers. When they do step in, their response is often to place LGBTQ youth in isolation, without their request or consent, rather than confronting the abusive behavior and creating policies that would foster tolerant and safe environments.") (footnotes omitted).

issues in private foster homes.[53] And, as far as shelters, federally funded providers have limited training, funding, and other support that negatively impacts their ability to serve specialized populations, including LGBTQ youth.[54] And, while it was made illegal for these federally funded shelters to discriminate against individuals on the basis of their sexual orientation or gender identity under the Obama administration,[55] the Trump administration has weakened these protections. The current Secretary of Housing and Urban Development, Ben Carson, removed online resources and training materials created to help housing providers comply with LGBTQ nondiscrimination laws and protect the health and safety of LGBTQ people in 2018, under the guise that the presence of transgender people in homeless shelters makes other residents of the shelters uncomfortable.[56] And, in many faith-based shelters (some of which may receive government grants, and some of which may not) discrimination against LGBTQ people is even more blatant, and rampant. Indeed, the Hope Center (a faith-based soup kitchen and homeless women's shelter) in Anchorage, Alaska is currently suing the city, asking for an injunction preventing the enforcement of an anti-discrimination ordinance that would force the shelter to allow transgender women to stay there overnight.[57] While it is unclear what the result of this

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[53] *See id.* at 795. ("When [child welfare-agencies] do place LGBTQ young people in private foster homes, they often fail to monitor them to ensure that foster parents are nurturing their healthy development. For example, foster parents sometimes force their LGBTQ charges to participate in 'reparative' therapy, or to attend religious services designed to convince them to renounce their sexuality or gender identity.").

[54] *See* Fact Sheet of *Runaway and Homeless Youth Act (RHYA) (P.L.110-378): Reauthorization 2013, supra* note 51.

[55] Chris Johnson, *HUD Makes Rule Final Barring Anti-Trans Bias in Homeless Shelters,* WASH. BLADE (Sept. 20, 2016, 1:09 PM), https://www.washingtonblade.com/2016/09/20/hud-finalizes-rule-barring-anti-trans-discrimination-in-homeless-shelters/.

[56] *See* Kashmira Gander, *Ben Carson: Trans People in Homeless Shelters Make Others Uncomfortable,* NEWSWEEK (Mar. 21, 2018, 6:49 AM), https://www.newsweek.com/ben-carson-trans-people-homeless-shelters-make-others-uncomfortable-854412. ("Responding to a question by Illinois Democratic Representative Mike Quigley during a House subcommittee hearing, Carson said: 'There are some women who said they were not comfortable with being in a shelter [with] somebody who had a very different anatomy.'. . . Quigley raised the issue after the HUD removed online resources created to help housing providers protect LGBTQ people and comply with nondiscrimination laws.").

[57] Interestingly, much of the rhetoric used by the attorneys representing The Hope Center (who work for the "Alliance Defending Freedom" [ADF], the very same conservative Christian law firm that previously defended evangelical baker Jack Phillips, in the recent Supreme Court case *Masterpiece Cakeshop v. Colorado Civil Rights Commission*) mirrors that used by Ben Carson in justifying his policy decisions as Secretary of HUD. Attorneys for ADF, purporting to stand for the interests of women in shelters who do not wish to share space with transgender women, have publicly stated that "Many of the women Downtown Hope Center serves have suffered rape, physical abuse, and domestic violence. They shouldn't be forced to sleep or disrobe in the same room as a man." The problem with this rhetoric is, of course, that transgender women are women, not men—regardless of their sexual anatomy—and that the general gendered nature of homeless shelters excludes not only transgender individuals, but also those that are non-binary, gender non-conforming, or intersex as well. *See* Carol Kuruvilla, *Christian Shelter Defends Choice to Reject Homeless Transgender Woman*, HUFFPOST (Jan. 14, 2019, 6:05 PM),

particular lawsuit will be, the fact remains that there are many barriers still in place preventing LGBTQ homeless youth from accessing resources, even those that are particularly set aside for youth.[58] The effects of childhood and youth homelessness negatively impact both homeless individuals[59] and society at large;[60] as such, it is vital to understand the factors that contribute to the disproportionate rates of LGBTQ youth homelessness to create viable, sustainable solutions for LGBTQ youth homelessness—and homelessness more generally—in the United States.

IV. PARALLEL LINES – THE CRIMINALIZATION OF LGBTQ PERSONS & INDIVIDUALS EXPERIENCING HOMELESSNESS AS STATUS CRIMINALIZATION

By virtue of experiencing homelessness at absurdly high rates, LGBTQ youth and adults[61] are more vulnerable to being arrested or even incarcerated as a result of various policies that criminalize homelessness than non-LGBTQ individuals. But these laws that criminalize homelessness and unfairly impact LGBTQ individuals because of their disproportionate presence on the streets are far from the only laws that have targeted LGBTQ people and branded them as criminals for fairly benign behavior. In fact, the United States has a significant and sordid history of criminalizing LGBTQ people simply for being LGBTQ – mostly, this took the form of laws criminalizing "sodomy." While the colloquial connotation of sodomy, at least currently, may include nonconsensual oral and anal sex (which

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https://www.huffpost.com/entry/alliance-defending-freedom-hope-center-transgender-women_n_5c3ca570e4b0922a21d703ce.

[58] *See* Hooks Wayman, *supra* note 34, at 589–90. ("Given the magnitude of LGBTQ homeless youth in America, the LGBTQ overrepresentation among the homeless population, and their amplified levels of risk for physical violence and sexual exploitation, the current structure of crisis shelters and transitional housing is alone insufficient to address their needs.").

[59] *See id.* at 589. ("LGBTQ homeless youth experience instability, abuse, and exploitation during a critical stage in human development. Without residential stability, nurturing, and opportunities for positive youth development, LGBTQ youth are set up for further challenges as adults.").

[60] Although perhaps they are discussed less often than the personal costs of youth homelessness, there are fiscal costs to this issue as well that affect not only the homeless individuals themselves but also society at large. According to one study by economist Steven Foldes, examining a wide range of expenses (including "lost earnings, lost tax payments, public expenditures and victim costs for crime, welfare costs, public costs for healthcare, education and job training and public support of housing") and applying those costs to 151 youth experiencing homelessness in Central Minnesota, the lifetime excess cost of the homelessness of these youths to society is at least $93 million. *See* Stephanie Dickrell, *Child Homelessness Can Have Long-Term Consequences,* ST. CLOUD TIMES (June 4, 2016, 9:45 AM), https://www.sctimes.com/story/news/local/homelesskids/2016/06/04/child-homelessness-can-have-long-term-consequences/84902750/.

[61] While the vast majority of scholarship and data regarding LGBTQ homelessness focuses on LGBTQ homeless youth, it is likely that LGBTQ adults also experience homelessness at a disproportionate rate. According to The National LGBTQ Task Force, "…LGBT[Q] adults are also vulnerable to homelessness because of a widespread lack of nondiscrimination protections." See *Task Force: Homelessness is a 'Critical Issue for the LBGT Community'*, NATIONAL LGBTQ TASK FORCE (June 25, 2010), http://www.thetaskforce.org/task-force-homelessness-is-a-critical-issue-for-the-lgbt-community/.

generally still is and should be illegal), for the majority of the twentieth century, laws criminalizing "sodomy" included *consensual* oral and anal sex, as well. Interestingly, however, this was likely not the original purpose of these laws.

According to an amicus brief filed by the Cato Institute in the landmark Supreme Court case invalidating anti-sodomy laws *Lawrence v. Texas*, nineteenth century anti-sodomy laws criminalized "crimes against nature, committed with mankind or with beast" which generally included anal sex between men and women, men and other men, or men and animals.[62] Court records from this time period show that, far from aiming to criminalize consensual same-sex sexual behavior, these anti-sodomy laws were passed to prevent sexual assault – indeed, consenting adults engaging in prohibited behaviors were considered immune from prosecution in most jurisdictions.[63] Throughout the next century, however, the substance and enforcement of anti-sodomy laws changed drastically – substantively, the laws began to include the criminalization of oral (as well as anal) sex, and the onset of McCarthyism in the 1950s led to persecution of homosexual men and suspected homosexual men via the selective enforcement of these laws on consenting adults.[64] This persecution continued throughout the second half of the twentieth century; indeed, until Illinois became the first state to overturn their anti-sodomy law in 1961, every state criminalized private consensual sodomy.[65] The catalyst for this change in Illinois was the state's adoption of the Model Penal Code, which had been altered to reflect the decriminalization of sodomy in 1955.[66] This alteration also reflected a larger paradigm shift towards the enhanced value placed on a right to privacy, particularly as it related to questioning the proper role of criminal law in regulating benign, intimate behavior.[67]

Perhaps as a form of backlash against this movement, by 1986 the legal tide turned once more towards favoring the criminalization of consensual same-sex sodomy.[68] *Bowers v. Hardwick,* decided that year, was the first watershed Supreme Court case challenging anti-sodomy laws, and its result was crushing for proponents of decriminalization.[69] In *Bowers*, the plaintiff – a "practicing homosexual" – had been charged with and convicted of violating a Georgia statute prohibiting consensual sodomy, after he was observed committing this act with another male, in his bedroom.[70] Upon

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[62] Brief of the CATO Inst. as Amicus Curiae in Support of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152342, at *9.

[63] *Id.* at *12.

[64] *Id.* at *13–14.

[65] *See* Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 696 (2017).

[66] Richard Weinmeyer, *The Decriminalization of Sodomy in the United States,* 16 AM. MED. ASS'N J. OF ETHICS 916, 917 (2014).

[67] *See* Woods, *supra* note 65, at 697.

[68] *Id*. at 699.

[69] *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986).

[70] *Id.* at 187–88.

review, the Court ruled that the federal constitution provided no "…fundamental right to homosexuals to engage in act of consensual sodomy", and upheld the right of Georgia – and, by extension, all states who so desired – to pass and enforce anti-sodomy laws.[71] This case remained good law until the turn of the century, when the Court once more took up the question of anti-sodomy laws in *Lawrence v. Texas*, decided in 2003.

In *Lawrence*, police officers in Houston, Texas were dispatched to the home of John Lawrence to respond to a report of a weapons disturbance.[72] They entered the apartment, where they observed Lawrence and another man (Tyler Garner) consensually engaging in an illegal sexual act – to wit, "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." [73] Both men were arrested, charged, and convicted of violating Texas' anti-sodomy law, which (unlike the anti-sodomy laws of other states, which criminalized certain sexual acts regardless of whether they were committed by same or opposite-sex people) criminalized "deviate sexual intercourse" (described as oral or anal sex) with an individual of the same sex only.[74] But, rather than focusing on the fact that this law as written applied only to homosexual individuals, the Court instead held that under the Due Process clause[75] of the federal constitution, any two consenting adults (including Lawrence and Garner) had "…the full right to engage in [sexual] conduct without intervention of the government," [76] thus invalidating any state's anti-sodomy law that prohibited specified sexual acts between consenting adults, in private.[77] This decision also served to overturn the Court's previous decision in *Bowers v. Hardwick.*[78]

Lawrence v. Texas was revolutionary for the LGBTQ rights movement because it effectively decriminalized same-sex sexual relations. In doing so, it served to largely decriminalize not only the *act* of anal and oral sex between two individuals of the same sex, but also the *status* of being LGBTQ in the United States. That is, many (if not most) LGBTQ people have sex with members of the same gender – that is one of the hallmarks of

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[71] *See id.* at 192.

[72] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[73] *Id.* at 563.

[74] *Id.*

[75] *See generally* Kirstin Andreasen, *Lawrence v. Texas: One Small Step for Gay Rights; One Giant Leap for Liberty*, 14 J. CONTEMP. LEGAL ISSUES 73 (2004) (providing a deeper analysis of the due process argument in *Lawrence*).

[76] Lawrence, 539 U.S. at 578.

[77] Despite being invalidated by *Lawrence* in 2003, as of 2014 twelve states (Louisiana, Alabama, Florida, Idaho, Kansas, Michigan, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, and Utah) still had laws on their books that banned sodomy between consenting adults. Some of these laws were tied together with aggravated (nonconsensual) sodomy laws, which lawmakers used as an excuse to fail to repeal them. *See 12 States Still Ban Sodomy A Decade After Court Ruling,* USA TODAY (Apr. 21, 2014, 6:42 PM), https://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/.

[78] Lawrence, 539 U.S. at 578.

an LGBTQ identity for many (if not most) LGBTQ individuals.[79] As such, criminalizing same-sex sexual relations effectively criminalized the status of *being* LGBTQ; and decriminalizing the former also served to decriminalize the latter. Following this, until *Lawrence* was decided in 2003, LGBTQ identity was criminalized (perhaps indirectly) throughout the United States. Interestingly, almost forty years before the decision in *Lawrence*, the Supreme Court ruled that status-based discrimination was illegal under the Eighth Amendment.[80] Indeed, in *Robinson v. California*, the Court found that a statute criminalizing being addicted to narcotics constituted cruel and unusual punishment, because it allowed an individual to be arrested solely due to their "status" rather than their participation in illegal acts.[81] In explaining the difference, and their ruling, they wrote:

> This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession... Rather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense...' It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease…We cannot but consider the statute before us as of the same category.[82]

To this end, although under *Robinson* it was still perfectly legal to criminalize the act of doing or selling drugs, it became illegal to criminalize the status of being an addict. The "status/act binary" – the legal differences between status (which cannot be criminalized) and acts (which can certainly be criminalized) – was further clarified in *Powell v. Texas*, decided six years after *Robinson*. Here, Leroy Powell had been arrested for public intoxication; he argued that the arrest was a violation of the Eighth Amendment because, as in Robinson, he was being punished simply for his status as a chronic alcoholic.[83] The Court disagreed, finding that "…appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion"; in short, that the law in question punished Powell for the *act* of being drunk in a public place, rather than for his *status* as an alcoholic.[84] As such, the law was upheld as

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[79] This is merely a generalization that in no way aims to invalidate the desires, experiences or identities of asexual, bisexual, pansexual, or other members of the LGBTQ community who may or may not have sexual relations with members of the same sex.

[80] *See generally* Robinson v. California, 370 U.S. 660 (1962).

[81] *Id.* at 666.

[82] *Id.*at 666-67.

[83] *See generally* Powell v. Texas, 392 U.S. 514 (1968).

[84] *Id.* at 532.

constitutional.[85]

Although the status/act binary was not discussed per se in the *Lawrence* decision, it stands to reason that the anti-sodomy laws of several states had not been invalidated prior to 2003 under the *Robinson* precedent because they purportedly criminalized the *act* of "sodomy" (effectively, certain sex acts between two people of the same gender) rather than the explicit *status* of actually being LGBTQ, in the same way that the law in *Powell* criminalized the *act* of going into public while drunk, rather than the *status* of being an alcoholic. The problem is, however, that the status/act binary is largely a legal fiction. The failings of the binary, and the reasoning behind its creation and sustenance, are clear in several contexts, particularly those of the criminalization of sexual orientation and that of homelessness status. Criminalizing an act that nearly all LGBTQ people participate in by virtue of being LBGTQ, that is so inextricably tied to LGBTQ status – oral and anal sex with individuals of the same gender – is status criminalization by another name. And, similarly, criminalizing acts that nearly all homeless individuals participate in by virtue of being homeless – sleeping on the street, for example – is equally insidious status criminalization, regardless of legal framings and justifications.

On the topic of legal justifications, the most common reasoning ensuring that criminalizing acts is legally protected, while it remains prohibited to criminalize status, comes from one of the most basic tenants[86] of criminal law: that is, that each crime must carry with it an *actus reus*, and a requisite *mens rea*.[87] The former refers to a wicked act, while the latter refers to a guilty mind; requiring both for criminal prosecution ensures both that one is not punished merely for thinking guilty thoughts, and that one who completes a wicked act by accident is subjected to no (or less, in certain cases) criminal liability than one who completes the same act with the requisite malicious intent.[88] Following this logic, laws criminalizing pure "status"– being an alcoholic, narcotics addict, mentally ill individual, or leper (borrowing from the examples used in *Robinson*) – have no *actus reus* component and, as such, cannot be upheld.[89] On the

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[85] *Id.* at 537.

[86] WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 125 (Oxford University Press 2012).

[87] These two requirements are so enmeshed in American law that they have been discussed by name in seminal works influencing popular culture. Indeed, in the popular film *Legally Blonde*, protagonist Elle Woods begins her direct examination of witness and eventual murder suspect Chutney Windham by addressing the judge and stating that her client (prominent fitness instructor Brooke Windham) cannot be found guilty. The prosecution's case, she tells the judge, has shown that "…there is a complete lack of *mens rea* which, by definition, tells us that there can be no crime without vicious will." The judge responds, "I am aware of the meaning of *mens rea*," and then instructs Ms. Woods to examine her witness. *See* LEGALLY BLONDE (Type A Films 2001).

[88] *See* SCHABAS, *supra* note 86.

[89] "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some

other hand, laws criminalizing certain actions[90] (even those that are inseparably tied with particular statuses) satisfy both elements which comprise a crime, and are hence not subjected to significant legal scrutiny as a general matter. This paper intends to depart from this and draw attention to the ways in which criminalization policies – against LGBTQ people (as shown in *Lawrence*), and against homeless individuals – use the status/act binary to form a jurisprudence of excuse which allows them to perpetuate status-based discrimination at will. And, rather than eliminating it, recent advancements in the LGBTQ rights movement that have only made this discrimination more clandestine and focused on the most marginalized and hidden members of the community: LGBTQ homeless youth and adults.

In Michelle Alexander's earthshattering book *The New Jim Crow*: *Mass Incarceration in the Age of Colorblindness*, she argued that mass incarceration and the war on drugs serves as merely the most modern form of a racial caste system, and that the criminalization and incapacitation of black individuals has caused and continues to cause similar harm to black communities as more blatant forms of racial discrimination, such as the infamous Jim Crow laws that were synonymous with the American south prior to the civil rights movement of the 1960s.[91] Although Alexander does not make an explicit status/act binary argument in her work, it can be construed that she at least implicitly argues that it is black identity and status that is now and has always been criminalized in America; and, that it is only the currently acceptable method of that criminalization that has evolved throughout history, from the more explicitly status-based criminalization of the Jim Crow era (where black individuals could be arrested for even inadvertently using a "white" restroom or drinking fountain, even if there was no alternative available) to the more easily justifiable act-based criminalization of the war on drugs. Putting this aside, in short, the crux of

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behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*." Powell*,* 392 U.S. at 533.

[90] It is questionable as to if the Court's decision in *Powell* stands for the assertion that *any* act can be punished (as long as mere status is *not* being punished) or that only *voluntary* acts can be punished. The answer may come down to one's interpretation of the meaning of Justice White's concurrence in *Powell*, although the former interpretation holds most favor. "As a doctrinal matter, it remains unclear whether White's vote should count towards the plurality's holding that the State may punish any conduct so long as it is not punishing mere status—or, alternatively, whether his vote should count towards the dissent's interpretation of *Robinson*, under which the State may punish only volitional conduct, that is, conduct which the defendant has the power to prevent… History, however, has not entirely borne out the success of the volitional reading, as 'the more common [judicial] interpretation has been to treat the plurality opinion as controlling and *Robinson* as limited to a proscription of status criminality.'" Benno Weisberg, *When Punishing Innocent Conduct Violated the Eighth Amendment: Applying the* Robinson *Doctrine to Homelessness and Other Contextual Crimes,* 96 J. CRIM. L. & CRIMINOLOGY 329, 339–40 (2005).

[91] ALEXANDER, *supra* note 1.

Alexander's argument is as follows: (a) African-Americans were historically criminalized (and, as a result, incapacitated) by systems of outward oppression and discrimination, including the various policies of the Jim Crow era; (b) currently, African-Americans are disproportionately arrested for drug offenses, which have been criminalized via the war on drugs; and (c) by virtue of these two facts, African-Americans remain criminalized and discriminated against due to their race, despite this more current form of oppression being perhaps more insidious than previous, more blatant iterations.[92]

In extending this analogy to the LGBTQ population and the criminalization of homelessness, this paper has argued that: (a) LGBTQ people in America have been historically criminalized by policies of outward discrimination, including anti-sodomy laws; (b) currently, LGBTQ people disproportionately experience homelessness, which has been criminalized through various ordinances; and (c) by virtue of these two facts, LGBTQ people remain discriminated against and criminalized due to their sexual orientation, despite this currently accepted form of oppression being less direct (and, certainly less publicized) than prior methods. The parallels in the two arguments are clear – this does not mean, however, that there are not limitations to the analogy itself, as well as to the extension of this analogy to LGBTQ populations. Regarding the former, Michelle Alexander noted at least two significant differences between historic and current race-based discrimination – those differences similarly can be applied to the differences between historic and current discrimination based on sexual orientation. These are: (a) the absence of overt hostility and (b) the harm to non-minority individuals[93], both of which, Alexander noted, are seen in policies related to mass incarceration, but did not occur in prior forms of discrimination. Similarly, there is a marked absence of overtly discriminatory motivations and animus (at least, towards LGBTQ people) behind the passage of policies that criminalize homelessness – an absence that was not as clearly seen in anti-sodomy laws – and these policies clearly harm more than just LGBTQ people (who, by contrast, were largely the only population significantly impacted by laws criminalizing consensual same-sex sodomy), instead impacting all homeless individuals. This does not mean that the significance of the analogy itself, or the extension of the analogy, is diluted – rather, it merely proves Alexander's point, that the discrimination via criminalization of minority groups (especially black, and extending to LGBTQ, individuals) can and does continue despite evolving into more palatable forms that carry all of the badges of the racism and homophobia of previous policies secretly in their pockets rather than

[92] *Id.*
[93] *Id.* at 197–202.

wearing them proudly on their chests.

Of course, extending Alexander's analogy to LGBTQ populations poses unique issues. For example, one of the reasons why Alexander's analogy between Jim Crow and mass incarceration works so well is not only because it discusses the disproportionality of impact of these incapacitating systems on black men, but also because it shows the near-universality of the experience of being victimized by mass incarceration, in some way, for people of color. While the statistics in Section III of this paper clearly illustrate the disproportionality of homelessness within the LGBTQ population, it fails to show the universality of being victimized by the criminalization of homelessness for all LGBTQ people, particularly because the majority of statistics on LGBTQ homelessness focus only on LGBTQ youth. As to this latter point, it is possible that the extension of Alexander's analogy and its application to the criminalization of LGBTQ populations through the criminalization of homelessness is better suited when narrowly construed to apply to LGBTQ youth only. However, this paper attempts to broaden the application slightly under what is largely an assumption that LGBTQ adults also disproportionately (if not as universally as LGBTQ youth) are impacted by homelessness, and policies criminalizing homelessness, and that their plight is simply being ignored even more so than that of LGBTQ youth. Finally, regarding the extension of Alexander's analogy to LGBTQ populations, this paper wishes to acknowledge that black individuals have faced and continue to face more extensive oppression than LGBTQ people in America[94] – and, the purpose of extending this analogy is not to engage in an "oppression Olympics" [95] of sorts, but instead to utilize the lessons of one civil rights movement and apply them to another, to produce intersectionally beneficial results.

V. CONCLUSION & CALL TO ACTION

In the age of nationwide marriage equality[96] and "love is love," [97] it may be tempting to declare victory in the decades-long fight for LGBTQ civil

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[94] It is important to note that LGBTQ status is outwardly criminalized in several countries, with dire consequences. Indeed, same-sex sexual contact is a criminal offense in seventy-four countries and is punishable by death in thirteen countries. *See* Siobhan Fenton, *LGBT Relationships are Illegal in 74 Countries, Research Finds*, THE INDEPENDENT (May 17, 2016), https://www.independent.co.uk/news/world/gay-lesbian-bisexual-relationships-illegal-in-74-countries-a7033666.html.

[95] *See generally*, ANGE-MARIE HANCOCK, SOLIDARITY POLITICS FOR MILLENNIALS: A GUIDE TO ENDING THE OPPRESSION OLYMPICS (2011).

[96] *See generally*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[97] "Love is love" is a broadly used catchphrase within the LGBTQ civil rights movement, perhaps most impactfully used by Broadway star Lin-Manuel Miranda in a speech aired mere hours after a shooting at a gay nightclub in Orlando, Florida killed forty-nine people. *See* Charlotte Runcie, *The English Poet Who Inspired Lin-Manuel Miranda's Tonys Speech – and Why It's a Literary Masterstroke*, THE TELEGRAPH (June 13, 2016, 1:17 PM), https://www.telegraph.co.uk/theatre/playwrights/the-english-poet-who-inspired-lin-manuel-mirandas-tonys-sonnet/.

rights. And while it is of course important to recognize how far this movement has come, and how many LGBTQ individuals have benefitted from landmark decisions like *Lawrence* and *Obergefell*, it is equally essential to realize that the most marginalized members of the LBGTQ community – that is, homeless LGBTQ youth and adults – are still being subjected to discrimination via the continued criminalization of homelessness. Less than twenty years ago, the very existence of LGBTQ individuals in the United States was criminalized via widespread anti-sodomy laws; and, while the *Lawrence* decision was revolutionary, the criminalization of LGBTQ individuals because of their sexual orientation did not end in 2003. Rather, this unnecessary marginalization has merely evolved in its framework, justifications, and purported target population, in the same way that Michelle Alexander so astutely recognized had occurred (on a much greater scale) with the African American population from the era of Jim Crow to that of mass incarceration.

Following this, it is necessary for the current and future generations of LGBTQ lawyers and advocates to shift their focus to concentrate both on the reduction of the prevalence of homelessness[98] in LGBTQ youth and adults, as well as the decriminalization of homelessness in general. Ideally, from a legal perspective, this attack on the criminalization of homelessness would eventually result in a federally-binding, federally-based Supreme Court decision outlawing the criminalization of certain life-sustaining conduct which homeless individuals frequently engage in simply by virtue of being homeless. This decision would likely only come after a majority of states had passed *Pottinger*-esque decisions attacking the criminalization of homelessness (rather than those mirroring the reasoning in *Callahan*, providing homeless individuals with an affirmative right to shelter)[99] which

[98] A policy analyst made the following five recommendations to reduce and prevent LGBTQ youth homelessness: "[1] Reauthorize the Runaway and Homeless Youth Act with LGBT-specific provisions; [2] Establish standards that protect LGBT youth from bullying and harassment in schools; [3] Support initiatives that strengthen families with LGBT children . . . [4] Disassemble the school-to-prison pipeline; [and 5] Initiate efforts to research LGBT youth homelessness and track demographic data on homeless youth that includes sexual orientation and gender identity." ANDREW CRAY ET AL., CTR. FOR AM. PROGRESS, SEEKING SHELTER: THE EXPERIENCES AND UNMET NEEDS OF LGBT HOMELESS YOUTH (2013).

[99] While the decisions in both *Pottinger* and *Callahan* help provide protections for homeless individuals, they are quite different in both the types of protections they provide as well as the rationales for those protections. *Callahan* essentially affirms that homeless individuals in New York City and New York State have an affirmative right to shelter, relying on the provision of that right in the New York Constitution. *Pottinger*, on the other hand, attacks the criminalization of homelessness rather than the underlying issue of homelessness itself – and while this approach may be a more indirect way of addressing homelessness, *Pottinger* nonetheless has the practical effect of forcing advocates, courts and governments to shift towards more humane and productive strategies to combat homelessness by ensuring that outright criminalization (previously a default option to address homelessness) is no longer an option. In addressing the criminalization of LGBTQ individuals via the criminalization of LGBTQ homelessness, it is more likely that a series of *Pottinger*-esque rulings – focusing on criminalization, rather than an outright right to housing or shelter as in *Callahan* – could pass throughout several states to set the stage for a federal prohibition on the animus-based criminalization of homeless individuals, based on the reasoning of *Moreno*. *See infra* pp. 4–7.

could then cause a paradigm shift towards more compassionate ways of dealing with homeless individuals once criminalization was no longer a viable option.[100]

To accomplish this, attorneys could utilize reasoning similar to that used in *United States Dept. of Agriculture v. Moreno,*[101] one of many cases that created a more welcoming legal and political environment for non-traditional families – which eventually led to the Court's decision in *Obergefell*, legalizing same-sex marriage throughout the United States.[102] In *Moreno*, the Court held that a food stamp ordinance which prohibited households with unrelated members from receiving benefits violated the Due Process clause of the Fifth Amendment.[103] They wrote that "…if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." [104] This holding, that laws passed out of animus which intend to harm "politically unpopular groups" cannot pass the muster of even a rational basis test, could certainly be utilized to constitutionally attack laws that target one particular unpopular group – homeless individuals – criminalize their very existence. If successful, this argument could result in a case that ends the criminalization of homelessness and, by extension, the criminalization of LGBTQ homeless individuals as well.

Once LGBTQ advocates recognize the criminalization of homelessness as one of the last vestiges of the status criminalization of LGBTQ people, they will devote their significant resources – the very same resources that have allowed the LGBTQ civil rights movement to be more successful, in a shorter period of time, than any other civil rights movement in American

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[100] This series of decisions would provide the Supreme Court with the security of knowing they were ruling in favor of the will of the states as well as of the public, in the same way that the *Obergefell* decision was only able to occur after a majority of states had legalized same-sex marriage – and, perhaps more importantly, after a cultural shift had occurred regarding public opinion and social policies on gay relationships and marriage throughout the American population. *See* Dawn Michelle Baunach, *Changing Same-Sex Marriage Attitudes in America from 1988 Through 2010*, 76 PUB. OP. QUARTERLY 364, 364 (2012); *see also* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 340 (2014) ("Throughout American history, the Supreme Court has based its constitutional decisions on many sources: the Constitution's text, its framers' intent, the Constitution's structure, the Court's prior decisions, society's traditions, and contemporary social policy considerations. A conscientious judge . . . will look to all of these sources in deciding cases and in explaining the rationale for his or her conclusions.").

[101] *See generally*, U.S. Dept. of Agric. v. Moreno, 413 U.S. 528 (1973).

[102] "Taken together, the non-marital parentage cases, *Moreno, Moore*, and *Eisenstadt* reflect a shift in the law's approach to non-marriage and departures from the traditional marital family form . . . they explicitly acknowledged that departures from the marital family form occurred and that, in some circumstances, these departures would be entitled to constitutional protection. In doing so, these cases began to sketch the contours of a jurisprudence of nonmarriage that would become more fully elaborated in *Lawrence v. Texas*." *See* Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality,* 104 CALIF. L. REV. 1207, 1223 (2016) (citations omitted).

[103] *See generally Moreno*, 413 U.S. at 529.

[104] *Id.* at 534.

history[105] – to the crusade to end the criminalization of homelessness. And with this devotion of time and resources, it is fully possible that enhanced protections for homeless individuals will spread across this nation, until there is no place where it is deemed acceptable to arrest and prosecute someone merely for existing as an individual without housing. It is then, and only then, that the criminalization of LGBTQ status and LGBTQ people can be fully vanquished; and perhaps more importantly, it is then and only then – when the most marginalized members of our community too, can live freely – that it can be said that the fight for LGBTQ equality has truly been won.

[105] "If, as the Rev. Martin Luther King Jr. once said, the arc of the moral universe is long but bends towards justice, then it's arguably moving faster and bending quicker in the direction of gay rights than any civil rights movement before…by moving public opinion so dramatically and changing the political dynamic with such rapidity, the gay rights movement has achieved remarkable success with unprecedented speed." *See* Mark Z. Barabak, *Gays May Have The Fastest of All Civil Rights Movements,* L.A. TIMES (May 20, 2012, 12:00 AM), https://www.latimes.com/style/la-xpm-2012-may-20-la-na-gay-rights-movement-20120521-story.html.