OUT OF SIGHT, OUT OF MIND: REMOVING UNHOUSED PEOPLE BY PROXY OF MENTAL ILLNESS

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Abstract. Across the United States, various legal mechanisms have subjected unhoused people to cruel practices that seek to remove them from public view. These practices have included laws that criminalize sleeping in public. Following a decades-long series of Supreme Court decisions, the Ninth Circuit recently struck down these “anti-homeless” laws under the Eighth Amendment’s ban on Cruel and Unusual Punishment and held that one’s status and unavoidable conduct resulting from that status could not be criminalized. Since 2022, a second wave of removal has emerged. California and New York City have both enacted initiatives, shrouded under the guise of a “compassionate” and “transformative” framework of moral obligation, that continue to target and remove unhoused people, this time by proxy of mental illness. This article argues that this trend, which attempts to circumvent the unconstitutional criminalization of unhoused people, is concerning and misguided. Although touted as a mechanism for moving away from police interaction, conservatorship, and involuntary treatment, the practical effect of both initiatives is to create a new quasi-criminal framework that will likely increase the use of these measures. Along with several other enforcement problems they share, both initiatives will further entrench vulnerable individuals within punitive systems, the precise opposite of what California and New York City purportedly promise to deliver.

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INTRODUCTION

Homelessness is a nationwide problem and moral crisis. On a given night in January 2020, over 580,000 people experienced homelessness in America. Overwhelming evidence demonstrates that the lack of affordable housing is the main driver of homelessness. That said, a descent into homelessness also results from a confluence of other factors, including: the lack of financial resources throughout this article, I use the terms “homeless” and “unhoused,” while aware of the shift in vernacular to “unhoused” or “houseless” people. Likewise with the term “mentally ill,” as compared to people “experiencing mental illness” or “living with a mental health issue.”


2 See, e.g., State of Homelessness: 2022 Edition, NATIONAL ALLIANCE TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/ [https://perma.cc/8XVS-DWD8]. This is a vast undercount as well since homelessness is often transitory. A more accurate number is “well over a million.” Jeff Olivet, Collaborate, Don’t Criminalize: How Communities Can Effectively and Humanely Address Homelessness, UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS (Oct. 26, 2022), https://www.usich.gov/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address-homelessness [https://perma.cc/8VDL-ZAUS]. This group includes children, single adults, and families, sheltered and unsheltered, a subset of which experience chronic homelessness (people who have experienced homelessness for more than a year). Chronically Homeless, NATIONAL ALLIANCE TO END HOMELESSNESS, (Apr. 2023), https://endhomelessness.org/homelessness-in-america/who-experiences-homelessness/chronically-homeless/. This article focuses primarily on the unsheltered, who are the most visible and targeted. But all unhoused people are at risk.

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and limited employment opportunities, domestic violence, substance addiction, and mental illness. Ill-informed policy choices beginning in the early 1980s—the "modern era of homelessness"—loom large as well, including permitting rapid gentrification of major cities which pushed out lower-income individuals while constraining development under local zoning laws and resident pushback, the acceleration of deinstitutionalization (without community-based support), and deep budget cuts to both federal and state housing and social service agencies. Against this backdrop, solutions will vary based on location. But since most unhoused people reside in major cities, attacking the issue requires solutions that work in these areas.

Two areas in particular, California and New York City ("NYC"), have been particularly affected by the crisis over the years. A combination of policy initiatives and civil rights litigation, either

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5 See Homelessness and Employment, HOMELESS POLICY RESEARCH INSTITUTE (Aug. 24, 2020), https://socialinnovation.usc.edu/wp-content/uploads/2020/08/Homelessness-and-Employment.pdf [https://perma.cc/G66Q-NXAY] (noting that "in Los Angeles County, 46% of unsheltered adults cited unemployment or a financial reason as a primary reason why they are homeless," even though evidence suggests "that many people experiencing homelessness want to work and, with the right supports and opportunities, can achieve positive employment outcomes." (citation omitted)).


7 See Douglas L. Polen, Co-occurring Substance Abuse and Mental Health Problems Among Homeless Persons: Suggestions for Research and Practice, 25 J. SOC. DISTRESS HOMELESS, 1, 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4833089/ [https://perma.cc/6C5D-YUNB] ("Over a third of individuals who are homeless experience alcohol and drug problems and up to two-thirds have a lifetime history of an alcohol or drug disorder.

8 See Homelessness and Mental Illness, BRAIN & BEHAVIOR (Nov. 18, 2018), https://www.bbrfoundation.org/blog/homelessness-and-mental-illness-challenge-our-society [https://perma.cc/WEH5-TW7R] (explaining that a 2015 assessment by the U.S. Department of Housing and Urban Development showed that twenty-five percent of those who were homeless on a given night were seriously mentally ill, and forty-five percent had any mental illness, compared to just 4.2 percent of the U.S. adult population who have been diagnosed with a serious mental illness). These factors are structural, so the lack of meaningful assistance to address them contributes to homelessness (i.e., the lack of mental health services as opposed to living with mental illness). But see Demas, supra note 4 ("[T]he claim that drug abuse and mental illness are the fundamental causes of homelessness falls apart upon investigation").

9 German Lopez, Homeless in America, THE NEW YORK TIMES (July 15, 2022), https://www.nytimes.com/2022/07/15/briefing/homelessness-america-housing-crisis.html [https://perma.cc/6LX3-2SHC] (discussing how "[t]he combination of zoning rules and local protests has added to a housing deficit year after year, as growing populations have outpaced new homes built").


11 Id.


13 See, e.g., Mary K. Cunningham, The Homelessness Blame Game, URBAN WIRE (Sep. 23, 2019), https://www.urban.org/urban-wire/homelessness-blame-game [https://perma.cc/NU88-JRHJ]. (California and New York have the two highest homeless populations in the country); Francine Kieler, Care Courts: California Focuses on Mental Illness to Reduce
directly targeting unhoused people or related issues, have tried to address the issue. They have not been effective.14 Today, California’s and NYC’s leadership’s inability to effectively address the problem has resulted in severe backlash from residents and a crisis among elected officials.15 Many view unhoused people as “undesirable,” a position “animated by a set of concerns related to crime, worklessness, welfare dependency and social breakdown.”16 A natural extension of this view is a turn to criminalization. That is exactly what Los Angeles did in 1968, when it enacted a statute that criminalized homelessness.17 Following a decades-long series of Supreme Court decisions that addressed the criminalization of status, in 2006 the Ninth Circuit struck down its enforcement as violating the Eighth Amendment’s prohibition against Cruel and Unusual Punishment since it punished the status of being unhoused and the involuntary acts resulting from such.18 Not to mention its policy failure: homelessness and incarceration “increase the risk of each other.”19

The problem, of course, did not go away. After this first wave of outright criminalization was

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14 See infra Part II(A), (B). This is not to say they have not helped the problem, but that they have not been enough.

15 Lopez, supra note 9 (noting that “[h]omelessness has become a particular bad political problem for the Democrats who govern big cities, where it is most visible,” even recently leading to the “recall of San Francisco’s district attorney.”); San Quentin, Skid Row Nation: How L.A.’s Homelessness Crisis Response Spread Across the Country, L.A. MAGAZINE (Oct. 6, 2022), https://www.lamag.com/citythinkblog/skid-row-nation-how-l-a-s-homelessness-crisis-response-spread-across-the-country/ (noting that “in recent years, homelessness in New York City has reached the highest levels since the Great Depression of the 1930s,” with 60,252 homeless people sleeping in the city’s main municipal shelter system in September 2022, with thousands unsheltered sleeping “on New York City streets, in the subway system, and in other public spaces”).

16 Marine Dasse, The Neoliberalization of Public Spaces and the Infringement of Civil Liberties, 8 ANGLES: NEW PERSPECTIVES ON THE ANGLOPHONE WORLD, at 8 (2019) (citation omitted), https://journals.openedition.org/angles/595?lang=en [https://perma.cc/B7SC-GBK4]. These views contribute to stigmatization of unhoused people, which alters the social relation between unhoused people and the community, including by “imparing which policies or services are supported by the public,” contributing to prejudicial behaviors that may “include segregation, coercion, withholding help, avoidance, and hostile behaviors,” while also impacting unhoused people themselves: “those oppressed report[ed] effects on their psychological well-being” and “ability to function in social relationships.” Nyssa L. Snow-Hill, The Survey of Attitudes Toward Homeless People: The Validation of a New Instrument Assessing Negative Attitudes Toward Homeless People (2019) (Ph.D. Dissertation, University of South Carolina) at 1, 12 (available at https://scholarcommons.sc.edu/cq/viewcontent.cgi?article=6397&context=etdj).

17 L.A., Cal. Ordinance 137,269 (Sep. 11, 1968); as amended, L.A., Cal., Mun. Code § 41.18(d) (2005) ("No person shall sit, lie or sleep in or upon any street, sidewalk or other public way.").

18 Jones v. City of L.A., 444 F.3d 1118, 1138 (9th Cir. 2006), vacated as moot, 505 F.3d 1006 (on settlement); Martin v. City of Boise, 920 F.3d 584, 617-18 (9th Cir. 2019) (following the reasoning of Jones).

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defeated, a new strategy recently emerged. In 2022, California and NYC introduced initiatives that explicitly target people experiencing mental illness as a proxy to remove unhoused people from public view. Call this the second wave: quasi-criminalization, or criminalization in all but name. This turn is perhaps unsurprising, since the (inaccurate) perception of the majority of unhoused as “mentally ill” has been ingrained in our society for decades. But by explicitly targeting individuals who sit at the intersection of two vulnerable groups, each with their own unique harms and lived experiences, California’s and NYC’s initiatives compound the trauma experienced by those removed.

And both California and NYC are sly. In enacting these initiatives, they have dressed up the forced removal of unhoused people from the streets as a “transformational” framework for addressing mental illness, one that “ensures compassionate care” of “moral obligation.” The CARE Act in California promises a “new pathway to deliver mental health and substance use disorder services to the most severely impaired... who too often suffer in homelessness... without treatment.” The

20 The Community Assistance, Recovery, and Empowerment (CARE) Court Program (“CARE Act” or “SB-1338”), was passed in California on September 14, 2022, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1338 (https://perma.cc/92BJ-TEPV). NY implemented its directive on Mental Health Involuntary Removal, on November 28, 2022. Mental Health Involuntary Removals (Nov. 28, 2022) https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2022/Mental-Health-Involuntary-Removals.pdf [hereinafter Involuntary Removal Policy]. There are other attempts to get around Jones and Martin as well. On the public side, a variety of laws have (increasingly) popped up that target certain conduct (while subject to challenge under the reasoning of Jones and Martin, see Part I, they remain on the books and are enforced). See Oliver, supra note 3 (“Most states (48) now outlaw daily survival activities, such as sleeping, eating, sitting, or living in their car. In the last 15 years, there has been a 50% rise in so-called camping bans that make it illegal for certain people to sleep in public places; nearly three-fourths (72%) of cities now have such a ban, and these laws are becoming tougher”). On the private side, a creative lawsuit was filed in Portland challenging the city’s failure to address homeless encampments as a violation of Title II of the ADA. See Tozer v. City of Portland, 22-cv-13336, Class Action Complaint, ECF #1, (D. Or. 2022). While beyond the scope of this article, this route is concerning, as it pits two socially disadvantaged groups (the physically disabled and unhoused) against each other. And the complaint makes no reference to the numerous physically disabled individuals who experience homelessness. That said, the alternative relief requested—an order requiring the City to construct, purchase, or otherwise provide for emergency shelters in which to house the unsheltered persons—points to an understanding that unhoused people are in need of further material support, not mere removal from the streets. Id. at ¶ 122.


22 Kiefer, supra note 13.


24 Cal. Health and Human Services [hereinafter Cal. HHS], Community Assistance, Recovery & Empowerment Act,
Involuntary Removal Policy in NYC is framed as “assist[ing] those who are suffering from mental illness and whose illness is endangering them by preventing them from meeting their basic human needs.”23 While both strategies have garnered support among various groups,24 they lodge a group of unhoused people in an apparatus of state coercion, with noncompliance penalties of hospitalization and conservatorship alongside increased police interaction which will likely lead to excessive force. Both have the practical effect of serious infringement on one’s liberty without any showing of dangerousness while entrenching the stigma of mental illness as a threat to the public and themselves. Both initiatives create a new category of state-diagnosed individuals—combining disability, poverty, and unsheltered status—under a new “constructed category” of people subject to removal from the public via criminalization and punitive regulation.25

Presented as a system of care, the effects of these new strategies mirror the outright criminalization of unhoused people already declared unconstitutional.26 California’s and NYC’s attempt to maneuver around the unconstitutional criminalization of status by continued removal of unhoused people, this time by proxy of mental illness, is concerning and misguided. Part I of this article discusses attempts to remove unhoused people by criminalizing the status of being unhoused and the line of Supreme Court decisions that struck these down, leading up to the Ninth Circuit’s decisions in Jones v. City of L.A. and Martin v. City of Boise, which held this strategy unconstitutional. Part II then explores the new shift in California and NYC—the CARE Act in California and the Involuntary Removal Policy in NYC. Part III discusses the problems of both: (1) they succumb to vagueness problems and result in arbitrary and discriminatory enforcement that will disproportionately affect vulnerable minority groups, (2) they flip the idea of voluntary treatment on its head under the guise of a questionable psychiatric theory, and (3) they place marginalized individuals within punitive systems of court-centered adjudication and harmful police interaction that fail to target key drivers of homelessness. While on their face unrelated, both initiatives reveal a new trend to remove unhoused people by proxy of mental illness, under the auspices of care, while maneuvering around Jones, Martin, and the unconstitutional criminalization of status. Both initiatives also exacerbate the moral panic27 surrounding unhoused people.


23 Newman, supra note 23.

24 For California, see Jocelyn Wiener and Manuel Tobias, CARE Court: Can California Counties Make it Work, CAL. MATTERS (July 14, 2022), https://calmatters.org/health/2022/07/care-court-california/ [https://perma.cc/6JMV-2AUS] (noting that the CARE Court “has garnered enthusiastic support from leaders of more than 45 cities, many of whom face fiery criticism over their handling of the homeless.”). For NYC, see infra Part IV(B).


26 See Caleb Brennan, Amid Years of Crime and Mental Illness, States Move to Expand Forced Treatment, THE APPEAL, (Aug. 4, 2022), https://thetappeal.org/assisted-outpatient-treatment-criminalization-mental-illness/ [https://perma.cc/K57V-2VVN] (“The reality is . . . that a cage and imprisonment doesn’t only have to be inside of a physical cell that is outside of your home or outside of your community,” quoting Stefanie Kaufman-Mthimkhulu, executive director of the peer support collective Project LET’S), see infra Part III(C). Even courts have held that involuntary removals are the “functional equivalent of [j] arrest[s].” Disability Advocates, Inc. v. McMahon, 279 F. Supp. 2d 158, 168–69 (N.D.N.Y. 2003), aff’d, 124 F. App’x 674 (2d Cir. 2005).

27 For a definition of moral panic, see generally Ashely Grossman, A Sociological Understanding of Moral Panic, THOUGHTCO, (July 14, 2019), https://www.thoughtco.com/moral-panic-3026420 [https://perma.cc/VGY8-KXVY] (“Moral panic is a widespread fear, most often an irrational one, that someone or something is a threat to the values, safety, and interests of a community or society at large[,] . . . perpetuated by the news media, fueled by politicians, and often result[ing] in the passage of new laws or policies that target the source of the panic, [while] . . . foster[ing] increased social control [of those]”
people who experience mental illness, which can and, in fact, has led to deadly collateral consequences. Despite being marketed as alternatives to involuntary commitment, recent developments reveal a parallel and converging track that will broaden its reach. But not all is lost. Part IV draws out the

marginalized in society.”); STANLEY COHEN, FOLK DEVILS AND MORAL PANICS 1 (2011) (defining moral panic as “[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible”); Susan Bandes, The Lessons of Capturing the Freedom: Moral Panic, Institutional Denial and Due Process, 3 LAW, CULTURE & HUMAN. 293, 294 (2007) (“[T]he creation of a moral panic depends on the complexity and active participation of the legal system,” since “[l]egal actors . . . have, in various ways, the power to affirmatively fuel the creation of institutionalized hysteria.”).

While a detailed discussion of moral panic is beyond the scope of this article, both California’s and NYC’s initiatives solidify the phenomena. They entrench the unfounded, but widespread, fear of unhoused people who experience mental illness by explicitly constructing a group of people subject to necessary removal. They overemphasize the dangers that many unhoused people with mental illness may pose and present them as a threat. In the backdrop of sensationalized news coverage surrounding this group, both California’s and NYC’s legal frameworks that “expertly” diagnose these individuals can and have already led to deadly collateral consequences. One need to look no further than the cruel and tragic killing of Jordan Neely—a thirty-year old homeless street performer who suffered from mental illness—by Daniel Penny, an unprovoked subway rider on May 1, 2023.

Mr. Neely was “riding the subway, complaining of hunger and thirst, saying that he was tired—that he didn’t care if he went to prison and that ‘it didn’t even matter if I died.’” NYPL Responds to Killing of Jordan Neely in NYC Subway, NEW YORK LAYERS FOR PUBLIC INTEREST (NYLPI), https://www.nylpi.org/resource/nypl-responds-to-killing-of-jordan-neely-in-nyc-subway/ (last visited June 15, 2023). Mr. Neely was a Black, male, unhoused individual living with severe mental health challenges. These classifications cannot be used to “justify being choked to death on the floor of a City subway car.” Id. Yet, phrased in the context of moral panic, this was Daniel Penny’s response: “[I] asked [my] own life and safety, for the good of [my] fellow passengers. The unfortunate result was the unintended and unforeseen death of Mr. Neely.” Samantha Marx and Phil Corso, Manhattan DA: Daniel Penny Expected to Face Manslaughter Charge in Killing of Jordan Neely, GOTHAMIST, (May 11, 2023), https://gothamist.com/news/manhattan-da-daniel-penny-expected-to-face-manslaughter-charge-in-killing-of-jordan-neely [https://perma.cc/Q2FE-PDBR] (quoting the statement from Daniel Penny’s attorneys). The immediate media coverage of the killing also directly fed into the moral panic. See Matt Shuham, How The Media Made a Villain Out of Jordan Neely, HUFFINGTON POST, (May 15, 2023), https://www.huffpost.com/entry/jordan-neely-daniel-penny-homicide-new-york-media__64625ebae4b005be8ff529cb [https://perma.cc/5E3W-XGSR] (citing news coverage that called Mr. Neely “unhinged,” a “vagrant,” and that framed the killing as “defending the passenger’s action as a defense against disorder” and a two-sided struggle). Politicians were no exception to the response either: Mayor Eric Adams hijacked this tragic moment to promote the Involuntary Removal Policy and suggested that Mr. Neely should have been detained by the city without his consent. See Matt Trostman, Mayor Implies It’s Jordan Neely Who Should Have Been Detained, PATCH, (May 10, 2023), https://patch.com/new-york/new-york-city/mayor-implies-its-jordan-neely-who-should-have-been-detained# [https://perma.cc/BC6X-Q7N1]. Mayor Adams has it wrong. A choice between vigilante activism that is celebrated by some, or in the alternative, an ambivalence towards violence, and involuntary removal is no choice at all. They are two sides of the same coin of the moral panic surrounding unhoused people who experience mental illness. Initiatives like the Involuntary Removal Policy (and the CARE Act) that dehumanize and demonize this group instead serve to justify this type of vigilante response. See Jay Caspian Kang, Jordan Neely’s Death and a Critical Moment in the Homelessness Crisis, The New Yorker, (May 4, 2023), https://www.newyorker.com/news/out-columnists/jordan-neelys-death-and-a-critical-moment-in-the-homelessness-crisis [https://perma.cc/JYF4-LBG8] (discussing multiple acts of violence against unhoused people in Northern California over a recent two-week period which received little media attention).

As of this writing, it appears there is “ping-pong” effect of both California’s and NYC’s initiatives. After the introduction of NYC’s Involuntary Removal Policy, Senator Susan Eggman, one sponsor of the CARE Act, introduced new legislation (which had previously failed to advance because of concerns that it would “impinge upon civil liberties”) to expand the definition of “gravely disabled” for involuntary commitment—it would allow for “a petition for conservatorship if an
benefits that the initiatives offer and points to better-suited models.

Part I. The First Wave: Throw Them in Jail

Homelessness is not a new problem. Many are adverse to unhoused people, seen as nuisances residing in their community, stereotyped as “dangerous criminals worthy of incarceration” or “sad figures suffering from severe mental illness who are beyond help” and who bring “street encampments, drug deals, overdoses, and panhandlers” to the neighborhood. Historically, they were targeted and removed through vagrancy statutes. But as these laws were struck down on vagueness grounds in the latter half of the twentieth century, governments adapted and targeted specific status traits they believed aligned with unhoused people. For example, a California law made it illegal to use “addicted to the use of narcotics.” No good, said the Supreme Court, which struck it down in Robinson v. California: “a law which made a criminal offense of . . . a disease [drug addiction] would doubtless be universally thought to be an infliction of cruel and unusual punishment.” This is because the Eighth Amendment’s prohibition on cruel and unusual punishment “places substantive limits” on what the


33 Dasse, supra note 16; see also Scott Clifford & Spencer Piston, Explaining Public Support for Counterproductive Homeless Policy: The Role of Disgust, 39 POLIT. BEHAV. 503, 508 (2017) (discussing media portrayals of unhoused people as “dirty, mentally ill, and deviant”) (citation omitted).

34 Mary Boatright, Jones v. City of Los Angeles: In Search of a Judicial Test of Anti-Homeless Ordinances, 25 LAW & INEQ. 515, 516 (2007); see also Susan Schweik, Kicked in the Crotch: Ugly Law Then and Now, 46 Harv. C.R.-C.L. L. Rev. 1, 2 (2011) (discussing “ugly laws” that outlawed panhandling, using “unsightliness” as a descriptor, and which were “status offense[,] illegal only for people without means,” which remain on the books today).

35 See Papachristou v. City of Jacksonville, 405 U.S. 156, 161, 171 (1972) (striking down a Jacksonville ordinance as void for vagueness while noting that historically, “vagrancy laws became criminal aspects of the poor laws” and “furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure” (quoting Thornhill v. Alabama, 310 U.S. 88, 97–97 (1940))); Jones v. City of L.A., 444 F.3d 1118, 1137 (9th Cir. 2006), vacated as moot, 505 F.3d 1006 (referencing cases that “found statues criminalizing the status of vagrancy to be unconstitutional”).


37 Id. at 666.
government may criminalize. Put another way, “the state may not criminalize ‘being[,]’ that is, the state may not punish a person for who he is, independent of anything he has done.” In Robinson, criminalizing “addiction itself” violated the Eighth Amendment.

Yet just a few years later, in Powell v. Texas, the Court upheld a statute that criminalized public drunkenness. Powell held that it was not the status of an alcoholic that was criminalized but the conduct of appearing in public while intoxicated. In a 4-1-4 opinion, the concurrence and dissent, later viewed as controlling, read Robinson broadly and distinguished between voluntary and involuntary conduct; involuntary conduct cannot be criminalized. Justice Fortas, in dissent, stated that Robinson stood for the principal that “criminal penalties may not be inflicted on a person for being in a condition he is powerless to change,” and Justice White, in concurrence, concluded that “the proper subject of inquiry is whether volitional acts brought about the [criminalized conduct or] ‘condition’ . . . .”

This leads to Jones v. City of L.A. At issue in Jones was a California ordinance that “criminalize[d] sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within Los Angeles’s city limits.” Although it was not always enforced, the Los Angeles Police Department’s policy leading up to its challenge was clear: if someone’s behavior breaks the law, “[y]ou arrest them, prosecute them. Put them in jail. And if they do it again, you arrest them, prosecute them, and put them in jail. It’s that simple.” In Jones, six unhoused individuals who lived on Skid Row could not obtain shelter and were cited or arrested as a result. Following Robinson’s “holding that the state cannot criminalize pure status,” and the five-Justice agreement in Powell that “the state cannot criminalize certain involuntary conduct,” the Ninth Circuit held that the enforcement of the law violated the Eighth Amendment. This was because unhoused people, who “have no access to private spaces” and thus are

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39 Jones, 444 F.3d at 1135.
40 Martin v. City of Boise, 920 F.3d 584, 615 (9th Cir. 2019).
42 Id. at 532 (finding that the statute did not fall within Robinson’s prohibition on criminalizing status since the defendant was “convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion.”).
43 Jones, 444 F.3d at 1135.
44 Powell, 392 U.S. at 533 (Fortas, J. dissenting).
45 Id. at 550 n.2 (White, J., concurring). On the facts, however, Justice White thought Powell’s act of drinking that night was voluntary.
46 Jones, 444 F.3d at 1122. Implemented in 1968 under the “Disorderly Conduct” section of the Municipal Code, newspaper reports reveal that although the law was meant to “keep hippies from annoying and molesting people on Hollywood streets,” it would “apply citywide.” Jim Newsome, Sidewalk Hippie Law-In, LA TIMES, June 26, 1968. Apply citywide it did, to unhoused people writ large. See Jones, 444 F.3d at 1124 (under the “expansive reach” of § 41.18, “many [unhoused] are arrested, losing what few possessions they may have”).
47 In the late 1980s, the Los Angeles City Attorney “refused to prosecute the homeless for sleeping in public” under the statute “unless the City provided them with an alternative to the streets.” Id. at 1122.
48 Id.
49 Id. at 1120.
50 Id. at 1136.
51 Id.
"unable to stay off the streets" but must still sit, lie, or sleep, are criminalized by the "unavoidable" (and involuntary) consequence of "being human and homeless without shelter in the City of Los Angeles," that is, by their status of being unhoused. Yet Jones was vacated as moot due to a settlement, and the policies at issue persisted.

Then comes Martin, twelve years later. Reaffirming the reasoning in Jones, Martin held that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them." Like Jones, at issue in Martin were the City of Boise's two ordinances, which (1) made it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time" and (2) banned "occupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof." Like Los Angeles, Boise had a problem with its large unhoused population. And like Los Angeles, Boise "wanted 'to drive . . . homeless individuals out of the City'" through criminal enforcement. But its attempt to solve it by criminalizing their status was unconstitutional "for essentially the same reasons articulated in [] Jones"—"just as the state may not criminalize the state of being 'homeless in public places,' the state may not 'criminalize conduct that is an unavoidable consequence of being homeless . . .'."

That said, the holdings in Jones and Martin are narrow. Unconstitutional enforcement of what are extreme versions of "anti-homeless" laws apply only when there are unavailable beds in shelters. If there is "an option of sleeping indoors," enforcement is fine. So to work around the holding in Martin and continue to remove and prosecute unhoused people, "cities need simply to create some way to

52 Id.
53 Id. at 1138.
54 Jones v. City of L.A., 444 F.3d 1118, 1138 (9th Cir. 2006), vacated as moot, 505 F.3d 1006 (on settlement).
55 Martin, 920 F.3d at 603.
56 Id. at 604 (“Boise has a significant and increasing homeless population.”).
58 Martin v. City of Boise, 920 F.3d 584, 615 (9th Cir. 2019).
59 Id. at 617.
60 Jones, 444 F.3d, at 1138 (explaining unconstitutionality when there is "a greater number of homeless individuals in Los Angeles than the number of available beds"); Martin, 920 F.3d at 617 (same). Unaddressed in the opinions, this way out disregards the reasons why unhoused persons do not want to go to shelters—they are often worse and more dangerous than public spaces. See Ela Banerjee & Annack Miller, The Shelter System is a Broken System, 1 Housless San Francisco Man Says, PRISM (July 1, 2021), https://prismreports.org/2021/07/01/the-shelter-system-is-a-broken-system-housless-san-francisco-man-says/ [https://perma.cc/F58A-RF73] (explaining the statements of Salvador Guerrero (using a pseudonym to protect his privacy): "The shelter system is a broken system. Being in a shelter is like being in jail and having everything controlled," where workers "treated us as if we had no rights, as if we were completely useless and worthless," and where he "experienced discrimination, humiliation, retaliation, and yelling"); see Georgett Roberts, I Feel Like I'm Back in Jail: Life Inside NYC's Broken Shelter System, NY POST, [Mar. 8, 2022], https://nypost.com/2022/03/08/the-miserable-life-inside-nycs-broken-shelter-system/ [https://perma.cc/3KAD-W9GR] (interviewing more than a dozen New Yorkers living inside shelters where "safety concerns have long reigned," who "describe treacherous, squalid conditions that have left some in fear for their lives and others regretting their decision to come indoors").
61 Martin, 920 F.3d at 617.
know that shelters are full or, because of restrictions, effectively so.” But outright criminalization has its drawbacks, such as public perception, increased costs of incarceration, and a revolving door that has failed to address the problem. Time for a new strategy, reframed in a positive light.

**Part II. The Second Wave: California’s and NYC’s “Moral Approach”**

In 2022, California and NYC enacted a new strategy to remove unhoused people from public view, this time by proxy of mental illness. In place of criminal statutes struck down in *Jones* and *Martin*, California enacted the Community Assistance, Recovery and Empowerment (“CARE”) Act, a statewide apparatus of courts that, via petition, enroll individuals with mental illness in court-ordered treatment plans, with threats of hospitalization and conservatorship if one fails to abide by its terms. Taking it a step further—a more drastic alternative—NYC enacted its Involuntary Removal Policy, which immediately involuntarily hospitalizes people experiencing mental illness, without any evidence of recent dangerous behavior. The exact motivations are unclear—perhaps a combination of a longstanding view of “homeless people as chronic mentally ill” and prevailing social attitudes of “disgust,” along with an increasing “crime wave,” portrayed in the media as the result of mentally ill homeless individuals. But in the background of these initiatives are *Jones* and *Martin*. Rather than

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62 Supra note 57, at 704.


65 See Olivet, supra note 3 (“blaming, criminalizing, and moving people from streets to jails does not solve homelessness or fix the systems that created it.”)


68 Clifford & Piston, supra note 33, at 505 (arguing that disgust “motivates the desire for physical distance, leading to support for policies that exclude homeless people from public life,” and finding that “disease cues in media coverage [...] can dramatically amplify this effect”). While not the subject of Clifford and Piston’s analysis, it follows that “disease” cues would include “mental illness” depiction as well.

69 Emma Tucker and Mark Morales, New York City Crime Wave Continues Into 2022 as City Rolls Out Safety Plan, CNN
targeting the status of being unhoused, they target the “status” of serious mental illness,\(^7^0\) even though actions resulting one’s experience of mental illness are often involuntary. Going back to Robinson, California and NYC have merely picked up a new involuntary trait to target. In doing so, they remove unhoused people by “organiz[ing] around the stigmatizing consequences of mental illness,” rather than the “mental illness itself,” and stigmatize unhoused people experiencing mental illness as harmful to themselves and society writ large.\(^7^1\) But unlike the criminalization of narcotics use in Robinson, experiencing mental illness and being unhoused is not illegal. Yet the effects of both initiatives (to varying extents) amount to quasi-criminalization: loss of liberties through involuntary court-ordered treatment plans and hospitalization (or worse). What follows is an analysis of both initiatives, how they

\(^7^0\) This “status” target reveals the initiatives as rooted in a medical model of mental illness, grounded in internal biological determinates. This is contrasted with the social model of mental illness, under which the experience is rooted in external social forces, *Compare Mental Illness*, Merriam-Webster Online Dictionary, (“any of a broad range of medical conditions (such as major depression, schizophrenia, obsessive compulsive disorder, or panic disorder) that are marked primarily by sufficient disorganization of personality, mind, or emotions to impair normal psychological functioning and cause marked distress or disability”); *Mental Illness*, Stedman’s Online Medical Dictionary (“a broadly inclusive term, generally denoting” either a “disease of the brain” or a “disease of the ‘mind’ or personality,” or “any psychiatric illness listed in *Current Medical Information and Terminology of the American Medical Association or in the Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association); with 42 U.S.C. § 12102(1)(C) (disability includes “being regarded as having such an impairment”); Art. 1, UN Convention on the Rights of Persons with Disabilities (2008) (disability “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others”); Rachel Adams *et al.*, *Disability, Keywords in Disability Studies*, NYU Press, 2015 (discussing the “social model” of disability, that “emphasize meanings of ‘disability’ that are external to the body, encompassing systems of social organization, institutional practices, and environmental structures” which “challenges the medical understanding of disability as located exclusively in an individual body, requiring treatment, correction, or cure”). Relied on by both California and NYC, the medical model is problematic. A medical diagnosis, or a biological explanation, “encourages people to think of mental health problems as permanent, and that the person so affected might be dangerous and unpredictable, and that we should distance ourselves from us” and “leads service users to be more pessimistic about treatment outcomes.” Justin Garson, *The Hefted Dilemma*, AEON, Nov. 14, 2022, https://aeon.co/essays/evidence-grows-that-mental-illness-is-more-than-dysfunction. It contributes to stigma, contrary to a social model which “helps us see ‘people with problems,’ rather than ‘patients with illness.’” Justin Garson, *Why is Stigma Toward Schizophrenia Getting Worse?*, Psychology Today, Dec. 12, 2022, Psychology Today, https://www.psychologytoday.com/us/blog/the-biology-human-nature/202212/why-is-stigma-toward-schizophrenia-getting-worse.

\(^7^1\) ROSSER, supra note 21 (an “important contributor to falsely applied stereotypes is the mass media,” whose coverage of mental illness is “consistently and overwhelmingly negative,” while “disseminating biased information surrounding mental illness” and providing “[g]eneralist reports of violence and crimes committed by individuals with these disorders” at a higher rate than other individuals: this “crystallizes a biased image of patients with mental disorders as threatening persons who endanger society.”)
converged on targeting mental illness as a proxy for removal, and their jointly held flaws.

A. California’s “Voluntary” CARE Courts

The CARE Act is the most recent iteration of legislation aimed to address mental illness in California. For decades, California has failed to enact policies to adequately address mental illness. In 1967, the Lanterman-Petris-Short Act (“LPS”) established a system of involuntary commitment and conservatorship for individuals who “pose a risk of harm to themselves or others or cannot provide for their basic needs.” But LPS did not set up a system of care itself—it created a system that either “keep[s] people in locked, restrictive settings, or [] turn[s] them out to the streets.” As an alternative to LPS, Laura’s Law was enacted in 2002, which allowed a court to order an individual into outpatient treatment if they meet certain requirements. Better than LPS, but still resulting in involuntary and discriminatory treatment, Laura’s Law is also ineffective—less than a thousand people are eligible for the program in the entire state, only 218 people were served by Laura’s Law in a recent year, and county participation is optional, with less than half of all counties having an operational program as of June 2020. Fast forward to September 2022, when Governor Gavin Newsom signed the CARE Act, an alleged “paradigm shift that will provide individuals with severe mental health and substance use disorders the care and services they need to get healthy.” It is framed as a “new pathway to deliver

72 State Auditor, Lanterman-Petris-Short Act, iii (July 2020), https://auditor.ca.gov/pdfs/reports/2019-119.pdf [https://perma.cc/ZK7K-A7SV]. LPS established three stages for involuntary treatment: (1) “short-term holds of up to 72 hours,” (2) “extended holds that generally last up to 14 days,” and (3) “conservatorships of up to one year during which courts appoint outside parties, such as county officials, to assume responsibility for individuals’ care.” Id at 1.

73 Kristen Choi, Letters to the Editor: Freedom for Mentally Ill Californians Isn’t the Problem. The Lack of Care Options Is., LA TIMES (Dec. 17, 2021), https://www.latimes.com/opinion/letters-to-the-editor/story/2021-12-17/freedom-for-mentally-ill-californians-lack-of-care-options [https://perma.cc/9JJS-F2R3] (affirming the conclusion that the problem is “the nonexistence of a system for community-based care or permanent supportive housing.”). A 2020 audit found that “many individuals were subjected to repeated instances of involuntary treatment without being connected to ongoing care that could help them live safely in their communities.” State Auditor, supra note 72.

74 See, e.g., Re Agenda Item #50, May 18, 2021, DISABILITY RIGHTS CALIFORNIA (May 18, 2021), https://www.disabilityrightsca.org/system/files/fac-attachments/2021-05-17_FINAL_Advocacy_letter_to_Sacramento_BOs.pdf [https://perma.cc/Q2AT-JJR2] (explaining that there is no benefit to court-ordered mental health treatment, its vast costs, and discriminatory nature, “[f]or example, in San Francisco, although only 5.2% of the population identifies as Black, 24% of court-ordered AOT participants were Black.”).

75 Jocelyn Wiener, Newsom’s New Strategy Would Force Some Homeless, Mentally Ill Californians into Treatment, CAL MATTERS (March 3, 2022), https://calmatters.org/health/2022/03/newsom-california-mentally-ill-treatment/ [https://perma.cc/5VMZ-EBT6]; Laura’s Law: Assisted Outpatient Treatment Demonstration Project Act of 2002, CAL. DEPT. OF HEALTH CARE SERVICES, # 6 (May 2022) https://www.dhcs.ca.gov/formsandpubs/Documents/Lauras-Law-AOT-Report-2021.pdf [https://perma.cc/MTRY-4T5V]. California has also established a “housing conservatorship” pilot for those “incapable of caring for their own health and well-being due to a serious mental illness and substance use disorder” evidenced by “at least eight 72-hour involuntary holds under Section 5150 [LPS] in the preceding 12 months,” but are not eligible for Laura’s Law outpatient treatment. Assembly Comm. on Judiciary, Cal. Bill Analysis, S.B. 1338 Sen., June 21, 2022. This program fills a gap in Laura’s Law for those unable to accept voluntary services, but as of last year, only one individual has been conserved under this program. Id.

mental health and substance use disorder services to the most severely impaired Californians who too often suffer in homelessness or incarceration without treatment," which allows people to “stabilize, begin healing, and exit homelessness in less restrictive, community-based care settings.”

Under the CARE Act, all counties in California are required to establish CARE courts, which accept petitions to have “treatment ordered for adults who have schizophrenia or another psychotic disorder and lack decision making capacity.” A broad range of people can petition CARE courts to hear a case, including family members, roommates, first responders (including the police), and behavioral health workers. Once a petition is filed, the CARE court determines whether the respondent-individual qualifies: they must be (1) over eighteen, (2) experiencing a severe mental illness and have a diagnoses of schizophrenia spectrum or other psychotic disorders, (3) not clinically stabilized in on-going voluntary treatment, and (4) either “unlikely to survive safely without supervision” with a condition that is “substantially deteriorating” or is “in need of services and supports in order to prevent a relapse or deterioration that would be likely to result in a grave disability or serious harm to the person or others [as defined in § 5150, the LPS Standard]." But unlike the LPS standard for involuntary hospitalization, the CARE Act does not require that an individual be currently dangerous to themselves or others, or gravely disabled and unable to meet their basic needs—mere likelihood is sufficient. The petition must also contain evidence that the individual was involuntarily

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77 Community Assistance, Recovery and Empowerment ACT, supra note 23.


81 A “severe mental illness” is defined as a “mental disorder that is severe in degree and persistent in duration, which may cause behavioral functioning which interferes substantially with the primary activities of daily living, and which may result in an inability to maintain stable adjustment and independent functioning without treatment, support, and rehabilitation for a long or indefinite period of time.” CA Welf & Inst. Code. § 5600.3(b)(2). And the schizophrenia spectrum, defined under the DSM-5, is wide-ranging and “are defined by abnormalities in one or more of the following domains: delusions, hallucinations, disorganized thinking (speech), grossly disorganized or abnormal motor behavior (including catatonia), and negative symptoms.” Nataly S. Beck and Jacob S. Balkin, Editorial Issues in Schizophrenia, FOCUS: THE JOURNAL OF LIFELONG LEARNING IN PSYCHIATRY (2020) (citing Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Publishing (5d ed. 2013)), https://focus.psychiatryonline.org/doi/10.1176/appi.focus.20200030 [https://perma.cc/76QO-JN93]. Notably, while the CARE Act is limited to those with severe mental illness and a diagnoses of schizophrenia spectrum, the state likely has broader goals. See Petitioner’s Reply in Support of Petition for Writ of Mandate at *27-28, Disability Rights Cal. v. Gavin Newsom, (2023) (Case No. S278330), 2023 CA S. CT, BRIEFS LEXIS 17 [hereinafter Disability Rights Brief for Writ of Mandate] (citing Preliminary Opposition to Petition for Writ of Mandate at *55-56, Disability Rights Cal. v. Gavin Newsom, (Cal. Feb. 10, 2023) (Case No. S278330) [hereinafter Opposition to Disability Rights’ Brief]) (“Alarming, the State suggests that the CARE Act is just the first ‘step’ in subjecting competent Californians to court-ordered mental health treatment—imploring that it may expand this new statutory regime to include people with other mental health conditions.”).

detained twice for fourteen days of treatment under § 5150 [of LPS].83 While the petition can include “an affidavit from a licensed behavioral health professional” stating the person meets the above criteria,84 that professional does not actually need to ever meet with the individual being placed in the CARE apparatus.85 The court must also find that participation “would be the least restrictive alternative necessary to ensure the person’s recovery and stability,” and that “it is likely that the person will benefit from participation.”86

If the CARE court determines the individual “meets, or is likely to meet, the[es] criteria;” it orders the county to investigate, submit a written report to confirm its conclusions, and provide notice to the individual.87 While framed as a “voluntary” engagement,88 if the individual does not engage the services voluntarily, the court will “[s]et an initial appearance on the petition within 14 days.”89 Due process considerations do arise; before the appearance, the court appoints legal counsel to the individual, as well as a voluntary supporter chosen by the individual, if desired, to “help the participant understand, consider, and communicate decisions throughout the CARE process.”90 At this initial appearance, if the court finds the parties have not already entered into, or are likely to enter into, a CARE agreement, the court will order a clinical evaluation of the individual.91 The individual must then come back for another hearing, at which time the court will determine, based on the clinical evaluation, if the individual meets the CARE criteria.92 If so, it will order the county behavioral health agency, the respondent, and the respondent’s counsel to jointly develop and submit to the court a CARE plan within fourteen days.93 If there is no agreement on the plan, the court will adopt the plan “that support the recovery and stability of the respondent,” irrespective of agreement from the individual subject to the plan.94 This plan can last for twelve to twenty-four months95 with progress regularly monitored.96

85 SB-1338 § 5975(d)(1), 2022 Leg. Reg. Sess. (Cal. 2022). (“or has made multiple attempts to examine, but has not been successful in eliciting the cooperation of the respondent to submit to an evaluation”).
90 CARE FAQ, supra note 80; SB-1338 §§ 5977(a)(5)(C)(i), (b), 2022 Leg. Reg. Sess. (Cal. 2022). This is a false sense of security, since this “voluntary supporter” is likely absent for individuals who are in a crisis of homelessness and who experience serious mental illness.
93 SB-1338 § 5977.1(c)(3)(A), 2022 Leg. Reg. Sess. (Cal. 2022). While this plan can be developed jointly by “the county behavioral health agency or the respondent” it is unclear what type of collaboration is involved.
94 SB-1338 § 5977.1(c)(2), 2022 Leg. Reg. Sess. (Cal. 2022). It is unclear how the CARE Court will assess the different plans under the standard described as one “that support[s] the recovery and stability of the respondent.” See id. § 5977.1(d)(2). Not is there any indication given of what other “orders” the court “may issue” that are “necessary to support the respondent in accessing appropriate services and supports.” The plan may include court-ordered medication treatment as well, despite the act stating the CARE Court may not forcibly medicate a targeted individual. See id. § 5977.1(d)(5). There is also no route for appeals of the court-ordered plan.
95 CARE FAQ, supra note 80; SB-1338 § 5977.1(e), 2022 Leg. Reg. Sess. (Cal. 2022).
Together, an individual faces “as many as five hearings within the first two months, followed by at least six status review hearings within the following year.”

The CARE plan may also require individuals to live in a shelter or emergency housing.

What happens if an individual fails to comply with the plan? It turns out that the CARE Court can conclude “at any time during the proceedings” that the individual “is not participating in the CARE process,” which allows the CARE Court to order the individual subject to an involuntary evaluation under LPS. This noncompliance creates a negative factual presumption at a subsequent LPS hearing. That said, according to the CARE Act, the plan ensures access to a coordinated set of “clinically appropriate, community-based services and supports that are . . . culturally and linguistically competent.”

Perhaps the CARE Act sounds decent at first glance; after all, the issue of homelessness and mental health in California has not been adequately addressed to date. But the forced nature of enrollment “give[s] cities and counties and the state another means of removing people from public spaces when they’re deemed undesirable.” And failure to comply with the court-ordered treatment can lead to hospitalization or conservatorship proceedings under LPS. True, the Act does reduce the prospect of incarceration for those found “mentally incompetent” by amending the penal code to allow for case referral to a CARE court. And it does not have any criminal penalties for failure to comply with the court-ordered CARE plan.

But going back to Jones and Martin, in replace of a misdemeanor fine (and other costs), a trip to jail, and a record of incarceration, California now has a state-wide apparatus of court-ordered treatment plans, petitioned for by various third-parties who may not even have met with the individual, with the possibility of hospitalization or conservatorship and defending against a LPS proceeding for

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97 Disability Rights Brief for Writ of Mandate at *26 (citing SB-1338 §§ 5977.1–5977.3, 2022 Leg. Reg. Sess. (Cal. 2022)).
99 See id. § 5979(a)(1), (b)(3).
100 CARE FAQ, supra note 80.
101 Los Angeles announced that it will accelerate its implementation of CARE Court by December 1, 2023, one year ahead of schedule. See Los Angeles County Accelerates CARE Court Implementation to Support Californians with Untreated Severe Mental Illness, OFFICE OF GOVERNOR, (Jan. 13, 2023), https://www.gov.ca.gov/2023/01/13/los-angeles-county-accelerates-care-court-implementation-to-support-californians-with-untreated-severe-mental-illness/ [https://perma.cc/SB82-4GKW].
103 Id. See also SB-1338 § 5979(a)(3), 2022 Leg. Reg. Sess. (Cal. 2022) (describing how the CARE Court can use existing authority under the Lanterman-Petris-Short Act (“LPS”) to commence involuntary holds and conservatorships).
104 SB-1338 § 1370.01, 2022 Leg. Reg. Sess. (Cal. 2022) (amending § 1370.01 of the Penal Code); see also SB-1338 § 5978(b).
105 See id. § 5979(a)(4).
those who fail to abide by their plan.106 And who is targeted? Unhoused people,107 by proxy of mental illness.

B. NYC’s Involuntarily Removal Policy

Compared to California, which first addressed the issue of mental illness, NYC first addressed the homelessness issue. With homelessness becoming a visible problem in the 1980s,108 state courts compelled the city to provide shelter for unhoused people in Callahan v. Carey under Article XVII—public relief and care—of the New York State Constitution.109 This right, however, was the subject of constant litigation due to the city’s tactics in evading its obligations.110 And while NYC implemented a variety of (failed) policies over the years to provide some form of public housing for unhoused people to address the issue,111 it also led parallel and often more robust efforts to solve endemic homelessness

106 This disciplinary power of CARE Courts creates subjects defined “by experts,” which produce “new kinds and typologies of individuals.” Lisa Carlson, Institutions, Keywords in Disability Studies, NYU Press, 2015 (discussing contemporary analyses of Michel Foucault’s work on the dynamics of institutionalization). Put another way, CARE Courts create a state-wide “government of disability” that is “self-authenticating and self-perpetuating,” with “established professional legitimacy for the superintendents in charge.” Id. Only in its inception, the revitalization of this type of institution in a new context is troubling.

107 Keeler, supra note 13 (describing how the CARE Court “targets the homeless population”); Cal. Bill Analyses, S.B. 1338 Sen. Before the Assem. Comm. on Health, June 28, 2022 (Cal. 2022) 20 (describing how Governor Newsom said the CARE Act is intended “to support the thousands of Californians living on our streets with severe mental health and substance use disorders”).

108 This framing, relying on the City in pushing for policies to address the plight of homelessness, raises a host of questions, including one that is central to any solution for unhoused people: visible to whom? The implicit goal in addressing the visibility of unhoused people is to make them “invisible.” For an illuminating discussion of attempts to make unhoused people “invisible,” see Schwerk, supra note 34 (discussing the “larger pattern in the neoliberal American cities of the twenty-first century” of implementing “invisible yet highly consequential gates and barriers [that] increasingly constrain[] the movement of some urbanites in public spaces,” who, “‘framed as manifestations of disorder,’ are given over to the monitoring, profiling, containment, and exile to the periphery—kicked to the literal curb”).


110 Numerous violations of this decree have occurred over the years. See The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter, COALITION FOR THE HOMELESS, https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/ [https://perma.cc/MSUB-LP45] (last visited Mar. 30, 2023) (discussing numerous lawsuits challenging city action, including “lowering of the living standards in shelters,” “denial of stable shelter placements,” “implementation of State regulations that would terminate or deny shelter to homeless adults due to non-compliance with social service plans and administrative rules,” evading notice requirements to legal support groups, halting use of “overnight-only” beds, and a Mayor Bloomberg rule (which was blocked) that aimed to deny shelter eligibility to those with mental illness and other serious health problems).

by removing unhoused people from public view, using police enforcement to criminalize and involuntarily hospitalize them.\footnote{For example, Mayor Edward Koch in 1985 ordered the police to remove by force anyone sleeping in the streets. See e.g., Diane Jeanett, A Brief History of Homelessness in New York, \textit{City Limits}, (Mar. 11, 2013), https://citylimits.org/2013/03/11/a-brief-history-of-homelessness-in-new-york/ [https://perma.cc/LC45-H7NP]. Likewise, Mayor Giuliani ordered police searches and the arrests of homeless New Yorkers during his administration. \textit{See also} Elizabeth Bumiller, \textit{In Wake of Attack, Giuliani Cracks Down on Homeless}, \textit{N.Y. Times}, (Nov. 20, 1999), https://www.nytimes.com/1999/11/20/nyregion/in-wake-of-attack-giuliani-cracks-down-on-homeless.html [https://perma.cc/XL47-W345] (discussing Giuliani’s declaration that “the homeless had no right to sleep on the streets and his police commissioner added that they could be arrested if they refused shelter,” remarks that came in the wake of a random attack by a man the police said may have been homeless. Notably, Giuliani’s comments referenced mental illness, noting the Daily News headline of “Get the Violent Crazies Off Our Streets,” which article called for the removal and institutionalization of the “dangerously deranged”). In 2002, the NYCLU filed a lawsuit against the NYPD alleging that its Homeless Outreach Unit was targeting and singling out the homeless for arrest. \textit{See Pizza the Homeless v. City of New York (Challenging NYPD’s Singling Out of the Homeless)}, NYCLU, (2023), https://www.nyclu.org/en/cases/picture-homeless-v-city-new-york-challenging-nypds-singling-out-homeless [https://perma.cc/9WCB-2TAW]. The City settled the case. Id.} Enter NYC’s recent removal initiative that explicitly targets people who experience mental illness, an apparatus that converges with the CARE Act.

On November 28, 2022, Mayor Eric Adams announced the Involuntary Removal Policy, which “remove[s] people with severe, untreated mental illness from the city’s streets and subways.”\footnote{See Craig Hughes, \textit{Overight—Mental Health Involuntary Removals and Mayor Adams’ Recently Announced Plan, Mobilization for Justice, 6 (Feb. 6, 2023) (discussing Mayor Adam’s line of tactics to remove unhoused people). Beginning in January 2022, Mayor Adams announced the deployment of an “omnipresence” of police in the subway to “get the homeless off the subways [as well as implement] a creative way to put more cops in the transit system.” See Marcia Kramer, “Mayor Eric Adams Unveils ‘Omnipresence’ Police Plan To Get Homeless Off The Subways,” https://www.cbsnews.com/newyork/news/nypd-omnipresence-plan-homeless-nyc-subways-kathy-hochul-keechant-sewell/ [https://perma.cc/8D25-7E6U]. On February 24, 2022, Mayor Adams implemented the Blueprint to End Gun Violence, which served as a precursor to the Involuntary Removal Policy and stated that “[i]n the immediate future, we will revisit existing law so that if someone who can’t take care of themselves refuses treatment, they can be hospitalized if that is what a doctor and judge recommend.” Hughes, supra (quoting City of New York, “The Blueprint to End Gun Violence,” 8 (2022) [https://www1.nyc.gov/assets/home/downloads/pdf/press-releases/2022/the-blueprint-to-end-gun-violence.pdf] [https://perma.cc/4ZYX-RC7A]). Just days later, Mayor Adams announced the Subway Safety Plan, which implemented a renewed broken-windows approach to policing by targeting unhoused people: enforcing no-sleeping ordinances on public trains and continuing the “End of Line” initiative of Mayor de Blasio which forced homeless people off trains at select endpoints. Hughes, supra, at 6–7. In his last sweep before the Involuntary Removal Policy, on March 25, 2022, Mayor Adams implemented}
the ball; the initiative reacts to the city’s growing unhoused population, who have dominated headlines alongside the “rise” in crime.\textsuperscript{115} While his previous initiatives did not explicitly target those living with mental illness, the Involuntary Removal Policy, like the CARE Act, lays bare its goal: to remove unhoused people by proxy of mental illness. But unlike the CARE Act, which at least attempts to create a “voluntary” process, NYC’s initiative does no such thing.

Described as an “effort to assist those who are suffering from mental illness,”\textsuperscript{116} it relies on an interpretation of Section 9.41 and Section 9.58 of New York’s MHL\textsuperscript{117} and “authorize[s] the removal of a person who appears to be mentally ill and displays an inability to meet basic living needs, even when no recent dangerous act has been observed.”\textsuperscript{118} A wide-ranging list of factors support an “indicia

the Aboveground Encampments Initiative which used the NYPD to clear homeless encampments and led to forced displacement. \textsuperscript{Id} at 7-8. Finally, the NYPD has recently directed officers to issue tickets for quality-of-life crimes, including unattended property or erecting “structures.” Id. at 8.

\textsuperscript{115} Emma Tucker and Mark Morales, \textit{New York City Crime Wave Continues Into 2022 as City Rolls Out Safety Plan}, CNN (Mar. 5, 2022), https://www.cnn.com/2022/03/05/us/new-york-city-crime-wave-2022/index.html [https://perma.cc/SMHY-Q3YS]. The Involuntary Removal Policy can also be seen as the latest in Mayor Adam’s campaign promise, which centered on “combating crime” under the guise that the “prerequisite to prosperity is public safety.” Erin Durkin, \textit{Eric Adams’ War Against Crime Sparks Democratic Unrest}, POLITICO, [Jan. 28, 2022], https://www.politico.com/news/2022/01/28/adams-nypd-crime-00002011 [https://perma.cc/9EPP-LSJZ]. But it is highly debatable that “more officers on the streets, protecting the police department from budget cuts and possible even reinstating a legal version of stop and frisk” increases public safety, much less is necessary for prosperity. Id. And the Involuntary Removal Policy will do all three of these things—bills for police training and thus more funding to implement the policy are already being introduced. See \textit{New York City Council, Committee on Hospitals}, (Feb. 6, 2023), https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=1074526&GUID=C4F33AC7-097E-41C7-A98C-D63F7C0FDDD5&Options=info%7C&Search= [https://perma.cc/G24X-UNQS] (introducing a bill for NYPD training related to autism spectrum disorder in a hearing on the Involuntary Removal Policy).

\textsuperscript{116} Newman, supra note 23.

\textsuperscript{117} NY Mental Hygiene Law, Article 9 § 9.41(a) (2021) [hereinafter MHL] authorizes a peace officer or police officer to “take into custody, any person who appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others.” MHL § 9.58(a) authorizes a “physician or qualified mental health professional” to “remove . . . or direct the removal of any person to a hospital for the purpose of evaluation for admission of such person appears to be mentally ill and is conducting themselves in a manner likely to result in serious harm to the person or others.”

\textsuperscript{118} Involuntary Removal Policy, supra note 20. According to the City, this new initiative merely implements the prior NYPD policy (established in September 2020) that is already subject to challenge. See \textit{Baraga Letter R.E Application to Strike, supra note 66, at 2} (seeking dismissal of plaintiff’s motion for a preliminary injunction for lack of standing). In \textit{Baraga}, plaintiffs challenged the NYPD’s policy (“IED Policy”) of requiring the NYPD (at the “unbridled discretion” of the patrol officer) to take an individual into custody “[w]hen a uniformed member of the service reasonably believes that [the] person . . . is apparently mentally ill or emotionally disturbed,” and “is conducting himself in a manner likely to result in serious injury to himself or others,” even where “the [person] is unarmed, not violent, and willing to leave voluntarily.” First Amended Complaint at ¶¶ 63–64, Baraga v. City of N.Y., 21 Civ. 5762 (S.D.N.Y. 2022), (ECF #21). But the Involuntary Removal Policy collapses “conducting himself in a manner likely to result in serious injury to himself or others” with being homeless itself. Put another way, “likely to result in serious injury to himself or others” is now “an inability to meet basic living needs.” So it “dramatically lowers the existing standard.” Declaration of Jonathan C. Moore at 2, \textit{Baraga} (ECF #112). Sure, the city argues that this position is supported by existing precedent. See \textit{Letter Response at 2, supra note 66} (citing Boggs v. Health Hosps. Corp., 132 A.D.2d 340, 362 (N.Y. App. Div. 1987) and Statement of N.Y. State Off. of Mental Health Guidance (Feb. 18, 2022)). But the Involuntary Removal Policy acknowledges the “grey area” in the law which it seeks to fill in. See \textit{Transcript: Mayor Adams Delivers Address on Mental Health Crisis in New York City and Holds Q-and-A, Opp. of the Mayor} (Nov. 29, 2022), https://www.nyc.gov/office-of-the-mayor/news/871-22/transcript-mayor-eric-adams-delivers-address-mental-health-crisis-new-york-city-holds [https://perma.cc/F8E8-DWJ4] [hereinafter \textit{Mayor Transcript}] (“For too long there’s been a gray area where policy, law, and
of an inability to support basic needs," including "serious untreated physical injury, unawareness or delusional misapprehension of surroundings, or unawareness or delusional misapprehension of physical condition or health." Who makes this initial determination? Either a "designated clinician" or the police. Who carries out the removal? Only the police. Just days after the policy was announced, the New York Police Department ("NYPD") sent out a memo to its officers directing its enforcement. Yet ample evidence shows that increased police interaction with people experiencing mental illness only leads to more harm. The training program to implement the policy consists of a mere "25-minute interactive lecture and a video." It is not alarmist to believe that this increased interaction with minimally trained police officers will lead to more arrests and excessive force.

One recent story is illuminating. On March 23, 2023—four months after the Involuntary Removal Policy was put in place—the NYPD shot Raul de la Cruz six times within 28 seconds of their accountability have not been clear," stating that if "the law is unclear, we need to make it clear").

119 Involuntary Removal Policy, supra note 20.

120 Id. (a "Designated Clinician" is a physician or a member of an approved mobile crisis outreach team"). See also Maya Kaufman, Inside New York City’s Training for Health Care Workers Doing Involuntary Removals, POLITICO (Feb. 13, 2023), https://www.politico.com/news/2023/02/13/nyc-health-care-involuntary-removals-00082410 [https://perma.cc/3Z3J-EZTW] (quoting the city’s presentation to health care workers obtained through a public records request in discussing a case for removal of a "man shaving his legs in the subway," who is "diseveled and rambling nonsensically but uninterested in support services or psychiatric care").

121 Id. (if a "Designated Clinician" determines that removal and transport to the hospital is necessary, the police are called to the scene (if not already there) and will request EMS transport; if the police officer themselves determines removal and transport is required, there is no involvement with the "designated clinician" and EMS is requested to complete the transport. In both scenarios, the police are required to "ensure that the individual stays on scene," and the Involuntary Removal Policy provides no guidance as to how this is accomplished). Furthermore, the option for a "Designated Clinician" to make the initial determination may be illusory, since the NYPD overwhelmingly responds to scenarios involving people experiencing mental illness. Additionally, research has shown that even mental healthcare professionals "display at least equal, or, in some cases, even stronger negative beliefs and attitudes [towards patients experiencing mental illness] than persons within the general population." ROSSLER, supra note 21.

122 See December FINEST Message, Baerga et al. v. NYC et al., 21-cv-05762 (S.D.N.Y. 2023) (PAC) (ECF # 123-1). In February 2023, city officials confirmed that at least 42 people had been taken involuntarily to the hospital in the initiative’s first month (December 2020). See Chris Sommerfeldt, Mayor Adams’ Controversial Mental Health Plan Prompted at Least 42 Involuntary Hospital Transfers in December, NY DAILY NEWS (Feb. 6, 2023), https://www.nydailynews.com/news/politics/new-york-elections-government/mayor-adams-mental-health-policy-prompts-42-hospitalizations-december-20230206-rndyach8opxysce59h6rsla-story.html [https://perma.cc/CA9F-HMXP] (according to Jason Hansman, a deputy director in Adams’ Office of Community Mental Health, “the actual number” was “likely higher than 42 because that number only covers a certain outreach category,” and is “very fragmented and very dependent on the type of removal.”). And the administration “declined to provide specifics about the 42 transfers, including details about where they took place,” nor did this number include “[i]ny transfers conducted by NYPD officers,” who “did not have data available on any transfers.” Id.

123 See, e.g., Jamelia Morgan, Disability’s Fourth Amendment, 122 Colum. L. Rev. 399 (2022) (discussing ways in which the Fourth Amendment doctrine renders disabled people vulnerable to police intrusions and police violence); Jamelia Morgan, Policing Under Disability Law, 73 Stan. L. Rev. 1401 (2021) (discussing the problem of policing and police violence as they impact people with disabilities); Complaint, at ¶ 69, Baerga v. City of N.Y., 21-cv-5762 (S.D.N.Y. 2022) (ECF #21) [hereinafter Baerga Complaint], (discussing the harmful and deadly interactions of people experiencing mental illness and the NYPD under the EDP policy).

124 Sommerfeldt, supra note 122 (quoting Juanita Holmes, the chief of the NYPD’s Training Bureau).
arrival to the scene. Mr. Cruz, a forty-two-year-old man, was unhoused and showering at his father’s apartment. Why were the police there? After all, his father called 311—not 911, because he “didn’t want something bad to happen”—seeking medical help for his son who “was in the midst of a schizophrenic episode.” The police came anyway. What did he ask for? “[M]edical authorities to commit Raul before something went away.” This scenario could be taken from the Involuntary Removal Policy’s guidebook for removal. In fact, both officers involved were trained in responding to involuntary removals.

The Involuntary Removal Policy also makes little reference to what happens once a person is hospitalized. In all likelihood, the “short interaction[] in the field” will lead to expanded use of Kendra’s Law (New York’s mandated outpatient treatment), or undetermined confinement—Mayor Adams stated that “the city [will] direct hospitals to keep those patients until they are stable and discharge them only when there is a workable plan in place to connect them to ongoing care.” This parallels the CARE Act, which creates a fast-track to LPS proceedings. And once back on the street, it’s unclear how the individual will be better off. The Involuntary Removal Policy contains no provision for housing, nor follow-up supportive services.

Part III. Problems Abound

To sum up, after the first wave of outright criminalization of unhoused people failed in Jones and Martin, California and NYC responded with a new strategy. In California, the CARE Act creates a new judicial apparatus that orders certain people who are unhoused and experiencing severe mental illness to comply with court-ordered treatment plans. If an individual fails to comply, they are threatened with hospitalization or conservatorship. In NYC, one needs only to be spotted on the street

127 Id.
128 Id.
129 Id.
130 Involuntary Removal Policy, supra note 20.
131 N.Y. MENTAL HYG. LAW § 9.60 (McKinney 1999). See Mayor Transcript, supra note 118 (“hospitals must be required to screen all psychiatric patients for Kendra’s Law eligibility”). Studies have shown that Kendra’s Law has resulted in less hospitalization, less homelessness, and less harmful behavior. See Brennan, supra note 28. However, Kendra’s Law suffers from similar critiques of involuntary treatment addressed infra Part III[B]. See The Dangers of Kendra’s Law, N.Y. C. L. UNION (NYCLI) (Jan. 6, 2022), [https://perma.cc/VJZ7-TQ4R].
132 Newman, supra note 23.
133 Although too early to tell, NYC may be making progress on addressing the housing crisis for unhoused people. See David Brand and Rebecca Reedmeyer, Dozens of Homeless New Yorkers Are Moving Into Vacant Apartments Thanks to a New Program, Gothamist, April 25, 2023, https://gothamist.com/news/dozens-of-homeless-new-yorkers-are-moving-into-vacant-apartments-thanks-to-a-new-program (the “Street-to-Home” pilot program, which bypasses common administrative hurdles that previously stymied housing options for those in need, has “connected nearly 60 once-homeless with private apartments that have on-site counseling and other services;” and “could provide a guadpost for the Admas administration” moving forward).
to be forced into interactions with the police and involuntarily hospitalized, with further unknown downstream consequences.

Some say that these initiatives are necessary to deal with the homelessness crisis. Yet both California and NYC have maneuvered around Jones and Martin by targeting unhoused people by proxy of mental illness. Both strategies have ushered in a second wave of criminalization, in all but name. This quasi-criminalization, while unlikely to be found unconstitutional under the Eighth Amendment as it does not outright criminalize being unhoused or experiencing mental illness, contributes to the already large set of pretextual logics of carceral intent for vulnerable individuals. And various issues arise with these programs: they (1) succumb to vagueness problems and very likely result in arbitrary and discriminatory enforcement that will disproportionately affect vulnerable minority groups, (2) they flip the idea of voluntary treatment on its head under the guise of a questionable psychiatric theory, and (3) they further entrench vulnerable individuals within punitive systems that fail to target key drivers of homelessness.

A. Vague Terms and Discriminatory and Arbitrary Enforcement

Vague terms abound in the CARE Act itself. Let’s start with the big picture. What does “trauma-informed” care mean? Or care that is “culturally and linguistically competent?” Even more to the point, what exactly are the “plans?” To date, California has not provided any sample plans, or what the requirements of the plans will consist of. There are also sparse details about how CARE courts monitor participants throughout the year (or two), and what other material support is provided within this “holistic” program.

Even specific terms of the Act are vague. Before enrollment, how will a court determine whether one is “unlikely to survive safely in the community,” needs services and support “in order to

134 A host of other states have enacted similar laws as well. See Martinson, supra note 102 (discussing legislation in Utah and Georgia that opens the door to more civic commitment).

135 See, e.g., Bryan Piestch, NYC Push to Visibly Hospitalizing Mentally Ill from Streets Spurs Backlash, THE WASHINGTON POST, Nov. 30, 2022, https://perma.cc/SHQL-HB79 (discussing that while “O’Connor v. Donaldson found it was illegal to confine someone against their will if they could safely live on their own,” the New York directive would “fly constitutionally” if “homelessness is used as the standard for danger posed to the person” (internal quotation omitted)). As of this writing, a host of other challenges have been brought against the Involuntary Removal Policy, including under Title II of the ADA, Section 504 of the Rehabilitation Act, the Fourth and Fourteenth Amendment, and New York State law. See Plaintiff Letter, Baerga v. City of N.Y., 21-cv-5762 (S.D.N.Y. 2022), (ECF #109) (supporting TRO and Preliminary Injunction request). And a lawsuit was filed by Disability Rights California in the California Supreme Court requesting a declaration that the CARE Act is facially invalid as unconstitutionally vague and violative of due process and equal protection under the California Constitution. Petition for Writ of Mandate and Supporting Memorandum of Points and Authorities at *55, Disability Rights Cal. v. Gavin Newsom, (2023) (Case No. S278330) (hereinafter Disability Rights Petition for Writ of Mandate) (supported by a wide-ranging group of disability, homeless, and civil rights organizations as amici). On April 19, 2023, the California Supreme Court denied the petition for writ of mandate in a one-sentence order. Disability Rights Cal. v. Gavin Newsom, S278330, 2023 Cal. LEXIS 2153 (Cal. 2023).

136 The lawsuit brought by Disability Rights California challenges the CARE Act on, among other theories, vagueness grounds. See Disability Rights Brief for Writ of Mandate, supra note 81, at *34-39.

137 CARE FAQ, supra note 80, at 1; SB-1338 § 5983(a).

138 CARE FAQ, supra note 80, at 1.
prevent a relapse," 139 or has a condition “likely to result in grave disability or serious harm.” 140 Or how will the CARE court determine whether participation in the plan “would be the least restrictive alternative necessary to ensure the person’s recovery and stability?” 141 Or whether “the person will benefit from participation?” Not only are these tests highly subjective and subject to bias—“rank speculation about what an individual may do in the future is baked into the central premise of the CARE Act” 142—but they all seem to create a presumption of enrollment: the comparison would be to not order a plan, yet a judge is likely to presume that a plan would be beneficial, is the “least restrictive means,” and that the individual before the Court is “likely” to need help. After enrollment, what exactly is the criteria and process for finding when an individual “is not participating” or has “failed to successfully complete their CARE Plan?” These undefined terms are concerning, especially given the power of the Act—it comes with threats of hospitalization or conservatorship. A rising in the context of mental illness, these vagueness concerns hark back to historical approaches to dealing with unhoused people that were found unconstitutional. 143 Like those cases, where states and cities aimed to remove a vast swath of “undesirables” from public view, the CARE Act’s language does the same, while fast-tracking the capture of a wide net of individuals that the state cannot ensnare under LPS or Laura’s Law.

These issues are also prevalent in NYC’s initiative. How can a responder—a police officer—tell if a person “appears to be mentally ill?” 144 Or if they have an “inability to meet basic living needs.” 145 Police are biased in their interactions with people experiencing mental illness. 146 Same with an “inability to meet basic living needs.” 147 Both these terms are left undefined. Mayor Adams offered the example of a “shadow boxer on the street corner in Midtown, mumbling to himself as he jabs at an invisible adversary.” 148 Is this someone who cannot care for his basic needs or needs involuntary hospitalization?

139 What ensuring recovery means is unclear, since “there are currently no established criteria by which to define relapse” and “reliable predictors for relapse have not been identified . . .” Olivares et al., Definitions and Drivers of Relapse in Patients with Schizophrenia: A Systematic Literature Review, 12 ANNALS OF GEN. PSYCHIATRY no. 32, 2013) at 1, 8, https://pubmed.ncbi.nlm.nih.gov/24148707/.

140 SB-1338 § 3972(d)(2). Studies have shown that the “track record of mental health professionals’ efforts to predict future violence has not been good” and recent research “has found that [while] the accuracy of clinical predictions of violence has improved somewhat,” the “rate of false positives [is still] below 50%.” Boldt, Perspectives on Outpatient Commitment, 49 NEW ENG. L. REV. 39, 51 (2014).

141 SB-1338 § 3972(c).

142 Disability Rights Brief for Writ of Mandate, supra note 81, at *36.


144 The NYPD was caught off guard, did not have prior training, and were unsure of how to implement the directive. See Craig McCarthy, et al., NYPO Was ‘Blindsided’ by Eric Adams’ Plan to Involuntarily Commit More Mentally Ill Homeless People, N.Y. POST, Nov. 30, 2022, https://nypost.com/2022/11/30/nypd-blindsided-by-eric-adams-plan-to-commit-mentally-ill-homeless/.

145 Involuntary Removal Policy, supra note 20.

146 See, e.g., Morgan, supra note 123, at 1437 (discussing how failure to accommodate and instead responding with force may be for “reasons such as implicit or explicit biases”).

147 Involuntary Removal Policy, supra note 20.

How about “if they don’t have a coat on in the winter?” Or if they talk back to the NYPD in an “incoherent” way. As Keith Ross, a retired police officer, explained, there was not “much thought put into the implementation [of] how this [will] work” in practice. This “basic needs” standard will result in people being sent to hospitals who need not be there.

Both programs are also severely underinclusive and overinclusive. The CARE Act targets only 7,000 to 12,000 people, a number that excludes a huge swath of unhoused people who need support, while entrapping individuals who are misdiagnosed. Same with the Involuntary Removal Policy, which will ensnare individuals who are not a danger to themselves or others and merely choose the safety of public places instead of the dangerousness of city shelters while ignoring those in shelters who may need help. At base, both programs operate under a “minority report” framework—they displace the prevailing standard of “dangerousness” with a “likely to result in danger” standard. In doing so, they arbitrarily target individuals based solely on their (perceived) status as “mentally ill,” even though the vast majority of people with mental illness are no more likely to be violent than anyone else, while instead being four times more likely to be victims of violent crime than the non-disabled population. And consider the arbitrary and harmful practical enforcement of both the CARE Act and the Involuntary Removal Policy.

How will CARE Court’s ensure that individuals appear before them after a petition is filed? As it stands, nearly a third of those eligible for out-patient treatment under Laura’s Law cannot be located. This is a problem, since under the CARE Act, noncompliance with a plan includes not showing up, which could place this group defending against civil commitment without notice. And due to the wide-ranging group of third parties who can petition the court for enrollment, inappropriate referrals by third parties who may view CARE courts as a means to address homelessness and broader

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Corey Kilgannon, Plan Tests Tense Relationship Between N.Y.P.D. and Mentally Ill People, N.Y. TIMES (Dec. 5, 2022), https://www.nytimes.com/2022/12/05/nyregion/mental-health-plan-nypd.html (providing Mayor Adams’s statement that officers should “rely on visual cues and ‘common sense’”). But if this is the enforcement mechanism, leaving this discretion to rank-and-file NYPD officers, as opposed to trained social workers or mental health providers, seems misguided. But see Kaufman, supra note 120. And while the policy does provide for health-care workers to make initial assessments as well, “[i]f no health care worker is available to assess [an individual’s] capacity to make decisions, it ‘may be appropriate’ for police to bring the man to the hospital against his will.” Kaufman, supra note 120.

149 Kilgannon, supra note 148.

150 Id.

151 For example, “a person who has a current diagnosis of substance use disorder . . . but does not meet the required criteria in this section shall not qualify for the CARE process.” SB-1338 § 5972(b).

152 See infra note 163.

153 Paul Raines, Minority Report, CSO, (Nov. 4, 2008 7:00 AM), https://www.csoonline.com/article/2123388/minority-report.html (Minority Report, a short story by Philip K. Dick which was adapted in the film starring Tom Cruise, revolves around “a system designed to predict crimes and then arrest people in advance for crimes which they hadn’t yet committed.”)

154 See ERIKA HARRELL, CRIME AGAINST PERSONS WITH DISABILITIES—2009–2019—STATISTICAL TABLES, DEPARTMENT OF JUSTICE (Nov. 2021), https://bjs.ojp.gov/content/pub/pdf/capd0919st.pdf (Minority Report, a short story by Philip K. Dick which was adapted in the film starring Tom Cruise, revolves around “a system designed to predict crimes and then arrest people in advance for crimes which they hadn’t yet committed.”)


156 CARE FAQ, supra note 80.

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systemic challenges with access to behavioral health treatment are likely. New York’s enforcement is even worse, since the initial contact is likely with the police. Just what neighborhoods are police going to be looking for these individuals in? At what time? The NYPD policies Black neighborhoods at a higher rate than white ones. The initiative is silent on what will happen if an individual refuses to be transported. It is easy to imagine an individual not complying with an officer—who will this lead to arrest? Excessive force? The initiative tells officers to “exhaust all voluntary transportation options, if feasible.” What does “feasible” mean? To be sure, the initiative does provide for the officer to “clearly communicate [his or her] intention” prior to removal. But will the targeted individual really understand this? Under the Involuntary Removal Policy, force will likely be necessary to get many to the hospital. Here is the kicker—the police officer “must ensure that the individual is transported to the hospital, even if the officer disagrees about the need for involuntary transport.” Perhaps this provision is intended to cut against arbitrary and discriminatory enforcement, but for now, the policy is clearly underdeveloped: instead of the use of discretion, now everyone must go.

This arbitrary enforcement will also likely lead to discriminatory enforcement that disproportionately affects vulnerable minority populations. Let’s start with the CARE Act. Although limited to schizophrenia and other severe mental illness, research reveals that “Black individuals are more likely to be diagnosed with a psychotic disorder than white individuals, despite no scientific evidence that they are more likely than other populations to have schizophrenia.” And due, in part,
to longstanding systemic discrimination, “Black Californians [also] suffer a disproportionate rate of homelessness.” So a policy that targets those with schizophrenia or other psychotic disorders who are unhoused will result in discriminatory enforcement that disproportionality affects the Black population. And where will these groups be moved to? Likely not where they have closest ties—the CARE Act gives state actors “a new tool to threaten unhoused people with referral to the court to pressure them to move from a given area.”

Similar disparities result with the Involuntary Removal Policy. Although Black and Latino New Yorkers make up, respectively, around 23 and 29 percent of the city’s population, 57 percent of the heads of households in shelters are Black and 32 percent are Hispanic/Latinx, with “homeless single adults experiencing higher rates of addiction disorders, mental illness, and other severe health complications than homeless families.” Black New Yorkers also make up 44 percent and Latino’s make up 32 percent of those currently receiving court-mandated treatment under Kendra’s Law, which

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c. al., Written Testimony Submitted to Assembly Judiciary and Health Committees, Apr. 19, 2022; see also Assembly Committee on Appropriations, California Bill Analysis, S.B. 1338 Sem., Aug. 3, 2022 (“The preponderance of literature clearly shows how African Americans are more frequently misdiagnosed than Euro-Americans, with research findings initially gaining momentum since the early 1980’s. In particular, African Americans are disproportionately diagnosed with Schizophrenia with estimates ranging from three to five times more likely in receiving such a diagnosis . . . ”). Deep-seeded biases are also at play. See id. (“Clinician perceived honesty was lower for African American consumers, a factor found to be a significant correlate of increased Schizophrenia diagnoses among African Americans. Conversely, increased distrust and a poorer clinical relationship were reported by African American consumers.”) (quoting Racial Disparities in Psychotic Disorder Diagnosis: A Review of Empirical Literature, 4 WORLD JOURNAL OF PSYCHIATRY no. 4, 133–140 (2014); see Assembly Comm. on Judiciary, supra note 75 (“Research demonstrates that Black, Indigenous, and People of Color (BIPOC) and immigrant racial minorities are more likely to be diagnosed, and misdiagnosed, with psychotic disorders than white Americans because of clinicians’ prejudice and misinterpretation of patient behaviors.”).

Assembly Comm. on Judiciary, supra note 75 (“Due to a long and ongoing history of racial discrimination in housing, banking, employment, policing, land use, and healthcare systems, Black people experience houselessness at a vastly disproportionate level compared to the overall population of the state . . . ”) In Los Angeles alone, “Black people make up 8% of the population, but 34% of the people experience houselessness.” Id. The state disparities are even worse, with 6.5% of the population identifying as Black or African-American yet accounting for nearly 40% of the unhoused population. See id.

The CARE Act will also have a disproportionate impact on other vulnerable and marginalized groups who are overrepresented in the homeless population. These include transition age youth (ages 18-25, who total over 23,000 in California) and the transgender and LGBT people. See Alliance for Children’s Rights, Amicus Curiae Letter in Support of Petition for Writ of Mandate, Feb. 10, 2023; Transgender Law Center, Amicus Letter of Transgender Law Center in Support of Petition for Writ of Mandate, Feb. 17, 2023.


will see increased usage under the Involuntary Removal Policy. Among this population, more than a quarter have experienced homelessness, incarceration, or both. All of this suggests an increase in a disproportionate number of Black and brown New Yorkers that will be involuntarily hospitalized under the new policy.

B. (In)voluntary Treatment and Coercion

Although framed as a voluntary and empowering process, the court-ordered CARE plan is anything but. It starts with a petition by a third party: involuntary. If the CARE court finds merit, but the individual fails to agree, they are ordered to show up anyway: involuntary. If a plan is ordered but the individual does not agree, it is ordered anyway: involuntary. This involuntary system is a far cry from the CARE Act’s purported framework of “self-determination.”

Put simply, “[i]f people under the supervision of CARE courts lack decision-making capacity, they can[not] voluntarily accept medical care.” CARE courts instead invert “voluntary treatment” via state coercion. This coercion is “frightening” and “antithetical to the peer-based model that is critical to recovery.” Instead, it undercuts self-determination in effective care and is instead harmful. As explained by Keris Myrick, an advocate who has schizophrenia and experienced

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174 See id.

175 “Self-determination” is mentioned twice in the CARE Act. See SB-1338 § 1(c); § SB-5813.5(d)(1).


177 “[R]equire a finding that a person lacks medical decision-making capacity as a prerequisite for ordering a person into CARE Court services undermines the entire CARE Court framework, which assumes a patient’s ability to participate in the development of their treatment plan and ultimately consent to it without the appointment of a substitute decision-maker.” Disability Rights California & Coalition’s Letter in Opposition to CARE courts, LETTER TO GOVERNOR (May 11, 2022), https://www.disabilityrightsca.org/latest-news/disability-rights-california-coalitions-letter-in-opposition-to-care-court [https://perma.cc/K7ZT-9VSD].


179 Beam & Har, supra note 178.

180 See Disability Rights California & Coalition’s Letter in Opposition to CARE Courts, supra note 177 (“[E]vidence shows that involuntary, coercive treatment is harmful. . . . CARE Court is antithetical to recovery principles, which are based on self-determination and self-direction.”); see also Disability Rights Brief for Writ of Mandate, supra note 81, at 58 (“Evidence before the Legislature showed that involuntary treatment reduces patient engagement, recovery and treatment goals. County representatives explained that someone who is a person ‘brought into services on a voluntary basis is much more likely to maintain their recovery in the long run,’ versus someone who is coerced into treatment.”) (citations omitted). Court appearances themselves “are also likely to increase or trigger anxiety, trauma, or mental deterioration.” See ACLU, Amicus Letter in Support of Petition for Writ of
homelessness: “[w]hen people are told that they need to go to court to get what they should be getting voluntarily in the community, and then they get a care plan that subjugates them to services that still do not meet their cultural needs, that is not compassion.” Even worse, when an individual fails to abide by the plan, “subsequent proceedings may use the CARE proceedings as a factual presumption that no suitable community alternatives are available to treat the individual.” These subsequent proceedings—hospitalization and conservatorship—strip people of their “legal capacity and personal autonomy” and lead to the “loss of personal liberty[.]” NYC’s plan needs no discussion regarding attempted voluntary compliance because it is completely involuntary—it is named the “Mental Health Involuntary Removals.”

To be sure, both California and NYC rest this involuntary treatment on medical grounds, namely the theory of anosognosia: “[t]he very nature of their illnesses keeps [individuals] from realizing they need intervention and support.” The philosophy, an idea of “service resistance,” has been pushed by senior advisors leading up to the initiatives in both California and NYC. Yet “historically rooted in early twentieth century efforts” to understand post stroke behavior, this concept has been transformed “into a psychiatric concept of ‘insight’” that now justifies involuntary treatment. And “there is no consensus in the field” about the root causes or the use of the concept, and psychiatrists

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Dembosky, supra note 31.

182 *Disability Rights California & Coalition’s Letter in Opposition to CARE Courts, supra note 177, SB-1338 § 5979(a)(5), 2022 Leg. Reg. Sess. (Cal. 2022).*

183 Human Rights Watch, supra note 170, at 2–3.

184 *Safia Samee Ali & Tom Winter, New York City Will Involuntarily Hospitalize More Mentally Ill People Under New Plan, NBC NEWS (Nov. 29, 2022), https://www.nbcnews.com/news/us-news/new-york-city-will-unvoluntarily-hospitalize-mentally-ill-people-new-p-135293 [https://perma.cc/U89D-CL7Q]. The CARE Act’s legislative history revealed that “Legislators asserted that potential CARE respondents are ‘taking a dump in a bucket,’ ‘walking around naked,’ committing battery and domestic violence, ‘walking like an alien [and] God,’ and ‘living under a bridge.’” *Disability Rights Petition for Writ of Mandate, supra note 135, at 55* (citing legislator’s comments preserved in hearing transcript). The legislators “also assumed that unhoused people living with schizophrenia ‘don’t think they need help,’ and made clear that a purpose of the CARE Act is to ‘take[ ] our streets back and help[ ] these people,’ and that ‘the individual should have an obligation to say yes . . . if you don’t, we’re going to step in’ . . . .” Id. These stereotypes are not only inaccurate and degrading but contribute to the initiative’s entrenchment of biases and stereotypes of the very individuals they seek to help.

185 In California, Dr. Mark Ghaly, Secretary of Health and Human Services, explained that the reason for focusing on schizophrenia and psychotic disorders was because they “are defined by impairment in insight and judgment,” making it difficult for individuals with those disorders to recognize the need for treatment.” Opposition to Disability Rights’ Brief, *supra note 81, at 55* (citing Hearing before Sen. Comm. on Judiciary on Sen. Bill No. 1338 (2001-2002 Reg. Sess.) (Apr. 26, 2022), testimony of Secretary Mark Ghaly [https://www.senate.ca.gov/media/senate-judiciary-committee-20220826/video] (as of Feb. 9, 2023) (see time stamp 0:14:16 of hearing [video] file)). In New York City, Brian Stettin, the senior advisor on mental illness to Mayor Adams and who worked on the implementation of Kendra’s Law, has been vocal for years that “mental illness often prevents a person from recognizing his own need for treatment. . . .” Hughes, *supra note 114, at 11* (citing Brian Stettin, N.Y.’s True Mental Health Problem, NY DAILY NEWS (Jan. 23, 2013), https://www.nydailynews.com/opinion/n-y-s-true-mental-health-problem/article-1.11245186 [https://perma.cc/SCCS-LRNN]).

186 Hughes, *supra note 114, at 12* (footnotes omitted).
recently cautioned against its use “to provide validity to arguments for coercion.” In any event, California and NYC have deployed this concept to remove unhoused people from public view, a concerning extension beyond coerced treatment for those experiencing mental illness.

C. Further Entrenchment of Vulnerable Individuals Within Punitive Systems

The CARE Act, which enables the removal of unhoused people by placing them into court-ordered plans under penalty of involuntary commitment or conservatorship, quasi-criminalizes the status of having living with certain mental illnesses. Those targeted—who lack alternative shelter or other modes of living available to them—are ensnared in a judicial apparatus that is perhaps even worse than before. According to Soma Snakeoil, the Executive Director and Co-Founder of The Sidewalk Project, the CARE Act “will inevitably lead to further criminalization [and] incarceration of our most vulnerable.” Enrollment in CARE court process preemptively places individuals in the California civil court system, which jumpstarts the process of further harm and removal from the public. This law essentially declares: we want you off the streets and will give you a chance, but if you fail, off you go. Rather than creating “adequate alternatives” to homelessness, “California has decided to use its civil commitment system to get homeless people off its streets [by] taking them against their liberty into state custody—but in a way that they think at least will stand up to an Eighth Amendment challenge.”

Although it may stand up, that does not warrant its endorsement. While framed as a process that “addresses the needs of those we are serving, instead of the bureaucratic structures of government,” CARE courts are a multi-million-dollar investment in court-ordered treatment, which has “been shown to often exacerbate harms while worsening existing health disparities and the overrepresentation of people of color in the criminal legal system.”

NYC’s Involuntary Removal Policy is even worse. There is no voluntary enrollment attempt, no required petition by a third-party, no effort to create (before hospitalization) a plan for treatment, nor any opportunity to encourage compliance with such a plan. Instead, the policy sweeps unhoused

187  Id.


189  See Dembosky, supra note 31 (Margot Kushel, director of the University of California, San Francisco’s Benioff Homelessness and Housing Initiative, stated that “[t]he problem of homelessness is that people don’t have housing,” and that “[i]f you had all the treatment in the world and you didn’t have the housing, we would still have this problem.” In California, only “24 units of affordable housing for every 1000 very low-income households” are available, and people with mental illness “have the hardest time competing for those scarce spots.” So if the goal is reducing homelessness, the CARE Act is the “wrong prescription.”).

190  Martinson, supra note 102.

191  Drug Policy Alliance, supra note 188; Human Rights Watch, supra note 170 (“[H]istoric over-diagnosing of Black and Latino people with schizophrenia [will] likely [] place many, disproportionately Black and brown, people under state control.”).
people off the street en masse, who are “scapegoated” as violent and needing help. Yet many of these individuals likely “don’t need to be in a hospital and are not a danger to themselves or others.” There is also no due process via appointment of a lawyer or personal representative. While Mayor Adams frames the initiative as “meeting [the mentally ill’s] basic human needs,” involuntary hospitalization does not target basic human needs. Housing would. But like the CARE Act, the Involuntary Removal Policy contains no authority to authorize housing.

Taken together, the CARE Act and the Involuntary Removal Policy—enacted in the two areas of the country with the largest unhoused populations—represent a concerning trend to remove unhoused people from the public under the guise of mental health. Both maneuver around the unconstitutional criminalization of status by selling the initiatives as a “moral imperative” that will aid those in need, but in practice merely place individuals in involuntary court proceedings or the hospital. The “moral imperative” instead feeds into the moral panic. Both are “based on stigma and stereotypes of people living with mental health disabilities and experiencing homelessness.” Instead of self-determining and dignifying care, the initiatives “are simply pathways to the even stricter system of control through [hospitalization and] conservatorship.” Although unsupported by current case law, perhaps this shift from misdemeanor criminal violations to civil proceedings should not make a


194 Bazelon Ctr., supra note 172.

195 Press Release, City of New York, Mayor Adams Announces Plan to Provide Care for Individuals Suffering from Untreated Severe Mental Illness Across NYC (Nov. 29, 2022), https://www.nyc.gov/office-of-the-mayor/news/870-22/mayor-adams-plan-provide-care-individuals-suffering-untreated-severe-mental Illness-across-NYC (Dec. 15, 2022), https://www.nytimes.com/2023/01/10/nyregion/hochul-mental-health-plan.html [https://perma.cc/8MTE-ZK9T]. This plan would open 800 more inpatient psychiatric beds in hospitals and create 3,500 units of housing. Id. The plan aims to address those “with serious mental illness who cycle in and out of hospitals, jails, shelters and street[es],” creating stricter standards for evaluation and dozens more teams of outpatient coordinators. Id. Whether this addresses the funding or feasibility of the Involuntary Removal Policy remains to be seen. Additionally, Mayor Adams has released a new “mental health agenda,” that includes additional “mobile treatment” teams, expanding a program that sends medical professionals rather than police officers to 911 calls, and investing in community centers for people with mental illness. Andy Newman & Emma G. Fitzsimmons, Street Teams and Clubhouses: A New Plan to Help Mentally Ill New Yorkers, N.Y. TIMES (Mar. 2, 2023), https://www.nytimes.com/2023/03/02/nyregion/eric-adams-mental-illness-plan.html [https://perma.cc/4NZ7-XFUV]. This is welcomed news, even though the administration has not hinted at rolling back the Involuntary Removal Policy. That said, this should be taken with a heavy dose of skepticism, especially considering the unsuccessful prior programs to substitute medical professionals for police. See generally Barre Complaint, supra note 123 (discussing failures of previous similar initiatives).


197 See supra note 29.

198 Disability Rights California & Coalition’s Letter in Opposition to CARE Act, supra note 182.

199 Human Rights Watch, supra note 170, at 3.
difference to the constitutional analysis. As stated by Human Rights Watch, CARE courts will “remove unhoused people with perceived mental health conditions from the public eye without effectively addressing those mental health conditions and without meeting the urgent need for housing.”200 As stated by the Bronx Defenders, NYC's policy of “forcibly removing people from the streets and confining them in hospitals against their will is policing and incarceration by another name.”201 Both initiatives subject unhoused individuals to detention for living with their illness in a public place, while “promot[ing] the [false] idea that people suffering from psychiatric disorders present a unique threat to the broader populace.”202 We are back to Jones and Martin: targeting and quasi-criminalizing the status and unavoidable conduct of being unhoused, this time by proxy of mental illness.

Part IV. All Is Not Lost—Benefits of the Initiatives and Further Developments

California’s CARE Act and NYC’s Involuntary Removal Policy paint a grim picture for engaging productively with the homelessness crisis and target those experiencing mental illness as a proxy to remove unhoused people from public view. But recognizing the harm of homelessness to unhoused people, and the harm of mental illness (if any) to those experiencing mental illness, is commendable. So seeking to implement programs that aim to address the problems in non-punitive and rehabilitative models are beneficial. Below I address some benefits of the two initiatives which could be part of better strategies moving forward.

A. Benefits of the CARE Act

The CARE Act, despite this article’s criticisms, does have various features that will help those in need. Afterall, because of the overlap between those who experience mental illness and those who are unhoused, reforms to address one will need to address the other. One prominent benefit is the coordinated state-wide funding mechanism, which combats the prior problem of dispersed resources and uncoordinated efforts throughout cities and localities.203 In doing so, it “includes real accountability” due to fines issued by the CARE courts if counties and local governments are out of compliance.204 This is notable since efforts to address homelessness “have been stymied both by

200 Id at 1.
201 The Bronx Defenders (@BronxDefenders), TWITTER (Nov. 30, 2022, 10:05 PM), https://twitter.com/BronxDefenders/status/159815121395426513?ext=HlswWgsD0fmd460sAAAA [https://perma.cc/V4ZA-FW29].
202 Brennan, supra note 28.
204 Press Release, Off. of the Governor Gavin Newsom, Governor Newsom Signs CARE Court Into Law, Providing a New Path Forward for Californians Struggling with Serious Mental Illness (Sep. 14, 2022), https://www.gov.ca.gov/2022/09/14/governor-newsom-signs-care-court-into-law-providing-a-new-path-forward-for-californians-struggling-with-serious-mental-illness/ [https://perma.cc/Y7KC-6L9Q]; SB 1338 § 5979(b), I.eq. Reg. Sess. (Cal. 2022). Going again to the “ping-pong effect,” Common Myths and Stereotypes of Homelessness supra note 32, Governor Hochul plans to “pursue legislation to increase the state’s ability to fine hospitals that don’t comply with the order [to reopen hospital beds for involuntary hospitalization] to $2,000 per violation, per day.” Sadurni and Newman, supra note 196. Whether this occurs or not is to be determined, but it demonstrates the high salience of both cities fast-moving (and influential) initiatives.

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neighborhoods that resist construction of shelters and supportive housing and by structural issues that, for example, make cities responsible for housing and sheltering homeless people, but put counties in charge of the public funding required to provide those who are mentally ill with continuing treatment.\footnote{205} So a state-wide initiative (though currently limited to those mental illnesses defined under the CARE Act) may nudge local governments, who currently deploy varying criminal and civil penalties to get rid of unhoused people in their communities, to shift towards different treatment as a whole. And since these fines support the efforts to serve the target population, it creates a feedback loop of targeted support.\footnote{206}

Another benefit is the diversion from status-quo criminal proceedings. The CARE Act provides for cases to be referred to CARE courts from “assisted outpatient treatment, conservatorship proceedings, or misdemeanor proceedings pursuant to Section 1370.01 of the Penal Code.”\footnote{207} This mimics a mental-health court model without requiring a plea or conviction. Finally, although seemingly involuntary, the step-by-step method, culminating in one’s “graduation” from the CARE program,\footnote{208} creates a better framework than one that merely addresses the immediate crisis of the unhoused—by incarceration, fine, or short-term hospitalization.

Time will tell whether CARE courts work. Attention from the legislature seems to emphasize continued engagement and oversight. Working groups have been established to monitor progress which include representatives from diverse networks, including “disability rights organizations, families, racial equity advocates, housing and homelessness stakeholders, behavioral health providers, associations, and others.”\footnote{209} The CARE Act has provisions for annual reporting and data collection, including independent evaluations, which presumably will provide insight into whether the program is effective and what will need to be modified moving forward.\footnote{210} That said, there are already problems with implementation, including delayed funding and a workforce crisis.\footnote{211}

B. (Slim) Benefits of the Involuntary Removal Policy

The Involuntary Removal Policy is less rosy, but it has its supporters. Eva Wong, the director of the Mayor’s Office of Community Mental Health, stated that it will “ensure that agencies and systems responsible for connecting our community members with severe mental illnesses to treatments are working in unison to get them the support they need and deserve.”\footnote{212} Psychiatrist E. Fuller Torrey, a


\footnotesize{206} Off. of the Governor, supra note 76.

\footnotesize{207} CARE FAQ, supra note 80, at 2.

\footnotesize{208} Community Assistance, Recovery, and Empowerment Court Program, SB-1338 § 5971(b) (2022).


\footnotesize{210} Community Assistance, Recovery, and Empowerment Court Program, SB 1338 §§ 5985, 5986 (2022).


\footnotesize{212} Giulia Heyward, \textit{NYC Mayor Adams Faces Backlash for Move to Involuntarily Hospitalize Homeless People}, \textit{NPR} (Nov. 30, 2022), [https://www.npr.org/2022/11/30/1139068573/nyc-mayor-adams-faces-backlash-for-move-to-involuntary-
long-time critic of the “deinstitutionalization” movement without adequate follow-up care, applauds the Initiative as instituting a system to “compel seriously mentally ill people in the community to get treatment.”213 Others argue that the initiative “help[s] people” because “it is cruel and dangerous to pretend [those with serious mental illness] are acting with free will,” and thus “it’s not ethical or compassionate to demand mentally ill people be abandoned in the name of civil rights.”214 Similar to California, Mayor Adams stated, “[t]he goal is to bring the team together[,]” noting that the response to mental illness is often “disjointed.”215 A coordinated response to address the issue of unhoused people who experience mental illness is necessary.

The language used to promote the initiative is also compelling. A Joint NYC Defender Statement, which was released but taken down the next day, stated they were “heartened to hear that Mayor Adams acknowledges that community-based treatment and least-restrictive services must guide the path to rehabilitation and recovery.”216 The organizations stated that Mayor Adams is correct that “homeless New Yorkers with mental health conditions have the right to health care, housing, treatment, respect, dignity and the hope that their futures will be safe and illness treated.” Mayor Adams is correct: we should “assist those who are suffering from mental illness and whose illness is endangering them by preventing them from meeting their basic human needs.”218 We should “not abandon them.”219 Those experiencing and suffering from mental illness and homelessness do have “[a] right to dignity and respect, a right to safety and security.”220 This language espoused by Mayor Adams is welcomed and lines up with the language in the Convention on the Rights of Persons with
C. Moving Forward

What to do instead? To be sure, creating solutions to address and meet the needs of unhoused people and those experiencing mental illness is a tall task. After years of failed efforts, it may seem nearly impossible in today’s current environment. This article acknowledges this reality. Yet this does not warrant endorsement of misguided initiatives that move in the opposite direction of progress and are contradictory to community-led and liberatory forms of mental health and housing alternatives.

Looking at the initiatives themselves, both California and NYC must pivot towards voluntary services which are made available to the community at large. They must respond to the crises with public health, not involuntary hospitalization, conservatorship, or criminalization. Both must remove the initial police interaction at the outset. And both must remove the retooled standard of dangerousness, which runs counter to empirical assessments of harm while entrenching the stigma of unhoused people who live with mental illness as a threat, writ large. True, some people experiencing severe mental illness may need to be taken “off the streets and out of awful conditions and into some sort of care.” But without an adequate care system, the initial removal, either to a prolonged court process or directly to the hospital, is problematic. Unlike the CARE Act, the Involuntary Removal Policy itself does not even attempt to address that need for care, nor are there even enough beds currently to house those in need—although there are 2,600 apartments designed for persons with mental illness that sit vacant in New York. Additionally, California and NYC should be even more preemptive. Rather than target unhoused people before any crime is committed, both should work to address the numerous pipelines that lead to one being unhoused by providing material support to those


222. See infra Part II(B).

223. The City Council has recently introduced a policy roadmap for mental health, which lays out policy and budget proposals in four main areas: prevention and supportive services, workforce, the intersection of mental health and the criminal justice system, and public awareness of resources. Maya Kaufman, Another Policy Roadmap for Mental Health, Courtesy of the City Council, POLITICO (Apr. 24, 2023), https://www.politico.com/newsletters/weekly-new-york-health-care/2023/04/24/another-policy-roadmap-for-mental-health-courtesy-of-the-city-council-00093425 [https://perma.cc/Y33D-73C6]. It calls for oversight into how the Involuntary Removal Policy is implemented and who is affected by it, and it seeks funding to build supportive housing and mental health clinics. Id. Although a welcome addition, it still requires Mayor Adam’s approval and does not negate the Involuntary Removal Policy itself.

224. See Berger Complaint, supra note 123, at ¶ 76 (“in [in] jest cases, even when the person in crisis clearly needs or wants assistance, the only assistance the police can offer is ‘non-assistance’” (citation omitted)).

225. Barry, supra note 213 (quoting Dr. Talbott, who served as a superintendent at Manhattan State Hospital).

in need at an early stage.

The personnel who operate the initiatives must also pivot away from “expert” legal actors to community-based actors, most importantly those with lived experience of homelessness and mental illness, to provide holistic and non-coercive services and outreach.227 As noted by the Bazelon Center, “[r]esearch indicates that high quality engagement of homeless people with mental health conditions . . . helps individuals see the value of and agree to participate in supportive services.”228 In fact, “there is no evidence that court-ordered involuntary treatment in hospitals is more effective than quality community-based treatment,” which are already in existence in both California and New York.229 Both initiatives must also focus on addressing the material needs of unhoused people, namely housing. As currently enacted, alternative housing arrangements are excluded from the CARE Act and the Involuntary Removal Policy, even though these are well-documented to address root-causes of both homelessness and concurrent mental illness concerns.230 These combine “affordable housing with access to voluntary support services, such as mental health counseling, substance use treatment, and education and employment opportunities.”231 But since community based treatment and housing first programs need funds, the massive investment in CARE courts and the cost to enforce the Involuntary Removal Policy should be redirected to these alternatives.

CONCLUSION

This article explored how California and NYC have maneuvered around Jones and Martin by targeting and removing unhoused people by proxy of mental illness. In one sense, these initiatives are

227 For example, Partnership for Zero in Seattle has recently introduced a three-part framework of affordable and supportive housing, crisis response, and mainstream systems and services (including behavioral health), grounded in racial equity and the need for affordable and supportive housing, valuing voices of lived experiences as equal partners in the work. We Are In Coalition, et al., King County Regional Action Framework (2020), https://wecare.org/wp-content/uploads/2020/09/King-County-Framework-for-Regional-Action-on-Homelessness-Final-w-Appendices9.18.20.pdf [https://perma.cc/K5BA-U2B6]. Project Return Peer Support Network in California, one of the first peer-run mental health programs in the country, manages a network of more than 150 peer led support groups that meet each week and are led by people with lived experience. See Peer Support Groups, Project Return Peer Support Network, https://prpsn.org/services-peer-support-network.html?id=169 [https://perma.cc/D794-X9GZ] (last visited June 15, 2023). Project HOME in Philadelphia, which provides housing for people who are or were homeless, opportunities for employment, medical care, education, and advocacy and community engagement, is staffed by many former Project HOME residents. See FAQ, Project HOME, https://www.projecthome.org/frequently-asked-questions (last visited June 15, 2023). The CARE Act and Involuntary Removal Policy provide no interaction with people with lived experience of homelessness or who experience mental illness.

228 Bazelon Ctr., supra note 172.

229 Id.

230 An example of an alternative housing arrangement concept is Housing First, which is “a homelessness assistance approach that prioritizes providing permanent housing to people experiencing homelessness, thus ending their homelessness and serving as a platform from which they can pursue personal goals and improve their quality of life.” See Housing First, Nat’l All. to End Homelessness (Mar. 20, 2022), https://endhomelessness.org/resource/housing-first/ [https://perma.cc/BHTC-MSRJ], Bazelon Ctr., supra note 172 (“[Longer-term services] delivered not in the hospital, but in the person’s own home and community—have been shown to break the cycle of institutionalization.”).

welcomed. Compared to criminal penalties outlawed in *Jones* and *Martin*, they take a preemptive approach to those suffering from mental illness. Compared to mental health courts, which deal with those already involved in a crime, this preemptive approach may decrease incarceration and further entrenchment in the criminal justice system. They offer a new pathway to much-needed care. But their paternalistic approaches raise grave concern about continued attempts to criminalize status and unavoidable conduct, by either involuntarily enrolling individuals in court-centered plans or involuntary hospitalization without any showing of dangerousness. As this article explained, these initiatives continue to target the status and unavoidable conduct of being unhoused that was forbidden by *Jones* and *Martin*, this time by proxy of mental illness. This is all the more concerning because “most people with a mental disorder aren’t dangerous.”\(^{232}\) And unless expanded, both programs still only target “a small group of people” and should not “be confused with a solution to homelessness.”\(^{233}\)

In the end, creating solutions for unhoused people who experience mental illness is a moral imperative. These individuals must be provided dignity and respect, with adequate care and nondiscriminatory services, which aim to allow them “to live in the community” and receive health services “as close as possible to [their] own communities.”\(^{234}\) But these communities are not in courts nor in hospitals.\(^{235}\) Involuntary and court-centered adjudication with vague enforcement standards implemented by untrained police officers that attempt to remove unhoused people by proxy of mental illness, veers on a misguided path.

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\(^{233}\) Chabria, supra note 148 (quoting Alex V. Barnard, an assistant professor of sociology at New York University and author of an upcoming book on conservatorships in California).

\(^{234}\) G.A. Res. 61/106, ¶¶ 19, 25, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006); see also *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999) (“[U]njustified institutional isolation of persons with disabilities is a form of discrimination”; this integration mandate requires individuals with disabilities to receive services in “the most integrated setting appropriate to [their needs].”).

\(^{235}\) *See Boggs*, 132 A.D.2d at 367 (“Regrettably, our affluent, sophisticated and medically advanced society has not developed a more rational, effective and humane way of dealing with the mentally disturbed homeless than in a manner other than what appears to be revolving door mental health—that is, forcibly institutionalize, forcibly medicate, stabilize, discharge back into the same environment, and then repeat the cycle.” (Milonas, J., dissenting).