

May 14, 2021

Joint Standing Committee on Criminal Justice and Public Safety

LD 1478: An Act to Decriminalize Homelessness Testimony in support

Good morning Senator Deschambault, Representative Warren, and distinguished members of the Committee on Criminal Justice and Public Safety. My name is Heather Zimmerman and I am a resident of Portland, ME. I am testifying to urge you to vote that LD 1478: An Act to Decriminalize Homelessness **ought to pass**.

LD 1478 is a critical piece of legislation that is needed now as ever. Across the nation, the criminalization of homelessness has grown consistently over the past two decades.¹ By criminalizing homelessness, these laws and policies make it a crime for people without a home to engage in life-sustaining conduct. Proponents of criminalization have justified these laws as cost-effective public health and safety measures. But the reality is that laws criminalizing homelessness prolong and deepen the crisis of homelessness — creating a revolving door that cycles people between the streets and the criminal justice system.² Laws that criminalize homelessness punish people without a home for merely *existing* in public; these policies seek to hide and control people experiencing homelessness through incapacitation and punishment.³

LD 1478 provides an opportunity to take a step toward true public health and safety by decreasing the contact between police and homeless populations and focusing on connecting people without a home to healthcare professionals, case managers, and needed resources — rather than punishing people for their status as homeless and poor. This bill can also productively be coupled with existing state laws that recognize homelessness as an emergency, like Public Law Chapter 515. The priority of public funds and laws should be to end — not punish — homelessness.

I encourage the committee to pass this important legislation without delay for four reasons. First, the COVID-19 pandemic has increased the criminalization of homelessness while also highlighting how criminalization creates and exacerbates public health crises. During the pandemic increased federal and state resources have been invested in homelessness services — legislation, like LD 1478, can help keep the focus on addressing the roots of homelessness, rather than wasting resources on policing and incarcerating people experiencing homelessness. Second, the criminalization of homelessness is embedded in the U.S.'s history of systemic racism and has a clear disproportionate impact on communities of color, particularly Black and African Americans. LD 1478 provides a concrete step for addressing racial and economic disparities in the criminal justice system. Third, laws that criminalize homelessness, under many

¹ National Law Center on Homelessness and Poverty. 2019. *Housing Not Handcuffs 2019*. Available online: <http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.

² Rankin, Sara K. 2019. *Punishing Homelessness*. 22 *New Criminal Law Review* 99. Available online: <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1815&context=faculty>; United States Interagency Council on Homelessness (USICH). 2012. *Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness*. Available online: https://www.usich.gov/resources/uploads/asset_library/Searching_Out_Solutions_2012.pdf.

³ Herring, Chris. 2019. *Complaint-Oriented Policing: Regulating Homelessness in Public Space*. *American Sociological Review*. Available online: https://static1.squarespace.com/static/5b391e9cda02bc79baffebb9/t/5d73e7609b56e748f432e358/1567876975179/c/complaint-oriented+policing_ASR.pdf.

circumstances, are unconstitutional. As such, LD 1478 can help municipalities and law enforcement avoid litigation by decriminalizing life-sustaining conduct that people experiencing homelessness cannot avoid. Fourth, there is proven success in legal measures that prevent police from arresting people experiencing homelessness for loitering, sleeping, or engaging in other life-sustaining activities in public and instead focus on connecting individuals to shelter and resources. Thus, LD 1478 will bring a model that has been shown to work in other jurisdictions to Maine.

COVID-19 & Criminalization of Homelessness

COVID-19 has exacerbated the criminalization of homelessness.⁴ The nature of the pandemic and the associated public health orders have expanded municipalities' means and opportunities for criminalizing homelessness. Government employees and law enforcement has been able to side-step legal limitations on criminalization under the pretext of "clean ups" required by the public health emergency. In addition, the pandemic made it easier to target and punish people experiencing homelessness because they became more visible due to the closure of public spaces and increase in homelessness. For example, the increase in unemployment resulted in more people losing their homes and turning to cars, campers, and tents for shelter. But these accommodations are banned in some jurisdictions and also carry collateral consequences; people sleeping outdoors or in other spaces not meant for human habitation are often subjected to increased citizen complaints, police interactions, and fines and charges for carrying out necessary activities in public (such as urination).

The pandemic has also made clear that laws and policies criminalizing homelessness do not support public health and safety. The Centers for Disease Control (CDC) recognized the threat to individual and community health by forcibly displacing unsheltered people; it issued guidance to municipalities, stating that "[i]f individual housing options are not available, allow people who are living unsheltered or in encampments to remain where they are."⁵ Unfortunately, some municipalities have flouted CDC and other public health guidance by continuing — and even increasing — encampment sweeps and arrests of unsheltered people.

LD 1478 address this problem by decriminalizing common offenses under which people experiencing homelessness are often prosecuted (subsection two) and by requiring the adoption a homelessness crisis protocol to guide the interactions between law enforcement and people without a home (subsection four). This bill will bring established best practices to Maine. For example, the well documented Crisis Assistance Helping Out On The Streets (CAHOOTS) program in Eugene Oregon has been in operation for more than 30 years and reroutes over 20% of 911 calls to social work teams (composed of medics and crisis workers).⁶

Systemic Racism & Criminalization of Homelessness

Laws criminalizing homelessness are embedded in and perpetuate systemic racism. It is well established that homelessness is intertwined with systemic racism. People of color

⁴ Zimmerman, Heather L. *Forthcoming. The Criminalization of Homelessness During the COVID-19 Pandemic.* GW Law Criminal Law Brief. Available online: <https://studentbriefs.law.gwu.edu/clb/>.

⁵ Centers for Disease Control (CDC). 2021. *Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials.* Available online: <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

⁶ National Public Radio (NPR). 2020. 'CAHOOTS': How Social Workers and Police Share Responsibilities in Eugene, Oregon. Available online: <https://www.npr.org/2020/06/10/874339977/cahoots-how-social-workers-and-police-share-responsibilities-in-eugene-oregon>

experience homelessness at disproportionate rates: Black and African American people account for 40% of the homeless population and 27% of the unsheltered population, despite only making up 13% of the general population.⁷ In Maine, in 2018, Black and African American people accounted for 19% of the homeless population, while only making up 1% of the general population.⁸ The disproportionate impact of homelessness on communities of color contributes to compounding racial discrimination because racial inequities and discrimination in housing, property rights, health care, the economy, and the criminal justice system pile up.⁹

That laws criminalizing homelessness have a disproportionate impact on communities of color, particularly Black and African Americans, is no mistake. Research has traced how modern statutes criminalizing homelessness and other vagrancy charges are rooted in Reconstruction-era Black Codes.¹⁰ Black Codes refers to the series of laws enacted by many southern states to limit the freedom of formerly enslaved people.¹¹ A common feature of Black Codes was making vagrancy illegal. The language used and conduct prohibited by Black Codes is similar to many modern laws that criminalize homelessness.¹² The continuity from Black Codes to contemporary laws criminalizing homelessness demonstrate the inherent violence of these policies and add emphasis to the need to decriminalize homelessness. LD 1478 is a step in the right direction. Many of the offenses listed in subsection two, including loitering and public drinking, are similar to conduct prohibited by Black Codes. It is past time that we stop criminalizing these behaviors, particularly given the inherent, dangerous racial implications.¹³

Criminalizing Homelessness Violates the Constitution

LD 1478 provides prudent legal guidance for the state because municipalities and law enforcement agencies that persist in criminalizing homelessness risk litigation that draws down resources. The criminalization of homelessness raises due process and discrimination issues and has been successfully challenged on constitutional grounds. In particular, the Supreme Court of the United States has held that laws criminalizing homelessness amount to cruel and unusual punishment “based on long-standing legal principles that people cannot be punished for their

⁷ Henry, Meghan, Rian Watt, Anna Mahathey, Jillian Ouellette, and Aubrey Sitler. 2020. *The 2019 Annual Homeless Assessment Report to Congress*. U.S. Department of Housing and Urban Development (HUD). Available online: <https://www.huduser.gov/portal/sites/default/files/pdf/2019-AHAR-Part-1.pdf>.

⁸ Maine State Housing Authority. 2018. Homeless Statistics: State Fiscal Year 2018. Available online: https://www.mainehousing.org/docs/default-source/housing-reports/2017-2018-state-fiscal-year-homeless-statistics.pdf?sfvrsn=eb32bd15_4.

⁹ Wiltz, Teresa. 2019. ‘A Pileup of Inequalities’: Why People of Color Are Hit Hardest by Homelessness. The PEW Charitable Trusts: Stateline. Available online: <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/03/29/a-pileup-of-inequities-why-people-of-color-are-hit-hardest-by-homelessness>; Los Angeles Homeless Services Authority (LAHSA). 2018. Report and Recommendations of the Ad Hoc Committee on Black People Experiencing Homelessness. Available online: <https://www.lahsa.org/news?article=514-groundbreaking-report-on-black-people-and-homelessness-released>.

¹⁰ Brennan, Jesse. *Forthcoming. The Criminalization of Homelessness*. GW Law Criminal Law Brief. Available online: <https://studentbriefs.law.gwu.edu/clb/>

¹¹ Constitutional Rights Foundation. *The Southern “Black Codes” of 1865-66*. Available online: <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html>; Choudhury, Nusrat and Orion Danjuma. 2019. The Supreme Court Rightly Cited the Black Codes in Ruling Against Excessive Fines, Fees, and Forfeitures. American Civil Liberties Union (ACLU). Available online: <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/supreme-court-rightly-cited-black-codes-ruling-against>.

¹² Brennan. *The Criminalization of Homelessness*.

¹³ *Id.*

status.”¹⁴ Moreover, federal courts and the U.S. Department of Justice have recognized that the Eighth Amendment prohibits both the criminalization of a person’s status as well as the criminalization of involuntary conduct. Following this interpretation, criminal laws banning life-sustaining conduct — such as sleeping and sitting in public — amount to cruel and unusual punishment in violation of the Eighth Amendment and are, therefore, unconstitutional when enforced against people experiencing homelessness who lack access to shelter or housing.¹⁵ Previously, cases have successfully challenging camping and sleeping bans when people could prove that law enforcement did not provide any other option for shelter. COVID-19 may provide new grounds for challenging criminalization laws because the public health crisis has shown a bright light on the health and safety concerns that lead many people to decide to stay outside (as opposed to congested shelters or other living situations like doubling up in apartments).

Legal Measures that Focus on Decriminalizing Homelessness Work

While the effort to decriminalize homelessness in Maine will require sustained effort, LD 1478 provides a critical step forward. Significantly, other jurisdictions show the meaningful impact that legal measures can play in protecting people without a home from being criminally punished for their public existence. A notable example was the Pottinger Agreement, a 1998 consent decree negotiated between the city of Miami and a class of unhoused residents.¹⁶ The Agreement required “police to offer a homeless person shelter before arresting [them] for engaging in life-sustaining activities in public. If no shelter was available, police could not arrest a homeless person for a number of misdemeanors which involved life-sustaining conduct. It further prohibited police from destroying the belongings of homeless people.”¹⁷ In 2019, the U.S. District Court for the Southern District of Florida granted the city of Miami’s request to vacate the Pottinger Agreement.¹⁸ While the Pottinger Agreement had not eliminated undue police harassment or arrest of homeless populations, it had helped reduce it. Concerningly, police harassment and arrests increased in the months leading up to the city’s request and in the time since the court vacated the agreement.¹⁹

¹⁴ Edelman, Peter B. and Charles R. Lawrence III. 2020. *Criminalizing Homelessness Violates the Constitution*. The Justice Collaborative Institute. Available online (via The Appeal): <https://theappeal.org/the-lab/research/criminalizing-homelessness-violates-the-constitution/>; (citing *Robinson v. California*, 370 U.S. 660, 667 (1962)).

¹⁵ Department of Justice (DoJ). 2015. Statement of Interest of the United States, *Bell v. City of Boise*, 993 F. Supp. 2d 1237 (D. Id. 2014). Available online: <https://www.justice.gov/crt/file/761211/download>

¹⁶ Daynes, Amelia. The Criminalization of Homelessness in a Post-Pottinger World. University of Miami Law Review. Available online: <https://lawreview.law.miami.edu/criminalization-homelessness-post-pottinger-world/>. (The Pottinger Agreement resulted from 10 years of litigation during which the Miami Police Department’s practices regarding homeless residents was found to violate the Fourth, Eighth, and Fourteenth Amendment rights of homeless Miami residents.)

¹⁷ Id.

¹⁸ Flechas, Joey. 2019. *Federal Judge Dissolves Homeless Protections from Police Harassment in Miami*. Miami Herald. Available online: <https://www.miamiherald.com/news/local/community/miami-dade/article226339915.html>.

¹⁹ Iannelli, Jerry. 2019. *Judge Invalidates Miami’s Landmark Homeless-Protection Order From 1998*. Miami New Times: Politics. Available online: <https://www.miaminewtimes.com/news/miami-judge-throws-out-pottinger-homeless-protection-law-11087371>; Iannelli, Jerry. 2020. *Despite Coronavirus Warnings, Miami Area Police Are Still Arresting Hundreds of Homeless People*. The Appeal. Available online: <https://theappeal.org/miami-police-arrest-homeless/>.

LD 1478 provides an opportunity for Maine to adopt corrective legislation that builds on the best practices from other jurisdictions. The focus of our legal system should be on ending — not aggravating — homelessness. I believe that LD 1478 presents a step in the right direction, which is why I urge you to vote in support of this bill. Thank you for your time and consideration.

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