

POLICING THE PSYCH UNIT

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Tens of thousands of people are involuntarily confined in a hospital each year in connection with their mental illness or disability. In response to misconduct by people who are civilly committed, hospitals often call the police, setting in motion a chain of events with devastating consequences for the person who is transferred to criminal custody. Despite the frequency with which it occurs, little research has explored this phenomenon. This Note aims to shed light on the practice and expose its tension with constitutional norms, using the Court’s decisions in City of Grants Pass v. Johnson and Robinson v. California as points of departure.

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INTRODUCTION

In November 2021, Melania Smith called 911 seeking emergency mental health assistance for her daughter, Alia Wardell.¹ Surgery to remove a brain tumor at age fourteen had permanently altered Alia’s mental functioning.² In the six years that followed, Melania struggled to secure help in caring for Alia, whom authorities tossed around like a “hot potato” between hospitals, jails, inpatient programs, and juvenile detention centers.³

Alia’s surgery left her body unable to regulate its temperature and electrolyte levels on its own,⁴ but with the right medication, Alia lived safely with her family.⁵ That’s why, when Alia threw out her medication one day, Melania thought the best course of action was to seek her daughter’s temporary involuntary hospitalization, as she had done numerous times before.⁶ On day five of Alia’s hospital stay,⁷ when

¹ Jennifer Rich, ‘Alia’s Law’: Century Mother Seeks Baker Act Reform After Daughter’s Death in Jail, PENSACOLA NEWS J. (Feb. 7, 2022, 6:01 AM), <https://www.pnj.com/story/news/local/escambia-county/2022/02/07/alia-wardell-mother-calls-change-florida-baker-act/9296936002> [<https://perma.cc/YQ7J-JUNV>].

² *Id.*

³ *Id.*

⁴ Jennifer Rich, *Medical Examiner Says 20-Year-Old Died of Natural Causes in Escambia Jail, but Questions Linger*, PENSACOLA NEWS J. (Mar. 1, 2022, 3:50 PM), <https://www.pnj.com/story/news/local/escambia-county/2022/02/28/alia-wardell-died-natural-causes-escambia-county-jail-report-says/6937750001> [<https://perma.cc/KKN7-C66J>].

⁵ Cody Long, *Mother Wants Answers After Special Needs Daughter Dies in Escambia Co. Jail*, WKRG (Dec. 7, 2021, 10:12 PM), <https://www.wkrg.com/northwest-florida/escambia-county/mother-wants-answers-after-special-needs-daughter-dies-in-escambia-co-jail> [<https://perma.cc/RVU8-4B85>] (“When she was on her meds, she was great That’s why usually she would go in under a Baker Act, get her medications, adjustments if needed, then I’d go pick her up.” (quoting Melania Smith)). The Florida Mental Health Act, commonly known as the Baker Act, allows a person with mental illness to be involuntarily held for inpatient treatment if “[t]here is substantial likelihood that in the near future he or she will inflict serious bodily harm on self or others, as evidenced by recent behavior causing, attempting, or threatening such harm.” FLA. STAT. § 394.467(1)(a)(2)(b) (2023). All fifty states and the District of Columbia have similar laws. *See infra* notes 77–78 and accompanying text.

⁶ Long, *supra* note 5.

⁷ Rich, *supra* note 1 (explaining that Alia was hospitalized on November 17 and brought to jail on November 22).

nurses attempted to turn off the television in her room, she allegedly responded by kicking and spitting.⁸ Police then arrested her and took her to the local jail, booking her on charges of felony battery.⁹ Though Melania attempted to provide jail staff with detailed information regarding her daughter's healthcare needs, Alia was never given her life-sustaining medications at the jail.¹⁰ Six days after her arrival, Alia was found unresponsive in her cell with a body temperature of eighty-two degrees.¹¹ She was pronounced dead shortly thereafter.¹²

It's not clear exactly how often stories like Alia Wardell's unfold—that is, how often people are arrested, charged, and prosecuted for crimes that allegedly took place while they were hospitalized in connection with a mental illness or disability.¹³ However, research indicates that hospitals, including government-run psychiatric facilities,¹⁴ frequently serve as a site of arrest for people with mental disability.¹⁵ For example,

⁸ Long, *supra* note 5.

⁹ Rich, *supra* note 1. In Florida, as in many states, battery is elevated from a misdemeanor to a felony offense when committed against an emergency medical provider. FLA. STAT. § 784.07(2)(b) (2023); *see also infra* note 40 and accompanying text (explaining that low-level offenses such as assault and battery often carry enhanced sentences when the victim is hospital staff).

¹⁰ Long, *supra* note 5. A later toxicology report revealed that none of Alia's usual medications were in her system at the time of death. Rich, *supra* note 4.

¹¹ Rich, *supra* note 1.

¹² *Id.* While a medical examiner's report declared that Alia's cause of death, a pulmonary embolism, was natural, Melania believes that her daughter would have never experienced a pulmonary embolism had she been administered her medications. Rich, *supra* note 4.

¹³ The lack of comprehensive data on this topic is not surprising given the dearth of legal research in this area, *see infra* notes 47–50 and accompanying text, and the lack of quality data on civil commitment more broadly, *see infra* note 60 and accompanying text.

¹⁴ This Note uses the term “hospital” broadly to include a variety of healthcare settings, such as public and private hospitals, public psychiatric institutions, public civil commitment facilities, and Veterans Affairs medical centers and clinics.

¹⁵ *See generally* Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1415–22 (2021) [hereinafter Morgan, *Disability Policing*] (discussing the vulnerability of disabled patients to violent policing when seeking treatment at medical facilities). In this Note, “mental disability” refers to a trait or condition that affects a person's mental functioning and results in disadvantage, whether because that trait or condition imposes intrinsic functional limitations, society responds to it in a discriminatory way (such as through inaccessible design or failure to accommodate), or both. *See* Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1255–62 (2007) (outlining the distinction between traits, impairments, and disability). Mental illness—that is, a diagnosable mental disorder—becomes a mental disability only when it results in disadvantage. *See What Is Mental Illness?*, AM. PSYCH. ASS'N (Nov. 2022), <https://www.psychiatry.org/patients-families/what-is-mental-illness> [<https://perma.cc/2ZBM-ATFT>] (explaining that not all diagnosable mental disorders interfere substantially with daily life or require treatment). “Mental disability” is an umbrella term that includes cognitive, intellectual, learning, and psychiatric disabilities. For instance, the implementing regulations for the Americans with Disabilities Act define “mental impairment” as “[a]ny mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and

between the summer of 2017 and the fall of 2018, at least 142 arrests were made at Portland, Oregon-area hospitals for the crime of trespass alone.¹⁶ Reports for forty-two of those arrests indicated a connection to mental health.¹⁷ Between July 2018 and July 2019, Seattle-area hospitals called police forty-eight times on patients receiving inpatient psychiatric care, resulting in nineteen arrests.¹⁸ In 2019, police were called to the Alaska Psychiatric Institute at least 144 times,¹⁹ with calls leading to criminal charges in dozens of instances.²⁰

In New York City, at least two of the many recent deaths at Rikers Island started with hospital arrests of people with psychiatric or other mental disabilities. Anthony Scott, an autistic grandfather with bipolar disorder, was arrested at a New York City hospital after allegedly assaulting a nurse.²¹ He died by suicide in pretrial custody.²² Erick Tavira, a young man diagnosed with schizophrenia and bipolar disorder, took himself to an East Harlem hospital for mental health treatment in June 2021.²³ Erick was arrested following an altercation with hospital police²⁴

specific learning disability.” 28 C.F.R. §§ 35.108(b)(1)(ii), 36.105(b)(1)(ii) (2024). Where sources specify the nature of a person’s disability, I try to use more specific terminology. See *Disability Language Style Guide*, NAT’L CTR. ON DISABILITY & JOURNALISM, <https://ncdj.org/style-guide> [<https://perma.cc/E7ZL-PZPS>] (explaining that journalists should reference specific conditions or diagnoses in lieu of the blanket term “mental illness”).

¹⁶ DISABILITY RTS. OR., THE “UNWANTEDS”: LOOKING FOR HELP, LANDING IN JAIL 10 (2019), <https://static1.squarespace.com/static/6387d767fc8a755e41aa5844/t/648cdfddce733b3e14d8cb08/1686953982796/Report-The-Unwanted-Looking-for-Help-Landing-in-Jail-2019-June18.pdf> [<https://perma.cc/W9NM-Y6MQ>].

¹⁷ *Id.* at 23.

¹⁸ DISABILITY RTS. WASH., FROM HOSPITALS TO HANDCUFFS: CRIMINALIZING PATIENTS IN CRISIS 18–19 (2020), <https://www.disabilityrightswa.org/wp-content/uploads/2020/05/Hospitals-to-Handcuffs-FINAL.pdf> [<https://perma.cc/K2RA-WMAA>].

¹⁹ Michelle Theriault Boots, *Dozens of Patients at Alaska’s Only State-Run Psychiatric Hospital Have Been Arrested This Year for Assaults Inside the Facility. Is There a Better Way for Authorities to React?*, ANCHORAGE DAILY NEWS (Dec. 14, 2019), <https://www.adn.com/alaska-news/anchorage/2019/12/14/dozens-of-patients-at-the-alaska-psychiatric-institute-have-been-arrested-this-year-for-assaults-inside-the-hospital-is-there-a-better-way-for-authorities-to-react> [<https://perma.cc/K5V4-MFFC>].

²⁰ *Id.*

²¹ Jan Ransom, *N.Y.C. Jail Deaths Climb to 14 as Detainee Is Taken Off Life Support*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/10/18/nyregion/rikers-death-toll.html> [<https://perma.cc/8QN8-Z7PF>]; Ayana Harry, *Jailed NYC Grandfather Who Couldn’t Afford \$15K Bail Dead After Suicide Attempt*, NEWS10 ABC (Oct. 20, 2021, 2:02 PM), <https://www.news10.com/news/ny-news/jailed-nyc-grandfather-who-couldnt-afford-15k-bail-dead-after-suicide-attempt> [<https://perma.cc/C4FY-RF64>].

²² Ransom, *supra* note 21.

²³ Nick Pinto, *Erick Tavira Went to the Hospital Seeking Treatment. Instead He Died on Rikers Island*, HELL GATE (Jan. 10, 2023, 10:13 PM), <https://hellgatenyc.com/erick-tavira-sought-treatment-instead-he-died-on-rikers> [<https://perma.cc/2EBA-Q37K>] (explaining that Erick would check himself into the hospital to protect his mother and aunts when he would notice his mental health declining).

²⁴ *Id.*

and before ever meeting with a healthcare provider.²⁵ One week later, while on supervised release and still without having received any mental health treatment, Erick was arrested again.²⁶ This time, the judge set bail at \$20,000—an amount that was out of reach for Erick, who was experiencing homelessness.²⁷ Over the 494 days that Erick spent at Rikers Island,²⁸ he struggled to obtain medication and appointments with doctors and counselors.²⁹ On October 22, 2022, Erick died by suicide—the sixth or seventh such death at Rikers in 2022 alone.³⁰

A quick search of state and federal case law reveals many more instances of people arrested while involuntarily hospitalized under a temporary detention order,³¹ civilly committed at a state hospital,³²

²⁵ *Id.* Long wait times in hospital emergency departments, especially for people seeking psychiatric care, are common. See Susan Scutti, *ERs 'Flooded' with Mentally Ill Patients with No Place Else to Turn*, CNN (Jan. 4, 2019, 9:45 PM), <https://www.cnn.com/2019/01/03/health/er-mental-health-patients-eprise/index.html> [<https://perma.cc/EPD2-VGD4>]. One study found that psychiatric patients wait 3.2 times longer than patients seeking non-psychiatric care. B.A. Nicks & D.M. Manthey, *The Impact of Psychiatric Patient Boarding in Emergency Departments*, *EMERGENCY MED. INT'L*, June 5, 2012, at 4.

²⁶ Pinto, *supra* note 23.

²⁷ *Id.*

²⁸ Courtney Gross, *Looking for Mental Health Care Behind Bars at Rikers*, NY1 SPECTRUM NEWS (Jan. 12, 2023, 7:00 PM), <https://ny1.com/nyc/all-boroughs/public-safety/2023/01/12/ny1-investigation—looking-for-mental-health-care-at-rikers> [<https://perma.cc/4X2K-35DU>].

²⁹ Pinto, *supra* note 23.

³⁰ Jan Ransom & Jonah E. Bromwich, *Tracking the Deaths in New York City's Jail System*, N.Y. TIMES (Oct. 19, 2023), <https://www.nytimes.com/article/rikers-deaths-jail.html> [<https://perma.cc/PMF3-XANT>].

³¹ See, e.g., *People v. Lopez*, No. B290344, 2019 WL 2521501, at *1 (Cal. Ct. App. June 19, 2019) (person under involuntary hold charged with assault with a deadly weapon); *Gray v. Cummings*, 917 F.3d 1, 7 (1st Cir. 2019) (person under involuntary hold charged with assault on a police officer, resisting arrest, disturbing the peace, and disorderly conduct); *Commonwealth v. Accime*, 68 N.E.3d 1153, 1155 (Mass. 2017) (person under involuntary hold charged with criminal threatening, disorderly conduct, and assault); *State v. Humphrey*, No. A14-0295, 2014 WL 7237028, at *1 (Minn. Ct. App. Dec. 22, 2014) (person under involuntary hold charged with fourth-degree assault on a peace officer). “Temporary detention order,” “involuntary hold,” and “emergency petition” all refer to the temporary hospitalization of an individual against their will before a judge has ordered them civilly committed. See *infra* notes 74–75 and accompanying text.

³² See, e.g., *State v. Roblero-Barrios*, No. A09-1009, 2009 WL 3575222, at *1 (Minn. Ct. App. Nov. 3, 2009) (defendant committed to Minnesota Sex Offender Program charged with fourth-degree assault); *State v. N.W.*, No. A-6214-04T2, 2006 WL 2164678, at *1 (N.J. Super. Ct. App. Div. Aug. 3, 2006) (person committed as a “sexually violent predator” charged with lewdness); *State v. Cummins*, 403 A.2d 67, 68 (N.J. Super. Ct. Law Div. 1979) (person involuntarily committed charged with disorderly conduct). Many cases involve the crime of escape. See, e.g., *People v. Walter*, 499 N.Y.S.2d 280 (N.Y. App. Div. 1986); *People v. Williams*, 504 N.Y.S.2d 339 (N.Y. Crim. Ct. 1986); *People v. Ortega*, 487 N.Y.S.2d 939 (N.Y. Sup. Ct. 1985); *People v. Giles*, 622 P.2d 1073 (Colo. 1983); *State v. Kyles*, 399 A.2d 1027 (N.J. Super. Ct. App. Div. 1979); see also Grant H. Morris, *Escaping the Asylum: When Freedom Is a Crime*, 40 SAN DIEGO L. REV. 481, 489–92 (2003) (providing an overview of how courts interpret statutes that criminalize escape from hospital confinement).

or otherwise receiving treatment related to a mental illness or disability.³³ The practice may become even more common as places like New York City³⁴ and California³⁵ move to make forced mental health treatment easier, driving already overwhelmed healthcare providers to their edge.³⁶

That people are often arrested at hospitals while being treated or confined in connection with their mental illness or disability is, perhaps, not surprising from a probabilistic standpoint: Hospitals are heavily policed,³⁷ and the use of hospital emergency departments (EDs) for mental health and substance use treatment is frequent and on the

³³ See, e.g., *Taylor v. Hartley*, 488 F. Supp. 3d 517, 524 (S.D. Tex. 2020) (plaintiff with cognitive, behavioral, and physical disabilities “arrested for assault while receiving treatment for his disabilities”).

³⁴ See Press Release, Eric Adams, Mayor, New York City, 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/#0> [<https://perma.cc/W2UB-3ABN>]. While Mayor Adams described his plan as “compassionate,” *id.*, it faced immediate backlash from disability rights advocates. See, e.g., Press Release, Bazelon Ctr., Organizations, Individuals from Across the Country Oppose Mayor Eric Adams’ Plan to Increase Involuntary Commitment of New Yorkers with Mental Disabilities (Dec. 12, 2022), <https://www.bazelon.org/wp-content/uploads/2022/12/media-release-for-NYC-statement-final-12-12-22.pdf> [<https://perma.cc/TW76-S9NA>]; Press Release, New York Laws. for the Pub. Int., NYLPI and Co-Counsel Files Emergency Request to Stop New York City’s New and Unconstitutional Mental Health Involuntary Removal Policy (Dec. 8, 2022), <https://www.nylpi.org/emergency-request-stop-nyc-unconstitutional-mental-health-involuntary-removal> [<https://perma.cc/842D-YSEC>].

³⁵ See Press Release, Gavin Newsom, Governor, California, Governor Newsom Signs CARE Court into Law, Providing a New Path Forward for Californians Struggling with Serious Mental Illness (Sept. 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/YJ35-U3Q8>] (describing a new California law that makes it easier for courts to order mandatory mental health treatment). Unlike Mayor Adams’s plan, the CARE Act focuses on involuntary outpatient treatment rather than hospitalization, but it, too, has seen widespread criticism from disability rights advocates, who have emphasized the disproportionate risk of harm that the law presents for Black and Brown people and victims of domestic violence. See, e.g., Press Release, Disability Rts. California, Disability Rights Advocates File Petition Challenging the Constitutional Validity of the CARE Act (Feb. 7, 2023), <https://www.disabilityrightsca.org/latest-news/disability-rights-california-information-on-care-act> [<https://perma.cc/FQ9A-4S39>]; E-mail from Olivia Ensign, Senior Advoc., U.S. Program, Hum. Rts. Watch, and John Raphling, Senior Researcher, U.S. Program, Hum. Rts. Watch, to Jud. Council of California (Jan. 26, 2023, 4:56 PM), <https://www.hrw.org/news/2023/01/26/public-comment-proposed-rules-and-forms-care-act> [<https://perma.cc/2EYB-7MJ4>].

³⁶ See, e.g., *‘There’s No Room in the System’: A Plan to Commit the Homeless Has Little Meaning in the ER*, N.Y. MAG. (Jan. 18, 2023), <https://nymag.com/intelligencer/2023/01/eric-adams-mentally-ill-homeless-nyc-hospitals.html> [<https://perma.cc/2UMC-RRDC>].

³⁷ See Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646, 2649–51, 2660–64 (2021) (describing the many ways that police embed themselves in—and are sometimes welcomed by—hospitals).

rise.³⁸ Further, statutes creating hospital-specific crimes³⁹ or enhancing penalties when misconduct takes place in a hospital⁴⁰ have proliferated in recent years. However, even if common and unsurprising, this form of transinstitutionalization⁴¹ should give observers pause. First, it inflicts significant harm on the person arrested. For someone with mental illness or disability, even the briefest of police encounters or jail stays can entail a host of dangerous repercussions, including loss of housing, disruption of healthcare, serious bodily injury, and even death.⁴² Second, people with mental illness or disability who are Black or negatively racialized, LGBTQ+, low-income, and/or experiencing homelessness are especially vulnerable to arrest in hospital settings, and thus to all the attendant consequences: They disproportionately rely on emergency rooms for medical and mental healthcare,⁴³ are involuntarily committed at disproportionate rates,⁴⁴ and are more likely to have

³⁸ Kayla M. Theriault, Robert A. Rosenheck & Taeho Greg Rhee, *Increasing Emergency Department Visits for Mental Health Conditions in the United States*, J. CLINICAL PSYCHIATRY, Sept.–Oct. 2020, at 1 (“Between 2007 and 2016, about 8.4 million (8.3%) of 100.9 million ED visits nationwide were for psychiatric or substance use-related diagnoses.”); *id.* (finding “the proportion of ED visits for mental health diagnoses increased from 6.6% to 10.9%” during this same period).

³⁹ For instance, many states now criminally proscribe interference with the discharge of healthcare services. *See, e.g.*, D.C. CODE ANN. § 22-1314.02 (West 2023); GA. CODE ANN. § 16-10-24.2 (West 2024); N.Y. PENAL LAW § 195.16 (McKinney 2023).

⁴⁰ For a list of statutes that make assault or battery of hospital staff an aggravated offense, see ONLABOR, 50 STATE SURVEY CRIMINAL LAWS PROTECTING HEALTH PROFESSIONALS UPDATED JANUARY 2014 (2014), <https://onlabor.org/wp-content/uploads/2016/03/StateLawsWorkplaceViolenceSheet.pdf> [<https://perma.cc/D9P3-CV53>].

⁴¹ “Transinstitutionalization” refers to “the shift of disabled people from psychiatric hospitals to jails and prisons.” Morgan, *Disability Policing*, *supra* note 15, at 1410 n.34 (collecting sources). I use this term as Morgan and other scholars use it: not to suggest that deinstitutionalization is the primary contributor to present-day mass incarceration, but to emphasize that jails and prisons are “now the default mental health treatment providers in many communities” and that “behaviors associated with untreated mental illness have been increasingly criminalized.” Lori Rifkin, *Barbarous and Ineffective: A Blueprint for Challenging Criminalization of People with Mental Illnesses and Psychiatric Disabilities*, 2017 UCLA CRIM. JUST. L. REV. 57, 69 n.59 (2017); *see also* Morgan, *Disability Policing*, *supra* note 15, at 1410 n.34 (arguing that lack of investment in community mental health initiatives is the primary driver of transinstitutionalization).

⁴² *See infra* Section I.B.

⁴³ For a brief primer on how and why ER use varies by socioeconomic status and race, *see* Song, *supra* note 37, at 2654–60. Reasons for this variation include unequal access to health insurance, discrepancies in medical needs, and a dearth of non-ER care options in poor, urban neighborhoods. *See* Song, *supra* note 37, at 2654–60.

⁴⁴ *See* Press Release, Williams Inst., UCLA School of Law, More than 6,300 People Are Detained in Civil Commitment Programs in the US (Oct. 22, 2020), <https://williamsinstitute.law.ucla.edu/press/svp-civil-commit-press-release> [<https://perma.cc/R5XM-GKSN>] (“Black sex offenders were twice as likely as [w]hite sex offenders to be civilly committed. In add[i]tion, men with male victims were [two] to [three] times more likely to be civilly committed than men with only female victims.”); Christie Thompson, *When Going*

their behavior construed as threatening or disruptive by authorities.⁴⁵ Finally, such arrests are problematic because they treat marginalized individuals as culpable for the systemic failures by which they have been victimized. These arrests leverage the criminal legal system to compensate for dysfunction and inadequacy in other social structures, prompting important questions about the U.S. tolerance for pretextual policing and the use of jails to warehouse people with psychiatric and other mental disabilities.⁴⁶

Although these arrests happen frequently, carry devastating consequences, entrench inequities, and expose glaring gaps in the American healthcare system, strikingly little academic research discusses them. Scholars of disability law—and disabled people outside the legal academy—have long argued that civil commitment and criminal incarceration are part and parcel of the same injustice. However, few legal scholars have investigated the specific practice of criminally sanctioning people who were already hospitalized for their disability. Indeed, in 2018, Professor Michael L. Perlin and other scholars identified this as an “unexplored blur question[]” that has received “virtually no” attention in the legal academic literature.⁴⁷ In the years since, there has been some progress in this area. Professor Jamelia

to the Hospital Is Just as Bad as Jail, MARSHALL PROJECT (Nov. 8, 2020), <https://www.themarshallproject.org/2020/11/08/when-going-to-the-hospital-is-just-as-bad-as-jail> [<https://perma.cc/4G2Y-VRC8>] (noting that in Alameda County, California, Black people make up over one third of those placed under involuntary psychiatric holds but only one tenth of the county’s population).

⁴⁵ See, e.g., Morgan, *Disability Policing*, *supra* note 15, at 1423–24 (explaining how society constructs certain disabilities as “threatening and dangerous,” especially when those disabilities present in Black and Indigenous bodies and the bodies of trans or gender-nonconforming people); Jamelia N. Morgan, *Disability’s Fourth Amendment*, 122 COLUM. L. REV. 489, 556 (2022) [hereinafter Morgan, *Fourth Amendment*] (arguing that harmful constructions of disability are “grafted onto certain historically marginalized groups” such that racialized or gendered bodies become seen as “sites for mental, physical, and moral abnormality”); ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 88–107 (2017) (illustrating how “perceptions of mental instability based on gender, gender nonconformity, and sexuality,” which interact with perceptions of race, shape the use of force by police); Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 FORDHAM URB. L.J. 615, 618–19 (2016) (arguing that police are more likely to construe negatively racialized individuals as defiant and label them as “crazy,” regardless of whether they have a diagnosed mental disorder); see also Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 1–11 (2010) (arguing that “the race of the person deemed mentally ill” affects whether police respond with punishment and force or treatment).

⁴⁶ See *infra* Section I.C.

⁴⁷ Michael L. Perlin, Deborah A. Dorfman & Naomi M. Weinstein, “On Desolation Row”: *The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What It Means to All of Us*, 24 TEX. J.C.L. & C.R. 59, 101–02 (2018). In 2003, Professor Grant H. Morris published research looking specifically at the criminalization of escape by civilly committed people. Morris, *supra* note 32.

N. Morgan has drawn attention to the order maintenance policing of people with psychiatric disabilities at hospitals,⁴⁸ while Professor Sunita Patel has done the same with respect to U.S. Department of Veterans Affairs (VA) hospitals specifically.⁴⁹ Additionally, Professor Ji Seon Song has written about emergency rooms as a site for the investigation and arrest of crimes that took place outside of the hospital.⁵⁰ Overall, however, literature on the topic remains sparse.

This Note aims to build on the existing scholarship in this area in two ways: First, it sheds further light on the practice of arresting people who are seeking or receiving treatment for their mental illness or disability, especially those who are already in state civil custody, and explains why this practice is problematic as a consequentialist matter. Second, using the opinions in *City of Grants Pass v. Johnson*⁵¹ and *Robinson v. California*⁵² as points of entry, it argues that this practice violates core constitutional norms.

Robinson invalidated a statute making it a crime to “be addicted to” the use of narcotics on the ground that it was cruel and unusual to punish a person’s status.⁵³ Initially, ambiguity regarding the meaning of a “status” engendered significant debate.⁵⁴ But six years later, the Court appeared to put this to rest when it handed down its decision in *Powell v. Texas*.⁵⁵ In holding that *Robinson* did not apply to a public intoxication statute, *Powell* seemed to limit *Robinson* to its facts, and the Court would not decide the applicability of *Robinson* to another statute until the 2024 term, when it issued its decision in *Grants Pass*. There, it held that an anti-camping ordinance prohibiting involuntarily unsheltered people from sleeping outside “with as little as a blanket to keep warm” did not violate the Eighth Amendment under *Robinson*.⁵⁶

⁴⁸ Morgan, *Disability Policing*, *supra* note 15, at 1415–25. Morgan has written extensively on how the criminal law simultaneously leverages and ignores disability in service of social control. See Jamelia N. Morgan, *Policing Marginality in Public Space*, 81 OHIO ST. L.J. 1045 (2020) [hereinafter Morgan, *Policing Marginality*]; Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637 (2021) [hereinafter Morgan, *Disorderly Conduct*]; Morgan, *Fourth Amendment*, *supra* note 45.

⁴⁹ Sunita Patel, *Embedded Healthcare Policing*, 69 UCLA L. REV. 808, 836–42 (2022) (arguing that the VA hospital “is a site of managing marginalized and poor people’s behavior using the threat and actual charging of low-level offenses”).

⁵⁰ Song, *supra* note 37.

⁵¹ 144 S. Ct. 2202 (2024).

⁵² 370 U.S. 660 (1962).

⁵³ *Id.* at 660, 666–67; see *infra* Part II.

⁵⁴ See *infra* note 135 and accompanying text.

⁵⁵ 392 U.S. 514 (1968).

⁵⁶ 144 S. Ct. at 2228 (Sotomayor, J., dissenting); see *id.* at 2218 (majority opinion) (holding that the anti-camping ordinances did not “implicate[]” *Robinson*).

Grants Pass and *Robinson* provide a helpful jumping-off point for analyzing the constitutionality of psychiatric hospital arrests because of both the overlap in populations experiencing homelessness, substance use disorders, and psychiatric hospitalization, and the substantial commentary *Robinson* has generated on the constitutional dimensions of the substantive criminal law. This Note further explores these issues in three Parts. Part I explains how involuntary psychiatric hospitalization works and why arresting someone who is already hospitalized in connection with their psychiatric or other mental disability is problematic from a practical standpoint. Part II uses *Grants Pass* and *Robinson* to explore the constitutional norms that are violated when people are arrested while hospitalized in connection with their psychiatric or other mental disability. Part III evaluates the strengths and weaknesses of different legal challenges to psychiatric hospital arrests and offers nonlegal policy suggestions to address the problem of policing in psychiatric facilities.

I

UNDERSTANDING POLICING IN PSYCHIATRIC FACILITIES

Arrests of people seeking or receiving psychiatric treatment are troubling on multiple levels. As a consequentialist matter, they inflict serious harm on people with psychiatric and other mental disabilities. As a theoretical matter, they expose a willingness to use the criminal legal system to compensate for dysfunction or gaps in other social structures. Section I.A explains the constitutionally-authorized pathways to involuntary psychiatric hospitalization and the respective due process requirements for each. Section I.B describes the devastating practical impacts of arrest and prosecution for individuals with psychiatric and other mental disabilities. Section I.C explores the reasons behind these arrests and argues that they reveal a disturbing tolerance for pretextual policing and the warehousing function of incarceration.

A. *Overview of Involuntary Psychiatric Hospitalization*

Hospitalization for a psychiatric disorder can be voluntary or involuntary. Involuntary psychiatric hospitalization—that is, hospitalization compelled by the state—is known as civil or involuntary commitment.⁵⁷ It includes both “long term, in-patient” hospitalization

⁵⁷ See HANNAH-ALISE ROGERS, CONG. RSCH. SERV., R47571, INVOLUNTARY CIVIL COMMITMENT: FOURTEENTH AMENDMENT DUE PROCESS PROTECTIONS 1, 1 n.3 (2023) (citing OFFICE OF THE CHIEF MEDICAL OFFICER, SUBSTANCE ABUSE & MENTAL HEALTH SERVS., CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND

and shorter-term hospitalization for “emergency psychiatric evaluation.”⁵⁸ Whether indefinite or temporary, it can only take place pursuant to or in anticipation of a judicial order.⁵⁹

Data on civil commitment is poor.⁶⁰ Research estimates suggest that somewhere between 20,000 and 50,000 people in the United States are currently held in long-term civil commitment.⁶¹ Countless more individuals are placed under temporary detention orders each year:

PRINCIPLES FOR LAW AND PRACTICE 1 (2019), <https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf> [<https://perma.cc/RG2X-3N48>], <https://crsreports.congress.gov/product/pdf/R/R47571> [<https://perma.cc/EKQ2-3RFC>]. This Note uses the terms “civil commitment,” “involuntary commitment,” and “involuntary civil commitment” interchangeably. *Id.* at 1–2.

⁵⁸ *Id.* at 1 n.3. While both types constitute civil commitment, this Note uses the phrase “civil commitment” to refer to long-term, indefinite inpatient commitment and the phrases “emergency psychiatric hold” and “temporary detention order” to refer to short-term, emergency detention. See Gi Lee & David Cohen, *Incidences of Involuntary Psychiatric Detentions in 25 U.S. States*, 72 PSYCHIATRIC SERVS. 61, 61 (2021) (explaining that state variations in detention requirements and timelines make it difficult to develop a clean typology of civil commitment, but that “the core component of civil commitment is involuntary detention of an individual because of mental illness.”); Nathaniel P. Morris, *Detention Without Data: Public Tracking of Civil Commitment*, 71 PSYCHIATRIC SERVS. 741, 742 (2020) (similarly explaining that “variability in commitment criteria complicates public tracking of civil commitment.”); Emma Ruth, *What Is Civil Commitment? Recent Report Raises Visibility of This Shadowy Form of Incarceration*, PRISON POL’Y INITIATIVE (May 18, 2023), <https://www.prisonpolicy.org/blog/2023/05/18/civil-commitment> [<https://perma.cc/CK9M-LDNB>] (defining civil commitment as prison-like confinement beyond the terms of criminal sentencing). The umbrella term “civil commitment” also includes court-ordered outpatient treatment. See ROGERS, *supra* note 57, at 1 n.3. However, this Note focuses on inpatient commitment.

⁵⁹ See *Commitment*, in 12 WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2005). The due process requirements for temporary and indefinite commitment are explored *infra* notes 65–80 and accompanying text.

⁶⁰ See Morris, *supra* note 58, at 741 (noting that scholars have lamented the lack of basic data on civil commitment since the 1970s); Lee & Cohen, *supra* note 58, at 61 (noting that no federal data set on civil commitment exists); Ruth, *supra* note 58 (explaining that civil commitment facilities “are housed under different agencies from state to state,” complicating researchers’ ability to compile national data).

⁶¹ CTR. FOR BEHAV. HEALTH STATS. & QUALITY, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NATIONAL MENTAL HEALTH SERVICES SURVEY (N-MHSS): 2020 47, 49 (2021), https://www.samhsa.gov/data/sites/default/files/reports/rpt35336/2020_NMHSS_final.pdf [<https://perma.cc/CYM9-ZJ97>] (noting that, of the 77,622 people receiving inpatient mental health services as of the survey’s reference date, fifty-eight percent (approximately 45,020 individuals) “were involuntarily admitted for care”); WENDY SAWYER & PETER WAGNER, PRISON POL’Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2023 (2023), <https://www.prisonpolicy.org/reports/pie2023.html> [<https://perma.cc/WCG7-8FAT>] (estimating that approximately 22,000 people are in long-term civil commitment); TIMOTHY KENNEL, PATRICK J. CANTWELL, ANDREW KELLER & JULI ZAMORA, U.S. CENSUS BUREAU, RESULTS FROM THE 2020 CENSUS GROUP QUARTERS COUNT IMPUTATION 19 tbl.11 (2023), <https://www2.census.gov/library/publications/decennial/2020/2020-census-group-quarters-imputation.pdf> [<https://perma.cc/88EB-SHV8>] (finding that, at the time of the 2020 U.S. Census, 43,000 people resided in psychiatric hospitals or in psychiatric units at other hospitals).

One study found that, in 2014, nearly 600,000 detentions took place across twenty-four states alone.⁶²

From the mid-nineteenth to the mid-twentieth century, hundreds of thousands of people were confined in psychiatric facilities against their will without judicial process.⁶³ Following a public reckoning with the widespread abuse and lack of treatment administered in these facilities, the Supreme Court began imposing due process requirements for civil commitment.⁶⁴ The resulting framework loosely defines the outermost bounds of when the government can forcibly hospitalize an adult for psychiatric reasons, but gives states significant leeway to fill in the gaps.

Civil commitment of the criminally accused, acquitted, and convicted. Allegations or findings of criminal misconduct can lead to a person's civil commitment in three scenarios. The due process requirements vary for each. First, a person who is found incompetent to stand trial can be civilly committed until it seems likely that their competence will be restored.⁶⁵ If, however, after a "reasonable period of time," the person has not been restored or it is not clear whether they will be restored, the state must release them or re-commit them under the standard that applies to those not criminally accused.⁶⁶ Second, a person who is found not guilty by reason of insanity can be civilly committed until they have "regained [their] sanity" or no longer pose a danger to themselves or others.⁶⁷ Third, the state can petition to civilly commit a person who has been convicted of a "sexually violent" crime upon completion of their criminal sentence,⁶⁸ but must show proof that the person has "serious difficulty in controlling [their] behavior" such that they can be differentiated from the ordinary recidivist offender.⁶⁹

⁶² Lee & Cohen, *supra* note 58, at 63.

⁶³ See Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 PSYCHIATRY 30, 30, 32–33 (2010).

⁶⁴ See *id.* at 33.

⁶⁵ See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

⁶⁶ *Id.*

⁶⁷ *Jones v. United States*, 463 U.S. 354, 370 (1983). For an exploration and critique of how the Court's treatment of insanity acquittees differs from its treatment of other civilly committed individuals, see Donna R. Shralow, Note, *Fifth Amendment—Indefinite Commitment of Insanity Acquittes and Due Process Considerations*, 74 J. CRIM. L. & CRIMINOLOGY 1334 (1983); see also Perlin et al., *supra* note 47, at 74–75 (describing how the right to refuse medication varies depending on the reason that the mentally ill person is in state custody).

⁶⁸ *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (upholding a "[s]exually [v]iolent [p]redator" statute against due process, double jeopardy, and ex post facto challenges). The statute at issue in *Hendricks* permitted initial transfer to a secure civil facility upon a finding of probable cause that the person was a "sexually violent predator," and civil commitment after a prosecutor had proved the same beyond a reasonable doubt. *Id.* at 351–53.

⁶⁹ *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

Civil commitment outside the criminal process. To civilly commit someone who has not been criminally convicted, the Constitution requires a finding that the person poses a danger to self or others⁷⁰ due to “mental illness”⁷¹ or “mental abnormality.”⁷² The government must prove this through clear and convincing evidence.⁷³ Prior to the formal adjudication of an individual’s eligibility for civil commitment, a person can be placed in a healthcare facility under an emergency psychiatric hold.⁷⁴ This practice, also known as, among other terms, an “involuntary hold,” “temporary detention order,” “emergency commitment,” or “emergency petition,”⁷⁵ allows the facility to confine a person temporarily for further evaluation.⁷⁶

All fifty states have statutes authorizing such holds,⁷⁷ but the laws vary in their precise due process requirements, such as how they define dangerousness, the timing of judicial approval and review, and whether a patient is entitled to an assessment by a mental health professional prior to being placed under a hold.⁷⁸ States also vary with respect to who may refer a person for emergency commitment.⁷⁹ For example, under different states’ “triggering criteria,” a person may be referred for emergency commitment by a loved one concerned for that person’s safety or their own, by police who encounter the person in mental health crisis, or by a healthcare provider to whom a patient expresses thoughts of harming themselves or others.⁸⁰

Once a person is hospitalized for psychiatric treatment—whether voluntarily, involuntarily under a long-term civil commitment order, or involuntarily under a temporary detention order—they may act in ways that endanger, disrupt, or cause discomfort. In response, hospitals may call the police, leading to criminal arrest.

⁷⁰ O’Connor v. Donaldson, 422 U.S. 563, 573, 576 (1975).

⁷¹ See Foucha v. Louisiana, 504 U.S. 71, 78, 80 (1992) (holding the state could not detain insanity acquittee who it contended was dangerous, but not “mentally ill”).

⁷² See *Hendricks*, 521 U.S. at 358 (explaining that both dangerousness and mental illness are required, and concluding that a finding of “mental abnormality” or “personality disorder” satisfies the second requirement).

⁷³ See Addington v. Texas, 441 U.S. 418, 433 (1979).

⁷⁴ See Leslie C. Hedman, John Petrila, William H. Fisher, Jeffrey W. Swanson, Deirdre A. Dingman & Scott Burris, *State Laws on Emergency Holds for Mental Health Stabilization*, 67 PSYCHIATRIC SERVS. 529, 529–30 (2016).

⁷⁵ *Id.* at 529. This Note uses these terms interchangeably.

⁷⁶ See *id.* at 530. The exact amount of time that a person may be confined under such an order varies by state, but the most common is three days. *Id.* at 530 tbl.1.

⁷⁷ *Id.* at 529–30.

⁷⁸ See *id.* at 529–34.

⁷⁹ *Id.* at 530–31, 531 tbl.2, 533.

⁸⁰ See *id.* at 530–31 (describing how such holds can variously be initiated by police, “mental health practitioners,” or “any interested person”).

B. *Consequences of Arrest for People with Psychiatric and Other Mental Disabilities*

Any interaction with law enforcement and the criminal legal system can portend a multitude of harms beyond a criminal sentence. As this Section will show, having a psychiatric or other mental disability puts a person at heightened risk of experiencing many of these harms.

Risk of police violence. People with psychiatric and other mental disabilities disproportionately die at the hands of police.⁸¹ For Black people with psychiatric and other mental disabilities, the risk of falling victim to a police killing may be especially high.⁸² One explanation, posited by Professor Morgan, is that the ease with which people interpret disabled bodyminds⁸³ and disability-related behaviors as threatening or criminal may produce interactions between police and disabled individuals that are both more frequent and more violent.⁸⁴

⁸¹ Data indicates that approximately fifteen to twenty percent of deaths due to lethal force by law enforcement involve a person with a mental disability, with victims' most common diagnoses including depression, schizophrenia, and bipolar disorder. See Sarah DeGue, Katherine A. Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement*, 51 AM. J. PREVENTIVE MED. S173, S176 tbls.1 & 2 (2016) (analyzing police killings from between 2009 and 2012); *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database> [<https://perma.cc/P3ZN-CYXE>] (last updated Jan. 18, 2024) (tracking fatal police shootings since 2015 and finding that twenty percent involved a "mental illness crisis"). In contrast, only "[one] in [twenty-five] U.S. adults lives with a serious mental illness, such as schizophrenia, bipolar disorder, or major depression"; such a ratio would predict only four percent of deaths caused by law enforcement to involve a person with these types of mental illness, illustrating the staggering disproportionality in these statistics. CTRS. FOR DISEASE CONTROL & PREVENTION, *About Mental Health*, <https://www.cdc.gov/mentalhealth/learn> [<https://perma.cc/8HGD-9XDK>] (last updated Apr. 25, 2023).

⁸² Overall, intersectional data on police violence, race, and disability is limited. See Vilissa Thompson, *Understanding the Policing of Black, Disabled Bodies*, CTR. FOR AM. PROGRESS (Feb. 10, 2021), <https://www.americanprogress.org/article/understanding-policing-black-disabled-bodies> [<https://perma.cc/C7S4-JQ5Y>]. However, one study analyzing the Washington Post data set, *Fatal Force*, *supra* note 81, concluded that Black people with serious mental illnesses appeared to be overrepresented in police killings by a factor of ten. Kyle Lane-McKinley, Tenzin Tsungmey & Laura Weiss Roberts, *The Deborah Danner Story: Officer-Involved Deaths of People Living with Mental Illness*, 42 ACAD. PSYCHIATRY 443, 444-45 (2018).

⁸³ See Morgan, *Fourth Amendment*, *supra* note 45, at 495 & n.34 ("Bodymind is a materialist feminist disability studies concept from Margaret Price that refers to the enmeshment of the mind and body, which are typically understood as interacting and connected, yet distinct entities due to the Cartesian dualism of Western philosophy." (quoting SAMI SCHALK, BODYMINDS REIMAGINED: (DIS)ABILITY, RACE, AND GENDER IN BLACK WOMEN'S SPECULATIVE FICTION 5 (2018))).

⁸⁴ See *id.* at 507-08 (explaining that "[r]ace, gender, and class intersect with disability . . . to portray behaviors as disruptive, offensive, threatening, or even violent," prompting greater "police intrusion"); *id.* at 508-09 ("Individuals with developmental and intellectual disabilities and traumatic brain injuries have been subjected to force in instances in which the

Risk of loss of housing or work. Even a brief stint in pretrial custody can lead to loss of housing or work, regardless of whether prosecutors ultimately pursue charges or secure a conviction.⁸⁵ For example, police arrested Jessica Sharp, “a young woman with schizophrenia,” for trespass at an Oregon hospital after she failed to wake from a catatonic episode.⁸⁶ When the jail released her one week later, she returned home to learn that she was being evicted from her apartment and her dog had been seized.⁸⁷ People with disabilities may have an especially hard time bouncing back from disruptions to their housing and work because they already experience homelessness⁸⁸ and unemployment⁸⁹ at higher rates than the general population.

Risk of languishing in pretrial detention. When prosecutors do pursue criminal charges, a defendant with a psychiatric or other mental disability may spend over a month in jail awaiting a competency

individual’s comprehension skills may have limited their ability to understand and comply with police commands.”).

⁸⁵ See, e.g., Zina Makar, *Unnecessary Incarceration*, 98 OR. L. REV. 607, 626 (2020) (explaining that the inability to make rental or mortgage payments while incarcerated can lead to loss of housing, while an inability to show up for work or even communicate with one’s employer can lead to loss of employment); Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 929 & n.283 (2022) (noting that, if a person spends more than ninety consecutive days in jail, they are no longer considered “chronically homeless” under federal regulations, costing them eligibility for Section 8 housing (citing 24 C.F.R. §§ 91.5, 578.3 (2020 & 2016))). For more background on the collateral consequences of low-level arrests, see generally, for example, ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME* (2018); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018).

⁸⁶ DISABILITY RTS. OR., *supra* note 16, at 18.

⁸⁷ *Id.* at 19. Jessica eventually found new housing and reclaimed her dog but later passed away from cancer. *Id.*

⁸⁸ National data suggests that at least one in three people experiencing homelessness has a disability. See TANYA DE SOUSA ET AL., U.S. DEP’T OF HOUS. & URB. DEV., *THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 26* (2023), <https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf> [<https://perma.cc/365U-86RJ>] (finding that thirty-one percent of surveyed individuals experienced chronic homelessness, which, by definition, requires having a disability). Meanwhile, data from New York’s Department of Health Services indicates that approximately two thirds of single adults in the NYC shelter system have a disability. GISELLE ROUTHIER, COAL. FOR THE HOMELESS, *STATE OF THE HOMELESS 2020*, at 9 (2020), <https://www.coalitionforthehomeless.org/wp-content/uploads/2020/03/StateofTheHomeless2020.pdf> [<https://perma.cc/R4LM-BKZ5>]. Being a person of color also increases one’s risk of experiencing homelessness, and being LGBTQ+ heightens the risk of unsheltered homelessness. See NAT’L ALL. TO END HOMELESSNESS, *STATE OF HOMELESSNESS: 2023 EDITION*, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/#homelessness-in-2022> [<https://perma.cc/7CCR-2ZNB>] (last visited Jan. 13, 2024).

⁸⁹ BUREAU OF LAB. STATS., *PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS – 2022*, at 1 (Feb. 23, 2023), https://www.bls.gov/news.release/archives/disabl_02232023.pdf [<https://perma.cc/9LMJ-K98Q>] (finding that in 2022, only 21.3% of people with disabilities were employed, compared to 65.4% of people without disabilities).

hearing.⁹⁰ If found incompetent to stand trial, they may then wait even longer for a hospital bed to open up before they can begin competency restoration,⁹¹ a process that itself often takes months.⁹² All told, the time many arrestees spend in jails and hospitals waiting to be found competent likely far exceeds the length their hospital stay would have been had they not been arrested.⁹³

Risk of dangerous jail and prison conditions. In jail and prison, people with psychiatric and other mental disabilities routinely experience self-harm,⁹⁴ violence at the hands of staff,⁹⁵ and violence at the hands of other

⁹⁰ See Paul Tullis, *When Mental Illness Becomes a Jail Sentence*, THE ATLANTIC (Dec. 9, 2019), <https://www.theatlantic.com/politics/archive/2019/12/when-mental-illness-becomes-jail-sentence/603154> [<https://perma.cc/YTT5-Q8K4>] (citing one study that found that in eight states, the average wait time for a competency evaluation exceeded 35 days).

⁹¹ As of March 2022, Coloradans “ordered to undergo competency restoration . . . faced an average wait time of 88.8 days.” Faith Miller, *Mentally Ill Coloradans Await Care in Jail for Months. Could a New Effort Clear the Backlog?*, COLO. NEWSLINE (May 23, 2022), <https://coloradonewsline.com/2022/05/23/mentally-ill-coloradans-await-care-in-jail-for-months-could-a-new-effort-clear-the-backlog> [<https://perma.cc/VTZ6-9W9Y>].

⁹² See DISABILITY RTS. OR., *supra* note 16, at 19 (explaining that, in Oregon, people spend an average of between seventy and eighty days in competency restoration); Michael L. Perlin, “*For the Misdemeanor Outlaw*”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 204 (2000) (describing how many states indefinitely confine people awaiting competency restoration despite the Court’s mandate against this practice in *Jackson v. Indiana*).

⁹³ See DORIS A. FULLER, ELIZABETH SINCLAIR, JEFFREY GELLER, CAMERON QUANBECK & JOHN SNOOK, TREATMENT ADVOC. CTR., GOING, GOING, GONE 27 (2016) (“Psychiatric hospital stays have shrunk to 7.2 days in the United States on average, but the length of forensic hospital stays is typically far longer, and the conditions of discharge may be dictated by state law or the courts rather than clinical need.” (footnote omitted)); Chun-Chi Hsu & Hung-Yu Chan, *Factors Associated with Prolonged Length of Stay in the Psychiatric Emergency Service*, PLOS ONE, Aug. 2018, at 2 (“Studies have found that with prompt intervention, the majority of psychiatric emergencies can be resolved in less than [twenty-four] hours . . .”).

⁹⁴ “Suicide is the leading cause of death” in U.S. jails, occurs at an elevated rate in prison, and is on the rise in both jails and prisons. JASON TAN DE BIBIANA, THERESE TODD & LEAH POPE, VERA INST. OF JUST., PREVENTING SUICIDE AND SELF-HARM IN JAIL 1 (2019), <https://www.vera.org/downloads/publications/preventing-suicide-and-self-harm-in-jail.pdf> [<https://perma.cc/67DD-ECCL>]; E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., SUICIDE IN LOCAL JAILS AND STATE AND FEDERAL PRISONS, 2000–2019 – STATISTICAL TABLES 1, 1 fig. 1 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf> [<https://perma.cc/3ZMT-WK2Y>]. The risk of suicide is especially high for people with psychiatric disabilities; a study of one jail system found that 77% of prisoners who attempted suicide had a known chronic psychiatric condition, compared with 15% of other prisoners. J. Richard Goss, Kari Peterson, Lawrence W. Smith, Kate Kalb & Benjamin B. Brodey, *Characteristics of Suicide Attempts in a Large Urban Jail System with an Established Suicide Prevention Program*, 53 PSYCHIATRIC SERVS. 574, 576 (2002); see also SASHA ABRAMSKY & JAMIE FELLNER, HUM. RTS. WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 178–79 (Joseph Saunders & James Ross eds., 2003), <https://www.hrw.org/reports/2003/usa1003/usa1003.pdf> [<https://perma.cc/CF3A-ZBH4>] (summarizing findings that prison suicides were more common “among prisoners with a diagnosed serious mental illness”).

⁹⁵ See JAMIE FELLNER, HUM. RTS. WATCH, CALLOUS AND CRUEL (Alison Parker, Shantha Rau Barriga & Joe Saunders eds., 2015), <https://www.hrw.org/report/2015/05/12/>

incarcerated people.⁹⁶ Jails and prisons offer abysmal mental healthcare,⁹⁷ so psychiatric and other mental disabilities go unmanaged. Those disabilities make it especially hard for a person to conform their behavior to the strictures of prison life and leave them vulnerable to exploitation by other prisoners.⁹⁸ As a result, prisoners with psychiatric and other mental disabilities are frequently subject to disciplinary and administrative measures such as loss of programming and placement in solitary confinement.⁹⁹ Restrictive housing in particular exacerbates disability symptoms, producing a “vicious cycle” whereby decompensation begets punishment which begets further decompensation.¹⁰⁰ The combination of inaccessible programming,¹⁰¹ increased likelihood of disciplinary

callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and#5524 [https://perma.cc/C7XN-94W5] (documenting use of force against prisoners with mental illness); see also Michael Winerip & Michael Schwirtz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. TIMES (July 14, 2014), https://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html [https://perma.cc/2JY2-JKSG] (describing a pattern of “brutal attacks” against people with mental disabilities by corrections officers at Rikers Island in New York). The absence of national data on the use of force in jails and prisons makes it difficult to discern whether the rate of violence against prisoners with disabilities exceeds that of the general prison population, but studies of individual facilities suggest that this is the case. See FELLNER, *supra* note 95.

⁹⁶ See DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 10, 10 tbl.16 (2006), https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf [https://perma.cc/KJ8Y-J85V] (showing that incarcerated people with a “mental health problem” are about two times more likely than other people in prison or jail to be injured in a fight).

⁹⁷ See generally ABRAMSKY & FELLNER, *supra* note 94, at 94–127 (2003) (finding that few prisons accommodate prisoners’ mental health needs).

⁹⁸ See Craig Haney, Univ. of Cal., Santa Cruz, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment* 13–14 (Dec. 2001) (working paper) (on file with author) (describing the significant challenges and vulnerabilities that people with psychiatric and other disabilities face in navigating prison); Margo Schlanger, *Prisoners with Disabilities*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295, 298–99 (Erik Luna ed., 2017); John J. Lennon, *This Place Is Crazy*, in THE BEST AMERICAN MAGAZINE WRITING 2019, at 278 (Sid Holt ed., 2019) (describing how Joe, a prisoner with schizophrenia who was incarcerated with the author, “struggled to adjust to prison etiquette”).

⁹⁹ See Schlanger, *supra* note 98, at 299–301.

¹⁰⁰ See *id.* at 299–300; Haney, *supra* note 98 (citing Patricia A. Streeter, *Incarceration of the Mentally Ill: Treatment or Warehousing?*, 77 MICH. BAR J. 166, 167 (1998)). Ample research documents the adverse effects of solitary confinement on wellbeing. See Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 476–87 (2006) (surveying the significant body of literature on the topic).

¹⁰¹ See RACHAEL SEEVERS, AVID PRISON PROJECT, MAKING HARD TIME HARDER: PROGRAMMATIC ACCOMMODATIONS FOR INMATES WITH DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT 28–29, 31 (2016) (describing how a lack of accommodations for learning disabilities left prisoners unable to complete mandatory programs).

infractions,¹⁰² and sometimes pure discrimination¹⁰³ creates barriers to acquiring good time credit and securing release before the completion of one's full sentence.¹⁰⁴

In sum, the criminalization of hospital misconduct carries devastating material consequences for people with psychiatric and other mental disabilities. It disrupts their access to care, housing, and employment, and puts them at risk of serious psychological and bodily harm. Furthermore, many arrestees will spend months or years in jail or prison for misconduct related to a mental health issue that could have been resolved in days or weeks. While the decision to call the police on a difficult patient may seem inconsequential, in reality, it is anything but.

C. *Reasons Behind the Arrest of Psychiatric Hospital Patients*

Police arrest psychiatric hospital patients over the objections of clinicians,¹⁰⁵ loved ones,¹⁰⁶ the American public,¹⁰⁷ and perhaps most remarkably, their own better judgment.¹⁰⁸ Furthermore, research suggests that arresting psychiatric hospital patients undermines public

¹⁰² JAMES & GLAZE, *supra* note 96, at 10, 10 tbl. 16 (showing that prisoners with “mental health problems” are more likely than others to be charged with rule violations).

¹⁰³ See Schlanger, *supra* note 98, at 300–01 (describing discriminatory practices such as blanket parole denial for disabled prisoners).

¹⁰⁴ For example, New York state allows a prisoner to “receive time allowance against the term or maximum term of his or her sentence imposed by the court.” N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2024). Such time allowances are earned through “good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program,” and may be revoked “for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned.” *Id.*

¹⁰⁵ See DISABILITY RTS. OR., *supra* note 16, at 12 (describing the decision to seek a trespass order at hospitals as frequently “divorced from” or at odds with clinical input).

¹⁰⁶ People who call 911 for emergency assistance with a loved one in mental health crisis may not want the person arrested. See, e.g., Greg B. Smith, *What Happens When Police Show Up for Mental Health Calls?*, THE CITY (Dec. 12, 2022, 5:00 AM), <https://www.thecity.nyc/2022/12/12/what-happens-police-respond-mental-health-calls-edp> [<https://perma.cc/23VV-FHXH>] (describing how, despite specifically requesting “an ambulance” and “not the police,” Peggy Herrera’s 911 call for help with her son experiencing a mental health breakdown was met with “a squad of police officers” who handcuffed her and strapped her son to a gurney).

¹⁰⁷ One survey found that a whopping eighty percent of Americans “want mental health professionals to be the primary first responder to a mental health or suicide crisis.” Ipsos, NAT’L ALL. ON MENTAL ILLNESS, NAMI 988 CRISIS RESPONSE RESEARCH 21 (2021), <https://www.nami.org/NAMI/media/NAMI-Media/Public%20Policy/NAMI-988-Crisis-Response-Report-11-12-2021-For-Release.pdf> [<https://perma.cc/QRH3-4Y4E>].

¹⁰⁸ Many police departments have joined in advocates’ calls to replace officers with more specialized first responders for mental health calls. See, e.g., Taylor Knopf, *Sheriffs Want to Turn Transport of Psych Patients Over to Mental Health Workers*, NC HEALTH NEWS (May 23, 2022), <https://www.northcarolinahealthnews.org/2022/05/23/sheriffs-want-out-of-involuntary-commitment> [<https://perma.cc/3QNQ-69F>].

safety rather than bolstering it.¹⁰⁹ The consensus that this practice is wrong begs the question of why it continues.

On this front, observe the following: First, hospitals are risk-averse¹¹⁰ and overwhelmed,¹¹¹ incentivizing them to offload responsibility for the patients they perceive as the most resource-intensive.¹¹² Second, a relatively small group of individuals, often struggling to simultaneously navigate homelessness, substance use, and disability, account for a

¹⁰⁹ For people with mental disability, interaction with the criminal system may increase recidivism and disincentivize voluntary treatment. The prison environment is inherently disabling, leaving people with functional impairments that make it more difficult to move through the world outside of prison. See Haney, *supra* note 98, at 4–12 (discussing the psychological effects of incarceration); Lorna Collier, *Incarceration Nation*, 45 MONITOR ON PSYCH., Oct. 2014, <https://www.apa.org/monitor/2014/10/incarceration> [<https://perma.cc/D6XK-Y7P4>] (“In prison, inmates face a variety of challenges that affect their ability to become productive members of society once they leave confinement . . .”); Diana Johns, *Confronting the Disabling Effects of Imprisonment: Toward Prehabilitation*, 45 SOC. JUST. 27, 27 (2018) (“On the outside, the effects of institutionalization bring forth men ill-equipped to deal with life in the community and facing homelessness, unemployment, and exclusion.” (citation omitted)). Additionally, the threat of arrest may disincentivize people at risk of acting violently from seeking voluntary treatment. See *State v. Delafosse*, 441 A.2d 158, 159, 161–63 (Conn. 1981) (quoting CONN. GEN. STAT. ANN. § 53a-169) (recognizing this paradox); cf. Michael L. Perlin & Naomi M. Weinstein, “*Friend to the Martyr, A Friend to the Woman of Shame*”: Thinking About the Law, Shame, and Humiliation, 24 S. CAL. REV. L. SOC. JUST. 1, 30–31 (2014) (arguing that poor institutional conditions disincentivize voluntary treatment). Finally, it is not clear that arresting difficult patients makes hospitals any safer over the long term. See DISABILITY RTS. WASH., *supra* note 18, at 3.

¹¹⁰ Profit motives and the law incentivize hospitals to avoid risk. Healthcare facilities can be liable for injuries inflicted by one patient on another. See, e.g., *ED Violence Means Possible Liability Exposure for Hospital*, RELIAS MEDIA (July 1, 2021), <https://www.reliasmedia.com/articles/148181-ed-violence-means-possible-liability-exposure-for-hospital> [<https://perma.cc/P88Q-8SYT>]. Furthermore, nearly every state imposes mandatory crime reporting duties on hospitals. See Song, *supra* note 37, at 2662 n.87 (“Only Alabama, New Mexico, and Wyoming have no mandatory reporting duty statutes.” (citing VICTIM RTS. L. CTR., MANDATORY REPORTING OF NON-ACCIDENTAL INJURIES: A STATE-BY-STATE GUIDE (2014))).

¹¹¹ The gap between demand and supply for voluntary and involuntary inpatient and outpatient mental health care is well documented. Psychiatric hospitals and hospital emergency departments are overwhelmed, driving them to triage care based on a patient’s perceived resource-intensiveness. See, e.g., Lisa Miller, “*There’s No Room in the System*,” N.Y. MAG. (Jan. 18, 2023), <https://nymag.com/intelligencer/2023/01/eric-adams-mentally-ill-homeless-nyc-hospitals.html> [<https://perma.cc/KB9B-473E>] (describing New York City’s hospital bed shortage and emergency rooms’ triaging of homeless patients); Neil Gong, *Between Tolerated Containment and Concerted Constraint: Managing Madness for the City and the Privileged Family*, 84 AM. SOCIO. REV. 664 (2019) (“[O]rganizational demands push staff to simply ‘empty beds,’ rapidly discharging patients with little in the way of concrete care.” (citing LORNA A. RHODES, EMPTYING BEDS: THE WORK OF AN EMERGENCY PSYCHIATRIC UNIT (1991))); Susan Scutti, *ERs ‘Flooded’ with Mentally Ill Patients with No Place Else to Turn*, CNN (Jan. 4, 2019), <https://www.cnn.com/2019/01/03/health/er-mental-health-patients-epribe/index.html> [<https://perma.cc/B38G-SME5>] (“The extent to which ERs are now flooded with patients with mental illness is unprecedented.”).

¹¹² This practice was so common in the 1980s that it was known as “patient dumping.” Song, *supra* note 37, at 2654–56.

disproportionate number of hospital calls to police.¹¹³ Third, those individuals often land at the hospital after unsuccessfully seeking help elsewhere.¹¹⁴ Fourth, hospitals often call the police in response to relatively innocuous, disability-related misconduct, such as raising one's voice,¹¹⁵ making repetitive movements,¹¹⁶ pacing,¹¹⁷ discussing a taboo topic,¹¹⁸ or resting.¹¹⁹ Fifth, the police often try, unsuccessfully, to avoid taking the person into custody.¹²⁰ Finally, the arrestee is often booked for a low-level offense that is never charged or quickly dropped.¹²¹

All this suggests that hospital patients with psychiatric or other mental disabilities often end up in jail simply because they have no

¹¹³ See Naomi M. Weinstein & Michael L. Perlin, "Who's Pretending to Care for Him?" *How the Endless Jail-to-Hospital-to-Street-Repeat Cycle Deprives Persons with Mental Disabilities the Right to Continuity of Care*, 8 WAKE FOREST J.L. & POL'Y 455, 455–56 (2018) (observing that scholars, jurists, and public officials have been drawing attention to this problem for decades).

¹¹⁴ See Song, *supra* note 37, at 2654–56 (explaining that for poor people, hospital emergency departments play an "important social welfare function" and act as the final "safety net," because they are "the only places in the U.S. healthcare system where the poor cannot be turned away" (quoting KRISTY GONZALEZ MORGANTI ET AL., RAND CORP., THE EVOLVING ROLE OF EMERGENCY DEPARTMENTS IN THE UNITED STATES 3 (2013))).

¹¹⁵ See, e.g., *United States v. Agront*, 773 F.3d 192, 194–95 (9th Cir. 2014) (describing disorderly conduct charge for yelling and refusing to sit due to back injury in parking lot of VA hospital); *Pui v. State*, 197 N.E.3d 847, 847 (Ind. Ct. App. 2022) (unpublished table decision) (affirming disorderly conduct conviction for raising voice and throwing identification cards on table in hospital lobby).

¹¹⁶ See, e.g., *State v. Amsden*, 75 A.3d 612, 615 (Vt. 2013) (describing disorderly conduct charge for repeatedly banging bed to which defendant was handcuffed against the wall of hospital "safe room").

¹¹⁷ See, e.g., *United States v. Bear*, 75 F. App'x 855, 856 (2d Cir. 2003) (describing disorderly conduct charge for "pacing back and forth, and talking constantly without sitting down"); *Commonwealth v. Accime*, 68 N.E.3d 1153, 1154–55 (Mass. 2017) (describing disorderly conduct charge for "pacing with clenched fists, hitting the open palm of one hand with the clenched fist of the other").

¹¹⁸ See, e.g., *Harris v. U.S. Dep't of Veterans Affs.*, 776 F.3d 907, 910 (D.C. Cir. 2015) (describing disorderly conduct citation issued for discussing politics in VA group therapy session).

¹¹⁹ See generally DISABILITY RTS. OR., *supra* note 16 (reporting on a pattern of hospitals and police issuing trespass orders for peaceful conduct like resting).

¹²⁰ See Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, NAT'L INST. JUST. J., July 2000, at 9–11; Maxine Bernstein, *Report: Hospital Calls About 'Unwanted' People Trespassing Leads to Jail, Criminalizing Mental Illness*, OR. LIVE (June 18, 2019), <https://www.oregonlive.com/crime/2019/06/report-hospital-calls-about-unwanted-people-trespassing-leads-to-jail-criminalizing-mental-illness.html> [<https://perma.cc/WC97-LGCT>] ("Portland police said they'd prefer not to go to the hospital trespass calls.").

¹²¹ For example, Edward Taylor, a man with "cognitive, behavioral, and physical disabilities," was "arrested for assault while receiving treatment for his disabilities at a hospital." *Taylor v. Hartley*, 488 F. Supp. 3d 517, 524 (S.D. Tex. 2020). While waiting to be processed at the jail, he was brutally beaten by an officer, resulting in injuries that required hospital treatment. *Id.* at 524–25. The alleged assault that originally brought him to the jail was never charged after a grand jury "determined that there were inadequate grounds for prosecution." *Id.* at 525.

other place to go. Research from social scientists and advocates supports this account. Over twenty years ago, psychiatry professor Linda A. Teplin observed that officer responses to people with psychiatric and other mental disabilities depended more on the practical “demands and constraints of the situation” than on the person’s symptoms.¹²² Faced with a complaint about someone with a psychiatric or other mental disability, police had limited options—hospitalize, arrest, or do nothing¹²³—since other caretaking systems were lacking.¹²⁴ Police often preferred to take someone to a hospital but knew hospitals did not want patients with dangerous or complex symptoms.¹²⁵ As a backup, police would acquire a signed victim complaint so they could arrest the person if the hospital refused to admit them.¹²⁶

Little has changed since Professor Teplin’s report. Take, for instance, Betty, a 76-year-old woman with visual impairments, injuries sustained from an assault at a homeless shelter, and dementia.¹²⁷ In 2018, a Portland-area hospital called the police to have her removed from the premises after she refused to depart of her own accord.¹²⁸ The responding officer “was reluctant to take her to jail,” so he called Adult Protective Services (APS).¹²⁹ But APS declined to provide support, asserting that Betty’s history of hoarding and property damage posed too great of a risk to the agency.¹³⁰ Unsure where else

¹²² Teplin, *supra* note 120, at 8, 10.

¹²³ *Id.* at 9 (describing officers’ choices when encountering an “irrational person”).

¹²⁴ *Id.* at 10, 11 (explaining that alternatives to hospitalization were limited because they “tended to design their programs as though clients were ‘pure types’” and were underfunded).

¹²⁵ *Id.* at 10 (“Ironically, it was precisely the requirements for emergency psychiatric detention set forth in most mental health codes—‘dangerous to self and others’—that rendered mentally disordered citizens undesirable to hospitals and resulted in their arrest. Persons whose symptoms crossed the boundaries of the caretaking systems met a similar fate.”).

¹²⁶ *Id.* at 10.

¹²⁷ *DISABILITY RTS. OR.*, *supra* note 16, at 4. Betty’s name was changed to protect her anonymity.

¹²⁸ *Id.* The hospital asserted she had no medical need to be there, though this seems debatable. As the responding officer’s police report explained, Betty had been to a different emergency department earlier that day, was still experiencing pain from the assault-related injuries, and could barely walk. *Id.*

¹²⁹ *Id.* APS departments typically investigate allegations of elder abuse and abuse of adults with disabilities and may provide social services to these populations as well. *See, e.g., Adult Protective Services*, MULTNOMAH CNTY., <https://www.multco.us/ads/adult-protective-services> [<https://perma.cc/2ZX8-DW2M>] (listing the types of adult abuse investigated by the Multnomah County, Oregon, APS).

¹³⁰ *See DISABILITY RTS. OR.*, *supra* note 16, at 4 (explaining that APS “reported that the woman was known to them, but they could not provide a motel voucher because [her history] . . . could result in county vouchers no longer being accepted by a particular motel”).

Betty could go, the officer arrested her and booked her at the county jail on a trespass charge.¹³¹

Of course, there is nothing new in the observation that the United States uses jails and prisons to warehouse people with psychiatric and other mental disabilities.¹³² So why do arrests of people who are already hospitalized in connection with their mental disability intuitively feel unjust? The next Part explores this question, using the U.S. Supreme Court's decisions in *City of Grants Pass v. Johnson* and *Robinson v. California* as entry points.

II

UNDERSTANDING THE STATUS PUNISHMENT BAN

In 1960, a jury convicted Lawrence Robinson of violating a California statute that made it a crime to “be addicted to the use of narcotics.”¹³³ A few years later, the U.S. Supreme Court reversed Robinson's conviction, holding that criminalizing the “status” of having a narcotics addiction, in contrast to the use, purchase, sale, or possession of narcotics or behavior resulting therefrom, constitutes a form of cruel and unusual punishment in violation of the Eighth Amendment.¹³⁴

¹³¹ DISABILITY RTS. OR., *supra* note 16, at 4. Police cannot take a person into custody without a warrant or probable cause that the person has committed or is attempting to commit a crime. *See Dunaway v. New York*, 442 U.S. 200 (1979) (holding that taking a person to the police station for questioning without probable cause violated the Fourth and Fourteenth Amendments). Thus, low-level offenses like trespass, disorderly conduct, and misdemeanor assault provide cover for officers who feel obliged to take people into custody despite the relatively harmless nature of the arrestee's misconduct. For examples of such arrests, see generally DISABILITY RTS. OR., *supra* note 16 (analyzing trespass arrests at Portland-area hospitals); DISABILITY RTS. WASH., *supra* note 18 (analyzing assault arrests at Seattle-area hospitals). Indeed, this practice is so common that it has a name: “mercy booking.” *See, e.g.,* H. Richard Lamb, Linda E. Weinberger & Walter J. DeCuir, Jr., *The Police and Mental Health*, 53 PSYCHIATRIC SERVS. 1266, 1267 (2002).

¹³² *See* Michael L. Perlin & Alison J. Lynch, “*Had to Be Held Down by Big Police*”: A Therapeutic Jurisprudence Perspective on Interactions Between Police and Persons with Mental Disabilities, 43 FORDHAM URB. L.J. 685, 685 (2016) (“It is a truism that the nation's largest urban jails are also the largest mental health facilities in the nation.”).

¹³³ *Robinson v. California*, 370 U.S. 660, 660 (1962); *see* Nancy Campbell, *Overdose, Police Science, and Lawrence Robinson's Legacy*, MIT PRESS READER (Aug. 29, 2022), <https://thereader.mitpress.mit.edu/overdose-police-science-and-lawrence-robinsons-legacy> [<https://perma.cc/G55Z-ST9B>] (telling the backstory of *Robinson*).

¹³⁴ *Robinson*, 370 U.S. at 666–67. The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. *Robinson* is also the case that incorporated the Eighth Amendment to the states. *Robinson*, 370 U.S. at 667 (holding that the statute “inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment”).

The Court's opaque reasoning in *Robinson* left scholars and jurists debating the principle for which it stood.¹³⁵ Was criminalizing a "status" cruel and unusual because it punishes someone for having a condition that is "innocent[]" and "involuntar[y]"?¹³⁶ Or was it cruel and unusual because it subjects a person to "continuous[] guilt," regardless of whether they engage in discrete addiction-related acts?¹³⁷ How concerned was the Court with the possibility that criminalizing addiction might facilitate pretextual policing?¹³⁸ For nearly sixty years, the sole Supreme Court decision addressing *Robinson*'s scope was *Powell v. Texas*, which considered the constitutionality of a public intoxication statute.¹³⁹ Then, on January 12, 2024, the Supreme Court agreed to hear a challenge to a city camping ordinance, granting certiorari on the following question: "Does the enforcement of generally applicable laws regulating camping on public property constitute 'cruel and unusual punishment' prohibited by the Eighth Amendment?"¹⁴⁰

This Part uses the opinions in *Grants Pass* and *Robinson* as points of departure for analyzing the constitutionality of psychiatric hospital arrests. It argues that no matter how you look at it, foundational constitutional norms are violated when we criminalize psychiatric patients for misconduct related to their disability.

A. City of Grants Pass v. Johnson: *Status as the Absence of Conduct*

Before the Court heard *Grants Pass* in 2024, it had issued only one decision expounding on the holding of *Robinson*. *Powell v. Texas*

¹³⁵ See, e.g., Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 386 (1966) (describing the opinion as "elliptic" and likely to "lead to further confusion"); Kent Greenawalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927, 929–30 (1969) (explaining that lower courts struggled to interpret *Robinson* in the years immediately after the decision was handed down); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1313 n.324 (1970) ("It is hard to discern precisely the principle which supports the holding of *Robinson v. California* . . ."); Martin R. Gardner, *Rethinking Robinson v. California in the Wake of Jones v. Los Angeles: Avoiding the "Demise of the Criminal Law" by Attending to "Punishment,"* 98 J. CRIM. L. & CRIMINOLOGY 429, 434 (2008) (characterizing the majority opinion as a "conclu[sion] without analysis").

¹³⁶ *Robinson*, 370 U.S. at 667.

¹³⁷ *Id.* at 665–66.

¹³⁸ *Id.* at 661 n.2 (declining to address *Robinson*'s Fourth Amendment argument but noting "that at the time the police first accosted the appellant, he was not engaging in illegal or irregular conduct of any kind, and the police had no reason to believe he had done so in the past").

¹³⁹ 392 U.S. 514 (1968); see Gardner, *supra* note 135, at 431 ("After *Powell*, the Supreme Court offered no more guidance on the meaning of *Robinson*.").

¹⁴⁰ See Petition for Writ of Certiorari at i, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175); City of Grants Pass v. Johnson, 144 S. Ct. 679 (2024) (granting certiorari).

considered the constitutionality of Texas's public intoxication statute as applied to someone with "chronic alcoholism."¹⁴¹ With a 4-1-4 vote, the Court affirmed Powell's conviction. The plurality opinion, authored by Justice Marshall, advanced a narrow reading of *Robinson*. That decision, Justice Marshall argued, stood only for the proposition that, for the state to inflict criminal punishment, the Eighth Amendment requires proof that the accused engaged in a specific act.¹⁴² It does not bar punishment solely because an act was involuntary or compulsory.¹⁴³ Thus, Powell's conviction could stand because it was predicated on the act of "being in public while drunk on a particular occasion," not on the status of "being a chronic alcoholic."¹⁴⁴

Justice White, concurring in judgment only, argued that Powell's conviction could stand for a different reason: While the record may have shown that Powell was compelled to "becom[e] drunk" on the night of his arrest, it failed to show that he was compelled to become drunk in public.¹⁴⁵ Justice White argued that, under *Robinson*, it would violate the Constitution to punish someone with "an irresistible urge to consume alcohol . . . for drinking or for being drunk"; the Texas statute's saving grace was that it criminalized *public* drunkenness,¹⁴⁶ and a compulsion to drink or be drunk does not presume a compulsion to do those activities in public.¹⁴⁷ Under Justice White's view—which is consistent with the view advanced by the four Justices who voted to reverse Powell's conviction¹⁴⁸—the dispositive question is not whether

¹⁴¹ The statute made it a crime to "get drunk or be found in a state of intoxication in any public place, or at any private house except his own." *Powell v. Texas*, 392 U.S. 514, 517 (1968) (quoting TEX. PENAL CODE ANN. art. 477 (West 1952)).

¹⁴² *Id.* at 533.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 532. Justice Marshall's opinion has been critiqued as inconsistent with not only his own typically progressive criminal legal jurisprudence but also the opinion of the public and legal academy. See Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101, 1139–48 (2012) (citing Justice Marshall's opinion in *Powell* as an example of a conservative decision issued by the Warren Court). It is worth asking whether Justice Marshall would have come down differently if, at the time, more due process protections were in place for the civilly committed. See *Powell*, 392 U.S. at 529 (arguing that a broader reading of *Robinson* would put people with alcohol addiction at risk of indefinite detention). Indeed, four years later, in *McNeil v. Director, Patuxent Institution*, Justice Marshall, writing for the majority, suggested that *Robinson* would bar the punishment of conduct that was "a manifestation of mental illness." 407 U.S. 245, 251 (1972).

¹⁴⁵ *Powell*, 392 U.S. at 552–54 (White, J., concurring).

¹⁴⁶ *Id.* at 548–49.

¹⁴⁷ *Id.* at 549.

¹⁴⁸ *Id.* at 567 (Fortas, J., dissenting) (arguing that *Robinson* stands for the principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change").

a statute punishes an act, but rather, whether the act it punishes is voluntary or involuntary.¹⁴⁹

In other words, according to Justice Marshall, *Robinson* merely constitutionalized the foundational precept of criminal law that a crime requires an *actus reus*.¹⁵⁰ According to Justice White, *Robinson* constitutionalized the requirement of *mens rea*.¹⁵¹

For many years, Justice Marshall's view of *Robinson* was the dominant one, followed by a majority of circuits.¹⁵² *Robinson* was primarily applied to invalidate state statutes that specifically criminalized having an alcohol or substance use disorder, much like the statute at issue in *Robinson*.¹⁵³ Starting in the 1990s, however, a new wave of scholarship¹⁵⁴ and litigation¹⁵⁵ began arguing that *Robinson*

¹⁴⁹ See *id.* at 551 n.2 (White, J., concurring) (“The proper subject of inquiry is whether volitional acts brought about the ‘condition’ and whether those acts are sufficiently proximate to the ‘condition’ for it to be permissible to impose penal sanctions on the ‘condition.’”).

¹⁵⁰ See *id.* at 533 (majority opinion) (explaining that *Robinson* requires that the accused “has committed some *actus reus*”); *id.* at 535 (“[T]his Court has never articulated a general constitutional doctrine of *mens rea*.”).

¹⁵¹ See *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (citing *Robinson* as an example of the principle that a defendant’s moral culpability depends on his intent).

¹⁵² See *United States v. Lopez-Ortiz*, 875 F.3d 49, 54 (1st Cir. 2017); *Smith v. Follette*, 445 F.2d 955, 961 (2d Cir. 1971); *United States v. Lyons*, 731 F.2d 243, 245 n.3 (5th Cir. 1984); *United States v. Lame*, 716 F.2d 515, 521 (8th Cir. 1983); *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989); *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973).

¹⁵³ See, e.g., *State v. Bridges*, 360 S.W.2d 648, 648, 650 (Mo. 1962) (striking down a statute criminalizing narcotics addiction); *People v. Davis*, 188 N.E.2d 225, 225, 227 (Ill. 1963) (same); *Ex parte Rogers*, 366 S.W.2d 559, 559–60 (Tex. Crim. App. 1963) (same); see also Gardner, *supra* note 135, at 446 (explaining that lower courts mostly applied *Robinson* to statutes punishing status conditions, but not to statutes punishing acts linked to those conditions).

¹⁵⁴ See, e.g., Edward J. Walters, Comment, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1620 (1995) (arguing certain statutes that effectively criminalize homelessness violate the Eighth Amendment); Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 294–95 (1996) (same); Benno Weisberg, Comment, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual “Crimes,”* 96 J. CRIM. L. & CRIMINOLOGY 329, 332 (2005) (same); Hannah Kieschnick, Note, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1573 (2018) (same); Jenna Marie Stupar, Comment, *Gangsta’s Paradise? How Chicago’s Antigang Loitering Ordinance Punishes Status Instead of Behavior*, 64 DEPAUL L. REV. 945, 947 (2015) (arguing the same with respect to gang loitering statutes in Chicago); Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1, 7–8 (2017) (arguing the same with respect to laws barring the use of bathrooms consistent with a person’s gender identity); Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1166–68, 1171–72 (2017) (arguing the same with respect to statutes criminalizing certain activities, including drug use, undertaken while pregnant).

¹⁵⁵ See *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019) (en banc) (holding that under *Robinson*, “the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot

could be used to challenge the enforcement of a variety of criminal statutes, especially for quality-of-life offenses.

In the 2024 Supreme Court term, this trend reached an inflection point when the Court granted certiorari in *City of Grants Pass v. Johnson*.¹⁵⁶ In 2013, the Oregon city of Grants Pass began increasing enforcement of a series of municipal ordinances with the aim of “mak[ing] it uncomfortable enough for [homeless people] in [Grants Pass] so they will want to move on down the road.”¹⁵⁷ Those ordinances made it a crime to sleep “on public sidewalks, streets, or alleyways”¹⁵⁸ and to “occupy a campsite” on “any sidewalk, street, alley, . . . or any other publicly-owned property,” including the city’s public parks.¹⁵⁹ The ordinances defined “[c]ampsite” as “any place where bedding, sleeping bag[s], or other material used for bedding purposes, or any stove or fire is placed . . . for the purpose of maintaining a temporary place to live,” including “any vehicle.”¹⁶⁰ Violators faced a series of escalating punishments, starting with a \$295 fine and ending with up to thirty days in jail.¹⁶¹

In 2018, three Grants Pass residents filed a class action lawsuit on behalf of all involuntarily homeless people in the city, challenging the ordinances under the Eighth Amendment’s Cruel and Unusual Punishments Clause.¹⁶² The district court granted partial summary judgment to the plaintiffs, finding the ordinances unconstitutional under *Martin v. City of Boise*, in which the Ninth Circuit held that under *Robinson*, “the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.”¹⁶³ As was the case in *Martin*, demand for shelter beds in Grants Pass outstripped supply, and thus the ordinances unconstitutionally “punish[ed] people who ha[d] no access to shelter for the act of sleeping or resting outside while having

obtain shelter”); *Manning v. Caldwell*, 930 F.3d 264, 268–69, 281 (4th Cir. 2019) (en banc) (holding statutory scheme that made it a crime for a “habitual drunkard” to possess or consume alcohol violated Eighth Amendment if applied to “conduct that is both compelled by [plaintiffs’] illness and is otherwise lawful for all those of legal drinking age”).

¹⁵⁶ 144 S. Ct. 2202 (2024).

¹⁵⁷ *Id.* at 2235 (Sotomayor, J., dissenting) (second alteration in original) (quoting Joint Appendix at 114, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175)).

¹⁵⁸ Joint Appendix at 221a, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) (quoting GRANTS PASS, OR., MUN. CODE § 5.61.020(A)).

¹⁵⁹ *Id.* at 222a (quoting GRANTS PASS, OR., MUN. CODE § 5.61.030).

¹⁶⁰ *Id.* at 221a (quoting GRANTS PASS, OR., MUN. CODE § 5.61.010(B)).

¹⁶¹ *Grants Pass*, 144 S. Ct. at 2232 (Sotomayor, J., dissenting).

¹⁶² *Johnson v. City of Grants Pass*, 72 F.4th 868, 875, 877 (9th Cir. 2023).

¹⁶³ *Blake v. City of Grants Pass*, No. 1:18-CV-01823-CL, 2020 WL 4209227, at *8 (D. Or. July 22, 2020); *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019) (en banc).

a blanket or other bedding.”¹⁶⁴ The Ninth Circuit affirmed the district court’s conclusion that the ordinances violated the Eighth Amendment “to the extent they prohibited homeless persons from ‘taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available,’”¹⁶⁵ but found that the ordinances were not “properly enjoined in their entirety,” and ordered the district court to “craft a narrower injunction” permitting enforcement of the ordinances’ “fire, stove, and structure prohibitions.”¹⁶⁶

The Supreme Court reversed.¹⁶⁷ As a threshold matter, the Court observed that *Robinson* served as the plaintiffs’ sole vehicle for asserting a Cruel and Unusual Punishments challenge to the ordinances¹⁶⁸: The “origins and meaning” of the Cruel and Unusual Punishments Clause generally make it “a poor foundation” for imposing substantive limits on what the law may criminalize.¹⁶⁹ Nor were the penalties under these particular ordinances cruel and unusual in their own right.¹⁷⁰

Thus, the only question was whether *Robinson* controlled. The Court concluded that it did not.¹⁷¹ *Robinson*, the Court declared, “held only that a State may not criminalize the ‘status’ of being an addict.”¹⁷² But the Grants Pass ordinances criminalized “actions,” such as “occupy[ing] a campsite.”¹⁷³ Nor does *Robinson* apply to laws that “‘effectively’ . . . punish a person because of his status.”¹⁷⁴ *Powell*, the Court reasoned, “rejected that view” when it held that Texas’s public intoxication statute was lawfully applied to a person whose “drunkenness was an ‘involuntary’ byproduct of his status as an alcoholic”—and this case was just like *Powell*.¹⁷⁵ Thus, while the Court technically stopped short of overturning *Robinson*,¹⁷⁶ in practice, it limited *Robinson* to its facts by holding that it applies only to “laws that criminalize ‘mere status’” on

¹⁶⁴ *Blake*, 2020 WL 4209227, at *7–8.

¹⁶⁵ *Johnson*, 72 F.4th at 891 (quoting *Blake*, 2020 WL 4209227, at *6).

¹⁶⁶ *Id.* at 895.

¹⁶⁷ *City of Grants Pass v. Johnson*, 144 S. Ct. 2022, 2226 (2024).

¹⁶⁸ *Id.* at 2216–18 (“[The plaintiffs] do not question that, by its terms, the Cruel and Unusual Punishments Clause speaks to the question what punishments may follow a criminal conviction, not to antecedent questions like what a State may criminalize or how it may go about securing a conviction. Yet . . . they insist one notable exception exists.”).

¹⁶⁹ *Id.* at 2215–16.

¹⁷⁰ *Id.* at 2216.

¹⁷¹ *Id.* at 2218.

¹⁷² *Id.* (internal quotation marks omitted) (quoting *Robinson v. California*, 370 U.S. 660, 666 (1962)).

¹⁷³ *Id.* (second alteration in original) (quoting GRANTS PASS, OR., MUN. CODE § 5.61.030).

¹⁷⁴ *Id.* at 2219.

¹⁷⁵ *Id.* at 2219–20 (internal quotation marks omitted) (quoting *Powell v. Texas*, 392 U.S. 514, 517 (1968)).

¹⁷⁶ *Id.* at 2218.

their face.¹⁷⁷ As explained in the Section that follows, the Court's rigid conception of "status" ignored the mechanics of how anti-camping ordinances function on the ground and the reality that *Robinson* reflects numerous constitutional principles that prohibit the criminalization of both homelessness and mental disability.

B. Alternative Conceptions of Status

The Court's conclusion in *Grants Pass* that the case before it was "no different from *Powell*"¹⁷⁸ reflects a failure to contend with the causes of homelessness, the plaintiffs' lack of say in whether or where to sleep, and the animosity of Grants Pass's other residents towards its homeless population. As a result of this failure, the Court adopted a narrow definition of "status" as simply the absence of conduct. In fact, however, multiple constitutional doctrines regulate the punishment of "status" conceived more broadly. As this Section explains, *Robinson* fits easily within those traditions.

Using the dissenting opinion authored by Justice Sotomayor as a starting point, this Section explores how both anti-camping ordinances and psychiatric hospital arrests are deployed and experienced on the ground. In so doing, it illuminates the friction between these practices and core constitutional norms.

1. The Deservingness Principle: Status as an "Innocent and Involuntary" Condition

In her dissent, Justice Sotomayor criticized the *Grants Pass* majority for failing to "engage seriously with the precipitating causes of homelessness . . . and the myriad legitimate reasons people may lack or decline shelter."¹⁷⁹ As she pointed out, "[p]eople become homeless for many reasons, including some beyond their control," such as a dearth of affordable and accessible housing, natural disasters, mental and physical health challenges, domestic violence, aging out of the foster care system, and tribal resettlement policies.¹⁸⁰ Once homeless, the act of sleeping "is a biological necessity."¹⁸¹ Further, at issue in *Grants Pass* was only whether the government could criminalize the harmless act of sleeping "with as little as a blanket or a rolled-up shirt as a pillow," even in one's own car.¹⁸² The lower court's injunction left room for the city to

¹⁷⁷ *Id.* at 2220.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2229 (Sotomayor, J., dissenting).

¹⁸⁰ *Id.* at 2229–30.

¹⁸¹ *Id.* at 2228.

¹⁸² *Id.* at 2231.

punish conduct implicating “public health and safety,” such as “littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence.”¹⁸³

Similarly, people often land in the hospital for psychiatric treatment either against their will,¹⁸⁴ or because, for reasons not their fault, they have no place else to go.¹⁸⁵ Once hospitalized, they may be arrested for conduct symptomatic of the very disability that prompted their hospitalization to begin with.¹⁸⁶ In the case of those who have been civilly committed or placed under a temporary hold, a court has necessarily found, or is expected to find, that the person’s disability leaves them unable to control their dangerous behavior.¹⁸⁷ Further, psychiatric hospital patients are often, though not always, arrested for relatively harmless misconduct.¹⁸⁸ For instance, a nurse at one Seattle-area hospital called the police on a patient in response to the patient’s having tossed the contents of a paper juice cup at the nurse’s shoulder.¹⁸⁹

The notion that criminal punishment should be commensurate with moral blameworthiness—and that people are not morally blameworthy for what they cannot control—is reflected in the Court’s proportionality doctrine, which recognizes that punishments violate the Eighth Amendment when they are “disproportionate to the crime committed.”¹⁹⁰ Under this doctrine, the Supreme Court has found certain punishments disproportionate on the basis that the defendant lacked the control or mental capacity to form the requisite intent.¹⁹¹ The Supreme Court has also found punishments unconstitutionally

¹⁸³ *Id.* at 2228 (internal quotation marks omitted).

¹⁸⁴ *See supra* Section I.A.

¹⁸⁵ *See supra* Section I.C.

¹⁸⁶ *See supra* notes 115–19 and accompanying text.

¹⁸⁷ *See supra* notes 70–76 and accompanying text.

¹⁸⁸ *See supra* notes 115–19 and accompanying text.

¹⁸⁹ *DISABILITY RTS. WASH.*, *supra* note 18, at 18.

¹⁹⁰ *Solem v. Helm*, 463 U.S. 277, 284 (1983).

¹⁹¹ *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (holding death penalty unconstitutional as to defendants with mental disabilities, in part because “cognitive and behavioral impairments . . . make these defendants less morally culpable”); *see also Thompson v. Oklahoma*, 487 U.S. 815, 835–38 (1988) (holding death penalty unconstitutional as to defendants under sixteen years old, in part because “[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult”); *Roper v. Simmons*, 543 U.S. 551, 568–70 (2005) (holding death penalty unconstitutional as to defendants under eighteen years old in part due to teens’ “vulnerability and comparative lack of control over their immediate surroundings”); *Miller v. Alabama*, 567 U.S. 460, 476–79 (2012) (relying on similar rationale to find mandatory life without possibility of parole unconstitutional as to defendants aged fourteen); *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (finding death penalty unconstitutional as punishment for felony murder, since defendant lacked “any intention of participating in or facilitating a murder”).

disproportionate because the punished conduct was not serious enough to warrant the given penalty.¹⁹² In short, the Eighth Amendment's proportionality requirement recognizes that a defendant's "punishment must be tailored to his personal responsibility and moral guilt."¹⁹³

The *Grants Pass* Court characterized *Robinson* as an aberration from the Eighth Amendment's "traditional function of addressing the punishments that follow a criminal conviction."¹⁹⁴ However, *Robinson*'s warnings that the cruelty of a punishment "cannot be considered in the abstract" and that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold" place it squarely within the Court's proportionality line of cases.¹⁹⁵ This reading of *Robinson* is further reinforced by its emphasis on the "innocent[] and involuntar[y]" nature of the "illness" of addiction,¹⁹⁶ as well as the harmless nature of what the statute punished, which did not include "the use of narcotics," "their purchase, sale, or possession," or "antisocial or disorderly behavior resulting from their administration."¹⁹⁷ These considerations—the fault of the accused and the severity of the harm—both factor in the Court's proportionality analysis.

2. *The Impossibility Principle: Status as the Source of "Continuous" Liability*

Justice Sotomayor's *Grants Pass* dissent recognized that the city's ordinance left its homeless population "with an impossible choice: Either stay awake or be arrested."¹⁹⁸ Because "[e]very human needs to sleep at some point," the ordinance meant that homeless people in Grants Pass "eventually must leave or be criminally punished."¹⁹⁹ It thus

¹⁹² See *Solem*, 463 U.S. at 290–91, 296 (observing that the court "look[s] to the gravity of the offense and the harshness of the penalty" and holding sentence of life without possibility of parole unconstitutionally disproportionate where defendant's crime was "one of the most passive felonies a person could commit"); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (holding death penalty unconstitutionally disproportionate as to non-homicide crimes); *Graham v. Florida*, 560 U.S. 48, 69 (2010) (holding life without possibility of parole unconstitutional for juveniles convicted of non-homicide offenses due to both the defendant's age and "the nature of the crime"); see also *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (finding life sentence not disproportionate but musing that proportionality would probably "come into play" if same sentence were applied to the crime of overtime parking).

¹⁹³ *Enmund*, 458 U.S. at 801.

¹⁹⁴ *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2218 (2024).

¹⁹⁵ *Robinson v. California*, 370 U.S. 660, 667 (1962); see also *Solem*, 463 U.S. at 287 (describing *Robinson* as an application of the proportionality principle).

¹⁹⁶ *Robinson*, 370 U.S. at 667 & n.9.

¹⁹⁷ *Id.* at 666.

¹⁹⁸ *Grants Pass*, 144 S. Ct. at 2228 (Sotomayor, J., dissenting).

¹⁹⁹ *Id.* at 2236.

“create[d] a situation where homeless people necessarily break the law just by existing.”²⁰⁰

Similarly, psychiatric hospital arrests leave people in need of potentially life-saving psychiatric care with an “impossible choice”: Either avoid the hospital but risk hurting yourself or others or seek help but risk arrest. (Of course, avoiding the hospital is no option at all for those who have been civilly committed.) When a person is told that a hospital is the only safe place where they can exist because of their psychiatric or other mental disability, arresting someone for misconduct related to that disability while they are hospitalized “creates a situation where [disabled] people necessarily break the law just by existing.”²⁰¹ As a former colleague put it during a case conference for a client who had been arrested while under an involuntary hold: “If you can’t freak out in the psych unit, where can you?”

The notion that damned-if-you-do, damned-if-you-don’t laws violate Anglo-American and constitutional legal norms is reflected in the vagueness doctrine. One way to understand the disparate set of cases the Court has decided on vagueness grounds is as imposing a “prohibition on requiring the impossible.”²⁰² Under this reading of the case law, “a statute violates due process principles” when it “leaves an actor essentially unable to potentially avoid being branded a criminal.”²⁰³

Robinson’s admonishment that California’s addiction statute left a person vulnerable to prosecution “‘at any time before he reforms’ . . . whether or not he has ever used or possessed any narcotics within the State” places it squarely in this tradition.²⁰⁴ By observing that the California statute rendered a person “continuously guilty” thereunder,²⁰⁵ the Court implicitly recognized that the statute denied someone with

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1097 (2020).

²⁰³ *Id.* at 1100. *See, e.g.,* City of Chicago v. Morales, 527 U.S. 41, 59 (1999) (plurality opinion) (finding anti-loitering statute void for vagueness where its “[l]ack of clarity” left unanswered “a host of questions” about how to avoid arrest); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (finding ordinance that prohibited “annoying” behavior vague, “not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, ‘men of common intelligence must necessarily guess at its meaning.’” (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926))); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (“[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.”).

²⁰⁴ *Robinson v. California*, 370 U.S. 660, 666 (1962).

²⁰⁵ *Id.*

addition the opportunity “to conform his or her conduct to the law” — one of the animating concerns of the vagueness doctrine.²⁰⁶

3. *The Antidiscrimination Principle: Status as the Basis for “Arbitrary” Unequal Treatment*

The *Grants Pass* majority asserted that “[u]nder the city’s laws, it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest on the lawn of a municipal building.”²⁰⁷ But as Justice Sotomayor pointed out, the record belied this assertion. Enforcement of the anti-camping ordinances increased following a city council meeting at which its president stated that “the point is to make it uncomfortable enough for [homeless people] in our city so they will want to move on down the road.”²⁰⁸ The city succeeded: As one homeless Grants Pass resident put it, “[t]he only way I have figured out how to get by is try to stay out of sight and out of mind.”²⁰⁹ Indeed, the city’s “deputy chief of police operations acknowledged that he was not aware of any non-homeless person ever getting a ticket for illegal camping in Grants Pass.”²¹⁰ Both by design and in effect, the ordinances mete out punishment “selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.”²¹¹

Similarly, many psychiatric hospital arrests are enabled by laws that are susceptible to discriminatory enforcement. Disorderly conduct statutes, which frequently serve as the basis for hospital arrests,²¹² “are deployed to enforce ableist norms that target behaviors linked

²⁰⁶ *Morales*, 527 U.S. at 58; see Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2060, 2079–81 (2015) (explaining that the principle that “the definition of a crime must be based on conduct occurring at a specific time and place” undergirds both *Robinson* and the vagueness case *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)).

²⁰⁷ *Grants Pass*, 144 S. Ct. at 2218.

²⁰⁸ *Id.* at 2235 (Sotomayor, J., dissenting) (alteration in original) (quoting Joint Appendix at 114, *Grants Pass*, 144 S. Ct. 2022 (No. 23-175)).

²⁰⁹ *Id.* at 2237.

²¹⁰ *Id.* (internal quotation marks omitted).

²¹¹ *Id.* at 2243 (quoting *Furman v. Georgia*, 408 U.S. 238, 245 (1972) (Douglas, J., concurring)).

²¹² See *supra* notes 31–33, 115–18 (surveying cases involving hospital arrests). According to data from the FBI’s Uniform Crime Reporting Program, 310,331 arrests for disorderly conduct took place in 2019. See *2019 Crime in the United States Table 29*, FED. BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTING, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-29> [<https://perma.cc/WH6S-QW7S>].

to disability.”²¹³ Hospitals appear to call the police for alleged trespass and assault to remove people they perceive as unsightly²¹⁴ or to teach patients a lesson,²¹⁵ even when their presence or conduct is harmless. In sum, hospitals leverage statutes for low-level offenses like disorderly conduct, trespass, and misdemeanor assault to remove people perceived as a nuisance.

Multiple constitutional doctrines prohibit the deprivation of a person’s liberty for the purpose of removing certain classes of people from public life. One is the vagueness doctrine, which, in addition to prohibiting laws that fail to provide fair notice, also bars laws that “authorize and even encourage arbitrary and discriminatory enforcement.”²¹⁶ The Court has also recognized that the Due Process Clause of the Fifth Amendment contains an “equal protection component” independent of the clause’s prohibition on vague criminal laws.²¹⁷

In addition, the Due Process Clause of the Fourteenth Amendment protects physical liberty by “requir[ing] that the nature of commitment bear some reasonable relation to the purpose for

²¹³ Morgan, *Disorderly Conduct*, *supra* note 48, at 1672; *see also* Morgan, *Disability Policing*, *supra* note 15, at 1418–21 (characterizing arrests at hospitals for offenses like nuisance, disorderly conduct, and trespass as a form of “aggressive order-maintenance enforcement” against people with disabilities).

²¹⁴ *See* DISABILITY RTS. OR., *supra* note 16, at 22 (recounting an incident when police were called to remove patient with amputated leg found lying on floor in adult diaper); *see also id.* at 26, 30 (describing a time police were called to remove people who appeared to be homeless but not disruptive).

²¹⁵ *See, e.g.*, DISABILITY RTS. WASH., *supra* note 18, at 17 (describing a social worker seeking to press charges for a “light shove” to avoid “set[ting] a precedent” that the patient “could behave this way towards staff”); *id.* at 18 (recounting how nurse called police to arrest patient for tossing juice cup contents because she believed the patient had been deliberately acting out).

²¹⁶ *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion); *see, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (holding vagrancy statute void for vagueness because it “permits and encourages an arbitrary and discriminatory enforcement of the law” against “poor people, nonconformists, dissenters, idlers—[who] may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts”); *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (holding anti-loitering statute void for vagueness because it did not “establish minimal guidelines to govern law enforcement” and thus enables “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections” (quoting *Smith v. Goguen*, 415 U.S. 566, 574–75 (1974))); *see also Thornhill v. Alabama*, 310 U.S. 88, 97–98, 100 (1940) (finding “vague” statute violated First Amendment because it “readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure”). For a deeper exploration of how the vagueness doctrine embodies equal protection principles, *see generally* Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 HARV. C.R.-C.L. L. REV. 149 (2011).

²¹⁷ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 & n.5 (1973).

which the individual is committed.”²¹⁸ While scholars debate the standard of review applicable to government impingements on physical liberty,²¹⁹ the Court has consistently described the right as “core” to the Fourteenth Amendment liberty interest,²²⁰ and the government may not restrict it without justification. Crucially, the Court has expressly recognized that “[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty” under the Fourteenth Amendment.²²¹

Under all these doctrines, statutes run afoul of the Constitution when they result in the arbitrary treatment of different classes of people differently, whether because they explicitly dictate such differential treatment or because they delegate excess discretion to law enforcement. *Robinson* can be read as part of this constitutional tradition, too. While the Court declined to address Robinson’s Fourth Amendment argument, it recognized that the statute facilitated pretextual policing when it pointed out “that at the time the police first accosted the appellant, he was not engaging in illegal or irregular conduct of any kind, and the police had no reason to believe he had done so in the past.”²²² Justice Harlan’s concurring opinion suggests a concern for antidiscrimination principles as well: He found the trial court’s construction of the California statute unconstitutional because its “effect . . . was to authorize criminal punishment for a bare desire to commit a criminal act.”²²³ That “is an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law.”²²⁴ Indeed, scholars have argued that *Robinson* should be read as a substantive due process case in which the Court found

²¹⁸ *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); see Low & Johnson, *supra* note 206, at 2056 (describing a general “‘everything else’ category of rights . . . based on liberty and equality” distinct from rights enumerated in the Bill of Rights or articulated in the Court’s substantive due process decisions).

²¹⁹ Compare Note, *The Right to Be Free from Arbitrary Probation Detention*, 135 HARV. L. REV. 1126, 1135 (2022) (arguing that the Court “has consistently applied the principles of strict scrutiny” to “schemes that impinge on physical liberty”), with Low & Johnson, *supra* note 206, at 2056 (arguing that rational basis review applies).

²²⁰ See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (recognizing liberty from bodily restraint “as the core of the liberty protected by the Due Process Clause” (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part))); *Reno v. Flores*, 507 U.S. 292, 315 (1993) (O’Connor, J., concurring) (describing “freedom from institutional confinement” as “within the core of the Due Process Clause”).

²²¹ *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

²²² *Robinson v. California*, 370 U.S. 660, 661 n.2 (1962).

²²³ *Id.* at 679 (Harlan, J., concurring).

²²⁴ *Id.*

the California statute unconstitutional because it “was a result of arbitrary law-making.”²²⁵

III

CHALLENGING POLICING IN PSYCHIATRIC FACILITIES

This Part will offer thought starters for how to challenge policing in psychiatric facilities. Section III.A evaluates the relative strengths and weaknesses of a strategy centered on each of the three principles described in Section II.B. Section III.B invites readers to consider ways to reduce arrests at psychiatric facilities beyond litigation.

A. *Legal Solutions to Policing in Psychiatric Facilities*

Challenging the criminalization of misconduct in psychiatric facilities presents thorny strategic challenges for litigators, who must navigate the conflicts between advancing decriminalization, affirming a client’s own understanding of their experience, undermining harmful social constructions of disability, and, above all, pursuing the winningest argument for their clients.²²⁶ This Section begins to grapple with some of those considerations.

The Deservingness Principle. In some ways, the Court’s Eighth Amendment proportionality doctrine presents the most straightforward path for challenging psychiatric hospital arrests. As amici pointed out in *Grants Pass*, “[t]he Eighth Amendment’s prohibition on disproportionate punishment is deeply rooted in centuries of history.”²²⁷ Further, the Court has already recognized both mental disability and conduct harmlessness as considerations that reduce moral culpability, creating a clear through-line from existing proportionality precedent to psychiatric hospital arrests.²²⁸

²²⁵ Gardner, *supra* note 135, at 484; *see also* Low & Johnson, *supra* note 206, at 2056 n.20 (“We think this is what Justice Harlan had in mind in his separate opinion in *Robinson . . .*”); Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 234–36 (1967) (“For practical purposes, it probably matters little whether *Robinson* is conceived as the Eighth Amendment case it calls itself or the substantive due process case it appears to be.”).

²²⁶ Cf. Matt Kellner, *Queer and Unusual: Capital Punishment, LGBTQ+ Identity, and the Constitutional Path Forward*, 29 TUL. J.L. & SEXUALITY 1, 20–23 (2020) (discussing the tradeoff between making out a “cognizable . . . *Robinson* claim” and “larger movement goals” in deciding whether to frame queerness as “immutable”).

²²⁷ Brief of the American Civil Liberties Union & Nineteen Affiliates as Amici Curiae in Support of Respondents at 9, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024) (No. 23-175) [hereinafter Brief of the ACLU].

²²⁸ *See supra* Section II.B.1.

Yet in *Grants Pass*, the Court characterized *Robinson* as an “exception” to the Eighth Amendment²²⁹ despite multiple groups of amici arguing that *Robinson* easily fits within the Court’s proportionality doctrine.²³⁰ Coupled with outright hostility towards the application of any proportionality analysis from some members of the Court,²³¹ the Court’s failure to contend with its proportionality cases in *Grants Pass* calls the viability of a proportionality challenge into question.

Further, scholars and jurists have advanced several theoretical concerns with constitutionalizing a voluntariness requirement. In the context of *Robinson*, critics have argued that such a requirement lacks any limiting principle and thus threatens to upend criminal law as we know it;²³² that it absolves individuals of responsibility for their actions, which contravenes addiction management best practices²³³ and denies dignity to people with addiction;²³⁴ and that it risks funneling more people into civil commitment, which can portend just as great an intrusion on a person’s liberty as criminal sanction but lacks the same level of due process.²³⁵ As a practical matter, requiring an individualized showing of involuntariness would require people to litigate the details of their disability in court, an exhausting process that might present such a high evidentiary barrier it would strip the status punishment

²²⁹ *Grants Pass*, 144 S. Ct. at 2217.

²³⁰ See, e.g., Brief of the ACLU, *supra* note 227, at 21–24 (arguing that *Robinson* “is fully consistent with the Court’s longstanding proportionality approach to the Eighth Amendment”); Brief of Criminal Law and Punishment Scholars as Amici Curiae in Support of Respondents at 8, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) (characterizing *Robinson* as a proportionality case).

²³¹ See, e.g., *Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring) (“I would not feel compelled by stare decisis to apply [*Solem v. Helm*, 463 U.S. 277 (1983)]. In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.”).

²³² See, e.g., Gardner, *supra* note 135, at 478–79 (arguing that, taken to its logical conclusion, a voluntariness requirement portends “full-fledged . . . psychological determinism” that threatens the “demise of the criminal law”); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 147 n.144 (1962) (“If [*Robinson*’s] premise, that the legislature may not make it a ‘crime’ to be ‘sick’ is to be taken literally, the demise of the criminal law may be at hand.”).

²³³ See Dawinder S. Sidhu, *Criminal Law x Addiction*, 99 N.C. L. REV. 1083, 1124–33 (2021) (arguing that a person with addiction still bears the responsibility to exercise choice).

²³⁴ See Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 444 (1975) (arguing that, while the “medical approach” is often seen as a more humane response to addiction than criminal sanction, the latter may in some cases be more humane because “[i]t regards the addict as an autonomous person”).

²³⁵ See *Powell v. Texas*, 392 U.S. 514, 529 (1968) (identifying one benefit criminal incarceration has over civil commitment, which is that “the duration of penal incarceration typically has some outside statutory limit”); Gardner, *supra* note 135, at 481 (“Given the alternatives of an indefinite period of preventive detention or a specified period of punishment, the right to be punished becomes an important right that offenders may wish to claim.”).

ban of its utility.²³⁶ However, not requiring an individualized showing of involuntariness risks reinforcing the harmful stereotypes that people with disabilities get “special treatment” and that their disabilities make them inherently dangerous.²³⁷ Additionally, a proportionality analysis that looks at the “gravity of the offense”²³⁸ risks minimizing the real harm that healthcare workers experience.²³⁹

The Impossibility Principle. Despite holding that *Robinson* permits the criminalization of outdoor sleeping by people who are involuntarily unsheltered, the *Grants Pass* Court took pains to assure readers that “[t]he Constitution and its Amendments impose a number of limits on what governments in this country may declare to be criminal behavior.”²⁴⁰ More than any other constitutional provision, the Court paid lip service to “[t]he Due Process Clauses of the Fifth and Fourteenth Amendments,” which “ensure that officials may not displace certain rules associated with criminal liability that are ‘so old and venerable,’ ‘so rooted in the traditions and conscience of our people[,] as to be ranked as fundamental.’”²⁴¹ One such “rule” the Court alluded to is the requirement of “fair notice.”²⁴² Another is the understanding that crimes require proof of both “some act (or *actus reus*)” and “some measure of volition (*mens rea*).”²⁴³

The Court’s conclusion that the Grants Pass ordinances punished “actions,” not status,²⁴⁴ would seem to foreclose a due process argument based on the requirement that “a complete crime” requires “both a will and an act.”²⁴⁵ But in *Grants Pass*, the Court did not have occasion to evaluate other possible due process challenges to the anti-camping ordinances. And as the dissent pointed out, the Court has previously held vagrancy laws unconstitutionally vague.²⁴⁶

²³⁶ See, e.g., Christopher Rowland, *Covid Long-Haulers Face Grueling Fights for Disability Benefits*, WASH. POST (Mar. 8, 2022, 7:30 AM), <https://www.washingtonpost.com/business/2022/03/08/long-covid-disability-benefits> [<https://perma.cc/LH9C-B9YY>] (describing challenges in litigating disability benefits).

²³⁷ Cf. Sidhu, *supra* note 233, at 1121 (describing the problems with the categorical immunity approach in the context of an addiction-related Eighth Amendment defense).

²³⁸ *Solem v. Helm*, 463 U.S. 277, 292 (1983).

²³⁹ See *infra* notes 259–63 and accompanying text (discussing the serious challenges that hospital and psychiatric care workers face).

²⁴⁰ *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2215 (2024).

²⁴¹ *Id.* (second alteration in original) (quoting *Kahler v. Kansas*, 140 S. Ct. 1021, 1027–28 (2020)).

²⁴² *Id.* at 2220.

²⁴³ *Id.* at 2217. Based on this principle, the Court suggested that *Robinson* could properly have been decided as a due process case. *Id.* at 2217–18.

²⁴⁴ *Id.* at 2218.

²⁴⁵ *Id.* at 2217 (quoting 4 William Blackstone, *Commentaries* *21).

²⁴⁶ *Id.* at 2242–43 (Sotomayor, J., dissenting).

Further, in *Manning v. Caldwell*, which held that a statutory scheme that made it a crime for a “habitual drunkard” to possess or consume alcohol could violate the Eighth Amendment,²⁴⁷ the Fourth Circuit also found the challenged scheme void for vagueness.²⁴⁸ The Court reasoned that “the term ‘habitual drunkard’ specifies *no* standard of conduct,” and thus “invites the very type of arbitrary enforcement that the Constitution’s prohibition against vague statutes is designed to prevent.”²⁴⁹

Normatively, an argument based on an impossibility principle avoids the charges of paternalism leveled at an argument based on deservingness. While both consider an arrestee’s lack of choice in committing the criminalized conduct, the impossibility principle lays blame at the feet of the government rather than a disability.

Still, the impossibility approach carries some challenges. First is the risk that courts conduct a superficial analysis of “choice” that effectively obligates patients to accept coercive treatment to avoid facing penal sanction later.²⁵⁰ Second is that it assumes disability is a problem to be treated, which masks the way society creates disability both by failing to accommodate functional impairments²⁵¹ and by weaponizing it for the reinforcement of social hierarchy.²⁵²

The Antidiscrimination Principle. From a normative standpoint, the antidiscrimination principle might most accurately reflect the dynamic that makes psychiatric hospital arrests problematic. By comparing how the state treats the general population and members of the defendant’s group, it exposes the social control function of psychiatric hospital arrests and locates the source of unfairness in state action rather than an impairment that the defendant needs help to control.

Legally, however, this type of argument may pose the steepest uphill battle. In *Grants Pass*, the Court recognized that antidiscrimination principles impose substantive limits on the criminal law, noting both that “[t]he Equal Protection Clause of the Fourteenth Amendment prevents governments from adopting laws that invidiously discriminate”²⁵³ and that “the Constitution . . . promis[es] . . . equal treatment under” the

²⁴⁷ 930 F.3d 264, 284 (4th Cir. 2019).

²⁴⁸ *Id.* at 278.

²⁴⁹ *Id.*

²⁵⁰ See Morgan, *Policing Marginality*, *supra* note 48, at 1059–60 (critiquing this aspect of *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019)).

²⁵¹ See Samaha, *supra* note 15, at 1255–62 (describing the social model of disability).

²⁵² See Morgan, *Fourth Amendment*, *supra* note 45, at 511–13 (arguing that policing disability serves a social control function).

²⁵³ *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2215 (2024).

laws.²⁵⁴ But the Court's blithe insistence that "laws like Grants Pass's" do not "apply only to the homeless" suggests an unwillingness to examine anything other than a painfully literal reading of a statute in assessing whether it promotes discriminatory enforcement.²⁵⁵

In addition to the Equal Protection Clause, the Court also offered the doctrine of selective prosecution as a potential safeguard against discriminatory law enforcement.²⁵⁶ But the standard for proving selective prosecution is "demanding":²⁵⁷ In order to overcome "the presumption that a prosecutor has not violated equal protection," the party asserting selective prosecution must prove by "clear evidence" that the challenged prosecutorial policy had both a "discriminatory effect and that it was motivated by a discriminatory purpose."²⁵⁸

In sum, numerous constitutional provisions offer a possible basis for challenging psychiatric hospital arrests—but they would cover only a relatively small portion of all such arrests. Furthermore, challenging an arrest on any of these bases may require individuals to litigate their disability in court and advance socially harmful constructions of disability. For these reasons and others, the next Section explores solutions to policing in the psych unit that go beyond litigation.

B. Nonlegal Solutions to Policing in Psychiatric Facilities

Legal challenges face several other limitations as a solution to the problem of policing in psychiatric facilities. First, courts would have to apply the above-delineated principles in novel ways, and in a context that some might view as subverting the interests of a sympathetic group, namely, healthcare workers.

Second, removing police as a possible response to patient misconduct may make life even harder for low-income hospital staff, who are disproportionately women of color and low-income.²⁵⁹ Psychiatric hospital work is dangerous,²⁶⁰ and during the pandemic, hospital

²⁵⁴ *Id.* at 2220.

²⁵⁵ *Id.* at 2218 n.5.

²⁵⁶ *See id.* at 2218 n.5, 2220 (suggesting that selective enforcement of anti-camping laws could "implicate due process and our precedents regarding selective prosecution").

²⁵⁷ *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

²⁵⁸ *Id.* at 465 (first quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926); and then quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

²⁵⁹ *See* Janette Dill & Mignon Duffy, *Structural Racism and Black Women's Employment in the US Health Care Sector*, 41 *HEALTH AFFS.* 265, 270 (2022) (finding Black women overrepresented in the healthcare industry as a whole and disproportionately concentrated in the industry's most dangerous and lowest-paying roles).

²⁶⁰ In 2013, the healthcare and social services industry experienced the highest rate of workplace injury out of any private industry. Ahmed E. Goma, Loren C. Tapp, Sara E. Luckhaupt, Kelly Vanoli, Raymond Francis Sarmiento, William M. Raudabaugh, Susan

staff left the industry in record numbers²⁶¹ in response to burnout, increasing levels of patient violence, and busier-than-ever emergency departments.²⁶² While it's not clear that patient arrests actually improve hospital safety in the long-run,²⁶³ physically removing patients from the premises does immediately reduce staff workload.

Third, eliminating arrest as a response to patient misconduct could produce perverse practical effects if not accompanied by measures that address the underlying factors that drive hospitals to call the police at the outset. Without the option to call the police, hospitals may respond by beefing up onsite security²⁶⁴ and increasing the use of sedative medications²⁶⁵ and physical restraints.²⁶⁶

Nowlin & Susan M. Sprigg, *Occupational Traumatic Injuries Among Workers in Health Care Facilities—United States, 2012–2014*, 64 MORBIDITY & MORTALITY WKLY. REP. 405, 405 (2015). Psychiatric aides and technicians experience higher rates of workplace injury than firefighters. See Constance E. George, *What Do We Owe Health Workers Earning Low Wages Who Are at Risk of Harm?*, 24 AMA J. ETHICS 830, 831 (2022).

²⁶¹ See Imani Telesford, Emma Wagner, Paul Hughes-Cromwick, Krutika Amin & Cynthia Cox, *What Are the Recent Trends in Health Sector Employment?*, PETERSON-KFF HEALTH SYS. TRACKER (Mar. 27, 2024), <https://www.healthsystemtracker.org/chart-collection/what-are-the-recent-trends-health-sector-employment> [<https://perma.cc/9FDG-CY4D>] (explaining that quit rates among healthcare workers hit an all-time high in November 2021 and have not yet recovered to pre-pandemic levels).

²⁶² See, e.g., Caroline Lewis, *Rise in Violent Incidents and Injuries Force Staff to Quit at NYC Psychiatric Ward*, GOTHAMIST (July 19, 2022), <https://gothamist.com/news/rise-violent-incidents-and-injuries-force-staff-quit-nyc-psychiatric-ward-metropolitan-hospital> [<https://perma.cc/5A8M-22JR>] (describing the challenges faced by workers in New York City's public hospitals); Ed Yong, *Why Health-Care Workers Are Quitting in Droves*, THE ATLANTIC (Nov. 16, 2021), <https://www.theatlantic.com/health/archive/2021/11/the-mass-exodus-of-americas-health-care-workers/620713> [<https://perma.cc/SQ5Y-DC9P>] (describing the effects of the COVID-19 pandemic on U.S. healthcare workers).

²⁶³ See DISABILITY RTS. WASH., *supra* note 18, at 3 & n.5 (collecting sources on the tenuous relationship between severity of punishment and deterrence, especially for individuals experiencing “a behavioral health crisis or serious mental health symptoms”).

²⁶⁴ See Song, *supra* note 37, at 2717–18 (suggesting that limiting hospital access to law enforcement before staff are ready may drive hospitals to hire less accountable private police forces). For an illustration of the ills of private hospital police forces, see David Armstrong, *The Startling Reach and Disparate Impact of Cleveland Clinic's Private Police Force*, PROPUBLICA (Sept. 28, 2020, 5:00 AM), <https://www.propublica.org/article/what-trump-and-biden-should-debate-at-the-cleveland-clinic-why-the-hospitals-private-police-mostly-arrest-black-people> [<https://perma.cc/8WE2-2KNC>].

²⁶⁵ Research suggests that under-resourced hospitals rely more heavily on sedative medications to respond to patients in psychiatric crisis. See Utsha G. Khatri, M. Kit Delgado, Eugenia South & Ari Friedman, *Racial Disparities in the Management of Emergency Department Patients Presenting with Psychiatric Disorders*, 69 ANNALS OF EPIDEMIOLOGY 9, 12–15 (2022) (finding that hospitals serving Black populations were more likely to use chemical sedatives regardless of the patient's race, and positing that this is due to structural racism in healthcare, including the fact that “hospitals have unequal distribution of resources and quality largely patterned on the racial makeup of their patients”).

²⁶⁶ See Vincent S. Staggs, *Variability in Psychiatric Facility Seclusion and Restraint Rates as Reported on Hospital Compare Site*, 71 PSYCHIATRIC SERVS. 893, 896 (2020) (finding that

Considering these three limitations, advocates should also pursue nonlegal solutions to policing in psychiatric facilities. This Section will offer some thought starters on how to do just that.

To address the first concern—that courts offer a slow and uncertain avenue for social change—advocates should also aim to reduce pathways to arrest, prosecution, and punishment of hospitalized psychiatric patients by working with the political branches and hospitals themselves.

One place to start is repealing laws that create hospital-specific crimes or sentencing enhancements.²⁶⁷ These laws enable the criminalization and harsh punishment of relatively innocuous conduct that might otherwise serve as shaky grounds for arrest, be difficult to prosecute, or carry limited sanctions.²⁶⁸ Another suggestion, inspired by harm reduction principles,²⁶⁹ is a law immunizing people who are civilly committed from arrest and prosecution for misconduct related to their mental illness or disability.²⁷⁰ In fact, Alia Wardell’s mother has lobbied for such a law in Florida in the wake of her daughter’s death.²⁷¹ Such a law should aim to ensure that fear of law enforcement interaction does not deter people from seeking life-saving mental health care.

In addition to legislative reform, prosecutors should exercise their executive discretion by declining to press charges for many of these arrests.²⁷² Where prosecutors feel charges are necessary, they should avoid leveling more serious ones based solely on the victim’s status

public hospitals are more likely than private, for-profit hospitals to use physical restraints).

²⁶⁷ See *supra* notes 39–40 and accompanying text (describing laws that prohibit certain conduct in hospital settings or elevate an offense from a misdemeanor to a felony when the victim is a healthcare worker).

²⁶⁸ See, e.g., *DISABILITY RTS. WASH.*, *supra* note 18, at 18 (telling the story of “Carol,” a patient arrested for tossing the contents of a paper juice cup on a nurse’s shoulder).

²⁶⁹ Harm reduction aims to reduce the “negative consequences associated with” a stigmatized condition or activity, such as drug use or sex work. NAT’L HARM REDUCTION COAL., *PRINCIPLES OF HARM REDUCTION* (2020), https://harmreduction.org/wp-content/uploads/2022/12/NHRC-PDF-Principles_Of_Harm_Reduction.pdf [<https://perma.cc/5BQT-8LWK>]. See generally G. Alan Marlatt, *Harm Reduction: Come As You Are*, 21 *ADDICTIVE BEHAV.* 779 (1996).

²⁷⁰ Cf. U.S. GOV’T ACCOUNTABILITY OFF., *GAO-21-248, DRUG MISUSE: MOST STATES HAVE GOOD SAMARITAN LAWS AND RESEARCH INDICATES THEY MAY HAVE POSITIVE EFFECTS* 12–17 (2021), <https://www.gao.gov/assets/gao-21-248.pdf> [<https://perma.cc/KM9A-RLK4>] (describing drug overdose Good Samaritan laws, which provide immunity to those who seek medical assistance for people experiencing a drug overdose).

²⁷¹ See Rich, *supra* note 1 (describing Alia’s Law, which would prevent “care staff” from pressing charges against patients under an involuntary hold).

²⁷² See *DISABILITY RTS. WASH.*, *supra* note 18, at 22–26, 30–31 (concluding that prosecutors in the Seattle area do not exercise this discretion as much as they could and encouraging them to use it more); cf. Andrew I. Lief, Comment, *A Prosecutorial Solution to the Criminalization of Homelessness*, 169 *U. PA. L. REV.* 1988–92 (2021) (arguing that *Robinson* has limited potential to challenge antihomeless statutes but that prosecutors should still decline to enforce them, at least against homeless people who are “working or seeking work”).

as a healthcare worker or other facts specific to the hospital setting, and they should divert cases to alternative resolution programs to the extent those programs are not unduly burdensome and coercive. Today, the impropriety of using the criminal legal system to handle patient misconduct may not factor into charging decisions.²⁷³ To change that, advocates should educate prosecutors on the costs this practice carries for the individuals who are arrested, for public safety, and for the legitimacy of the criminal legal system.

Finally, hospitals themselves should modify their policies and procedures so that police are no longer the *de facto* response to patient misconduct. First, hospitals should take steps to limit police presence onsite so that it is harder for police to insert themselves into patient interactions unsolicited.²⁷⁴ Second, hospitals should revamp their policies so that calling the police is used only as a last resort. This includes training security and clinical staff in de-escalation and crisis intervention techniques so that they are capable of safely intervening on their own;²⁷⁵ educating staff on how devastating arrests can be for their patients so they are less eager to use police to simply teach patients a lesson;²⁷⁶ and advising staff that calling the police is to be used only as a last resort.²⁷⁷

To address the second concern—the harm to healthcare workers—hospitals should explore internal ways to recognize worker harm, such as restorative justice programs²⁷⁸ and hazard pay.²⁷⁹ Longer term,

²⁷³ For instance, when prosecutors in Anchorage, Alaska evaluate whether to charge patients at the state psychiatric hospital, they appear to consider that a defendant's mental illness will make it harder to prove the requisite mental state for an offense, but not that it might be wrong to punish people for their mental illness. See *Boots*, *supra* note 19 (quoting municipal prosecutor Sarah Stanley: "It's kind of tough. We want to support the care providers—and at the same time, you can only charge what's supported by the law[.]"); see also *DISABILITY RTS. WASH.*, *supra* note 18, at 25 (reprinting a memo wherein a prosecutor declined to file felony assault charges in large part because defense counsel "would most certainly argue [defendant] did not have the requisite intent").

²⁷⁴ See *Song*, *supra* note 37, at 2711–15 (describing measures hospitals have taken or could take to restrict police access to patients).

²⁷⁵ Disability rights advocacy organizations have proposed this as well. See *DISABILITY RTS. OR.*, *supra* note 16, at 31; *DISABILITY RTS. WASH.*, *supra* note 18, at 27.

²⁷⁶ See *DISABILITY RTS. WASH.*, *supra* note 18, at 27–28 (making this recommendation).

²⁷⁷ Cf. *DISABILITY RTS. OR.*, *supra* note 16, at 31 (recommending hospitals reform their trespass policies so that banning individuals is "recognized as a serious, . . . last-resort option").

²⁷⁸ For research on the utility of restorative justice programs when the person harmed or responsible for harm has a mental illness or disability, see generally, for example, Jessica Burns, Note, *A Restorative Justice Model for Mental Health Courts*, 23 *REV. L. & SOC. JUST.* 427 (2014); ELIZA HEW, *RESTORATIVE JUSTICE IN FORENSIC MENTAL HEALTH SETTINGS* (2020), <https://cij.org.au/cms/wp-content/uploads/2020/11/restorative-justice-in-forensic-mental-health-settings-eliza-hew.pdf> [<https://perma.cc/FQ3E-4TGS>].

²⁷⁹ During the COVID-19 pandemic, lawmakers put forth multiple proposals for hazard pay for nurses and doctors. Sandeep Jauhar, *You Know What Would Help Exhausted Doctors and Nurses? More Money.*, *N.Y. TIMES* (Jan. 8, 2022), <https://www.nytimes.com/2022/01/08/>

localities should aim to address the underlying factors that have resulted in healthcare worker burnout and driven emergency departments to a breaking point.²⁸⁰

To address the third concern—that, without ameliorating the underlying issues that drive this form of transinstitutionalization to begin with, other coercive measures will fill the void—more transformative changes are needed. First, we must fix the overcrowding in emergency departments and inpatient psychiatric facilities, including by making affordable, accessible, community-based, preventative mental health services more widely available.²⁸¹ Where such programs do exist, we must address the factors that prevent people from taking advantage of them, like mistrust of the medical system and lack of housing.²⁸² Second, we must alter the incentive structures that drive hospitals to prioritize profit at the expense of patient interests. And third, we must shift cultural norms so that we all become more tolerant of harmless behaviors associated with disability.

CONCLUSION

I was inspired to write this Note after working with a client whom I met during my first internship as a law student. His case shared much in common with the stories told here: a search for life-sustaining treatment; innocuous misbehavior triggered by a trauma response; a violent arrest followed by hundreds of days in jail awaiting trial. Despite over three years of subsequent reflection on why his case so deeply moved me and research on legal pathways out, I have struggled to find a better answer to either of those questions than the one my colleague offered during

opinion/hazard-pay-covid-nurse-doctor.html [https://perma.cc/BS8J-UV6P]. Ultimately, however, none passed at the federal level. *Id.*

²⁸⁰ See, e.g., Anthony Almojera, *I'm an N.Y.C. Paramedic. I've Never Witnessed a Mental Health Crisis Like This One*, N.Y. TIMES (Dec. 7, 2022), <https://www.nytimes.com/2022/12/07/opinion/nyc-paramedic-mental-health-crisis.html> [https://perma.cc/EPN9-LVPW] (arguing that the city should “invest in social services, housing and mental health care” rather than involuntarily hospitalize more people in mental health crisis).

²⁸¹ The relationship between the decline in community-based mental health services and the overuse of emergency departments is well-documented. See Song, *supra* note 37, at 2657 n.44 (collecting sources); see also Heidi Schultheis, *Lack of Housing and Mental Health Disabilities Exacerbate One Another*, CTR. FOR AM. PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/article/lack-housing-mental-health-disabilities-exacerbate-one-another> [https://perma.cc/627U-QJQK] (explaining that Congress enacted legislation for community-based mental healthcare in the 1960s but it was not properly funded in subsequent years).

²⁸² See *supra* note 43 (discussing why people from marginalized backgrounds disproportionately rely on emergency rooms for medical and mental healthcare).

a case conference: “If you can’t freak out in the psych unit, where can you?”

This is as much a legal argument as it is a moral one. Reflecting on the groundbreaking prison conditions litigation he presided over in *Ruiz v. Estelle*,²⁸³ Judge William Wayne Justice reminded listeners of lawyers’ tendency to miss the forest for the trees: “[Y]ou begin to ask whether a system of government that might permit systematic violations of constitutionally guaranteed rights to go unnoticed and unaddressed is, in reality, constitutional. The answer to that question is plainly no.”²⁸⁴

So too it is with policing in the psych unit. When the state jails a person for exhibiting symptoms of her disability in the one place it has told her she is allowed to be disabled, you begin to ask whether such a Kafkaesque restraint on physical liberty is, in reality, constitutional. The answer to that question should be plainly no.

²⁸³ 503 F. Supp. 1265 (S.D. Tex. 1980). Judge Justice sua sponte aggregated hundreds of pro se prisoner petitions, identified representative plaintiffs, appointed class counsel, and eventually placed the entire Texas Department of Corrections under a remedial order. See William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STAN. L. REV. 1, 1 (1990).

²⁸⁴ Justice, *supra* note 283, at 10.