

“ENSLAVEMENT” FOR THOSE WHO “LIVETH IDLY AND LOITERINGLY”: AMERICAN VAGRANCY LAW & SYSTEMS OF LABOR

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INTRODUCTION

The Founding Era of America is the birthplace of many of the pervasive myths about homelessness and indigent labor we see employed by organizations attempting to address the root causes of homelessness today.¹ The idea that indigency and idleness is a moral failing that one can only overcome through work is manifest through systems of forced and coerced labor from the Founding Era that have been repurposed throughout time.² After it became illegal for officers to arrest unhoused persons for the status of being a “vagrant,” legislatures, municipalities, and cities have adopted systems of coerced labor to address the rising numbers of unhoused persons in their communities.³ The result of these programs, however, achieves the opposite of reducing homelessness and, rather, reinforces the social hierarchies seen at the time of the Founding.

While many historians and scholars have connected the links between Founding Era vagrancy laws and the criminalization of the status of being indigent, this paper will uniquely address the connection between the forced labor systems from the colonial era and the modern approaches to addressing homelessness.⁴ This paper will explore the ways in which colonial-era ideas about indigency, vagrancy, and homelessness are inadvertently applied to modern approaches to homelessness.

¹ See Mark Malone, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L.J. 749, 754 n.17 (1982) (citing 1 Edw. 6, ch. 3 (1547)) (explaining that the “Slavery Acts,” so called because of the two years enslavement penalty they provided for anyone who ‘liveth idly and loiteringly, by the space of three days,’ no longer reflected the thinking that labor shortages caused economic havoc, but rather the hypothesis that wanderers supported themselves through the commission of criminal acts at the expense of the more economically prosperous.”).

² William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 114 (1997).

³ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169-70 (1972).

⁴ See Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 643-47 (1956); Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1206 (1953); Malone, *supra* note 1; Arthur H. Sherry, *Vagrants, Rogues, and Vagabonds—Old Concepts in Need of Revision*, 48 CAL. L. REV. 557, 560-61 (1960); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 640 (1992); Quigley, *supra* note 2.

Part I of this paper will explore the values and ideas formed in the Founding Era about vagrancy, indigency, and the creation of forced labor systems as a solution to indigency. Part II will discuss applications of these principles throughout the Eighteenth, Nineteenth, and Twentieth centuries. Finally, Part III will look at modern approaches to controlling homelessness and how the principles from the Founding Era guide the values about how to address the root cause of homelessness.

I. BACKGROUND

Homelessness continues to be a social ill that plagues most American cities.⁵ As homelessness rises, public opinion about the unhoused continues to sour.⁶ Seeing visibly unhoused people elicits reported feelings of disgust and rage.⁷ These feelings target individual unhoused people and blame their status on personal or moral failings rather than at the feet of the root cause of homelessness, namely, lack of affordable housing.⁸ By focusing on alleviating the feelings of discomfort towards unhoused people in modern approaches to homelessness, the goal of eliminating homelessness grows further and further out of reach.

⁵ See Hanna Love & Tracy Hadden Loh, *Homelessness in US Cities and Towns: The Perception, the Reality, and How to Address Both*, BROOKINGS (Dec. 7, 2023), <https://www.brookings.edu/articles/homelessness-in-us-cities-and-downtowns/> [https://perma.cc/YKM6-WNWC]; See also Jerusalem Demsas, *The Root Cause of the Homelessness Crisis*, THE ATLANTIC (July 18, 2023), <https://www.theatlantic.com/ideas/archive/2023/07/california-homelessness-housing-crisis/674737/> [https://perma.cc/V2FC-7QAD].

⁶ See George Mullen & Bill Walton, *Opinion: Sunbreak Ranch is the Answer to San Diego — and America's — Homeless Crisis*, TIMES OF SAN DIEGO (Jan. 14, 2023, 10:05 PM), <https://timesofsandiego.com/opinion/2023/01/14/sunbreak-ranch-is-the-answer-to-san-diego-and-americas-homeless-crisis/> [https://perma.cc/A8YF-728W] (referring to unhoused persons as “a slew of walking-zombies who are impossible to distinguish between those just down on their luck and others who are out-of-control substance abusers about to attack us” and advocates for shipping unhoused people to a ranch in the desert).

⁷ Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCH. SCI. 847, at 852 (2006) (finding that people see homeless people and those addicted to drugs as less than human).

⁸ Demsas, *supra* note 5.

The United States Supreme Court continues to shift the lens through which constitutional questions are engaged to the history and tradition of the Founding Fathers and colonial America.⁹ The history of vagrancy law is deeply rooted in the Colonial Era.¹⁰ In fact, vagrancy law in America is a relic of the English poor laws that were enacted to criminalize vagrancy and idleness in Elizabethan England.¹¹ The history of vagrancy law is a dark and shameful pocket of American history.¹² Indigent persons were treated with inhumanity and cruelty.¹³ This paper argues that the collective feelings of discomfort and disgust towards unhoused people are deeply rooted in the history and tradition of this nation. To aptly address the roots of homelessness, a thorough look at where the attitudes and beliefs about homelessness and vagrancy began must occur.

II. COLONIAL-ERA FOUNDING PRINCIPLES

A. *Historical Background*

In the aftermath of the mass casualty event caused by the Black Death and the subsequent feudal land battles, a large swath of laborers and indigent persons across Europe lost their employment and were forced to take up a vagrant life, traveling from place to place looking for work.¹⁴ Leaders, like Henry VIII, crusaded against monasteries and religious institutions that historically cared for the poor and created gaping holes in the social safety net for indigent persons who could not find work.¹⁵ In the late

⁹ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 216-17 (2022) (holding that “guided by the history and tradition that map the essential components of the Nation’s concept of ordered liberty, the Court finds the Fourteenth Amendment clearly does not protect the right to an abortion.”); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 19 (2022) (creating a history-specific test for analyzing gun restriction regulations).

¹⁰ Malone, *supra* note 1, at 754-56; Quigley, *supra* note 2, at 113-15.

¹¹ Malone, *supra* note 1, at 754-56; Quigley, *supra* note 2, at 113-15.

¹² Quigley, *supra* note 2, at 111-12 (recounting the whipping, beatings, disenfranchisement, and public humiliation experienced by the poor).

¹³ *Id.*

¹⁴ Malone, *supra* note 1, at 754 n.16.

¹⁵ Foote, *supra* note 4, at 616 n. 32; *See also* *Ledwith v. Roberts*, [1937] EWCA (Crim)1 KB 232 [271] (Eng.).

fifteenth century, Henry VIII stated “beggars and idle persons, after appropriate punishment in the stocks, were to be put out of town and directed to return to their homes, there to remain upon pain of further punishment should they return.”¹⁶ Additionally, legislative acts and lore criminalizing vagrancy made visibly homeless and poor people more identifiable, reviled, and criminalized throughout the fourteenth through seventeenth centuries.¹⁷ The goal of regulating these indigent, unemployed persons with punishment was to deter indigent persons from accepting social welfare benefits and reinforce the expectation that all able-bodied persons should be working.¹⁸

Well before the United States’ founding, the early colonies adopted statutes and court rules like the Elizabethan poor laws that sought to control and criminalize people whom the colony feared would become a public charge.¹⁹ A person became a “public charge” when they were no longer able to support themselves or their families, necessitating state intervention in supplying their basic needs.²⁰ These vagrancy laws originated from the Elizabethan “poor laws” enacted in England in the centuries before the founding of the United States.²¹ The implementation of these vagrancy laws reflects fears about excessive unemployment, idleness, and traveling rogue persons that haunted the psyche of early American

The early Vagrancy Acts came into being under peculiar conditions utterly different to those of the present time. From the time of the Black Death in the middle of the 14th century till the middle of the 17th century, and indeed, although in diminishing degree, right down to the reform of the Poor Law in the first half of the 19th century, the roads of England were crowded with masterless men and their families, who had lost their former employment through a variety of causes, had no means of livelihood and had taken to a vagrant life. The main causes were the gradual decay of the feudal system under which the labouring classes had been anchored to the soil, the economic slackening of the legal compulsion to work for fixed wages, the breakup of the monasteries in the reign of Henry VIII....

Id.

¹⁶ *Id.* (citing Statute of Westminster, 1494, 2 Hen. 7, c. 2).

¹⁷ See Foote, *supra* note 4, at 616.

¹⁸ Quigley, *supra* note 2, at 114 n.9.

¹⁹ Lacey, *supra* note 4, at 1206; Quigley, *supra* note 2, at 140-49.

²⁰ See Malone, *supra* note 1, at 754.

²¹ Foote, *supra* note 4, at 603 n.1.

colonial settlers from their English roots.²² At their core, the Elizabethan and then colonial vagrancy laws sought to criminalize all idleness because it was believed that idleness was the source of criminal activity.²³

Between 1614 and 1805, fourteen states and colonies adopted anti-vagrancy statutes, court orders, or ordinances: Connecticut²⁴, Delaware,²⁵ Georgia,²⁶ Maryland,²⁷ Massachusetts,²⁸ New Hampshire,²⁹ New Jersey,³⁰ New York,³¹ North Carolina,³² Pennsylvania,³³ Rhode Island,³⁴ South Carolina,³⁵ and Virginia.³⁶ Many colonial-era laws restricted the ability of indigent people to travel or relocate and included provisions that allowed for the expulsion, banishment, and forcible removal of people deemed to be public charges.³⁷ Often, what a community deemed best for indigent and idle persons was forced labor, corporal punishment, or banishment, instilling the idea that the poor could be reformed out of their poverty through forced labor and beatings.³⁸

Three core principles arise from these colonial era vagrancy laws. First, that idleness and indigency are statuses that must be criminalized.³⁹ Next, that forced labor and work is a solution to idleness and vagrancy.⁴⁰ And finally, that visible idleness, indigency, and vagrancy should not exist, and all persons found idle should be removed from the community.⁴¹ These principles flow

²² See *id.* at 560-61; Quigley *supra* note 2, at 140-42.

²³ Lacey, *supra* note 4, at 1206.

²⁴ Quigley, *supra* note 2, at 119-22.

²⁵ *Id.* at 122-24.

²⁶ *Id.* at 124-25.

²⁷ *Id.* at 125-26.

²⁸ *Id.* at 126-28.

²⁹ *Id.* at 128-29.

³⁰ *Id.* at 129-30.

³¹ *Id.* at 130-33.

³² *Id.* at 133-35.

³³ *Id.* at 135-36.

³⁴ *Id.* at 136-38.

³⁵ *Id.* at 138-39.

³⁶ *Id.* at 139-40; Sherry, *supra* note 4, at 558.

³⁷ Quigley, *supra* note 2, at 112.

³⁸ *Id.*

³⁹ Malone, *supra* note 1, at 754-56.

⁴⁰ Quigley, *supra* note 2, at 161.

⁴¹ *Id.* at 137 (“Needy people who were determined not to be settled in that town could be removed by the constable back to wherever they had prior legal settlement.”).

from the English poor laws into the founding of the United States and are then reapplied and reinforced in modern approaches to homelessness.⁴²

B. Principle I: Visible Idleness and Indigency Must Be Criminalized and Punished

Inherent in criminalizing vagrancy is the notion that, at a baseline, all persons should be working, and that able-bodied persons who do not work should be punished for not working.⁴³ This is especially true for persons visibly begging or idle.⁴⁴ Choosing not to work or being unemployed resulted in severe punishment in the colonial era.⁴⁵ Punishments included “imprisonment for debt, disenfranchisement, badging, and the criminalization of idleness and begging in the vagrancy statutes.”⁴⁶ This idea reflects the Puritanical Christian roots of Early America that believed that wealth was a divinely ordained gift bestowed upon the holy and, in turn, poverty was the result of sinfulness for those who had not yet reached sanctification.⁴⁷ The Christian Bible has verses throughout its text that condemn idleness.⁴⁸ Several forms of Early American Christianity espoused this belief:

⁴² See Sherry, *supra* note 4, at 560.

⁴³ Quigley, *supra* note 2, at 114 n.9 (“[S]ociety firmly needs to keep poor people laboring. This is for two reasons: first, someone is needed to perform low-paying, unpleasant tasks; secondly, there are so many working poor people that the authorities deem it impossible to assist all of them. Therefore, everyone who can work, must. Nonworking poor people are, if unable to work, to be pitied; if able to work, to be set immediately to work; and, if work is refused, severely and publicly punished.”).

⁴⁴ Simon, *supra* note 4, at 640 (“Vagrancy legislation varied from state to state but contained one common element: vagrancy laws punished idle persons without visible means of support who, although able to work, failed to do so.”).

⁴⁵ Quigley, *supra* note 2, at 177.

⁴⁶ *Id.* at 160.

⁴⁷ Eric Luis Uhlmann et al., *American Moral Exceptionalism*, in *SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION* 41 (John T. Jost et al. eds., 2009) (explaining that American ideologies rooted in the Protestant ethic favor the wealthy as competent people deserving of their social status).

⁴⁸ See 2 *Thessalonians* 3:6 (English Standard Version); *Romans* 12:11 (English Standard Version); *Proverbs* 31:27 (English Standard Version); *Proverbs* 14:23 (English Standard Version).

The early Calvinists believed that God has called us to work in our vocation. Those who do his will by engaging in consistent and diligent labor, and who resist the temptations of the flesh, will be materially blessed. This belief derives from the doctrine that “all things work together for the good of those who love God and who are called according to his purpose.”⁴⁹

Connecticut’s vagrancy law diagnosed the issue with vagrant and idle persons stating, “whereas there are frequently diverse persons who wander about, and vagabond, idle, and dissolute persons, begging and committing many insolvencies; and many are guilty of profane and evil discourse, and other disorders, to the corruption of manners, *the promotion of idleness, and the detriment of good order and religion.*”⁵⁰ The religious undertones of the colonial era vagrancy laws enforced the belief that indigency and idleness were both an economic and moral failing that necessitated punishment by God and the State.⁵¹

Early American vagrancy law utilized the local police power to criminalize and punish vagrancy because it was believed that crime flowed from indigency and idleness.⁵² Although varied amongst the states and colonies, most vagrancy laws criminalized the act of being idle without visible means of supporting oneself.⁵³ This meant that the status of being poor was in and of itself the crime.⁵⁴ These laws reinforced the idea that someone may be punished for being a part of a particular class of undesirable persons because it is the duty of the state to both control and criminalize behaviors that it does not want to see amongst its people.⁵⁵

⁴⁹ Kenneth Hudson & Andrea Coukos, *The Dark Side of the Protestant Ethic: A Comparative Analysis of Welfare Reform*, 23 SOCIO. THEORY 1, 4 (2005) (citing *Romans* 8:28 (English Standard Version)).

⁵⁰ Quigley, *supra* note 2, at 122 (emphasis added) (citing Act of 1784, in *THE FIRST LAWS OF THE STATE OF CONNECTICUT* (John D. Cushing ed., 1982)).

⁵¹ See Hudson & Coukos, *supra* note 49, at 4.

⁵² Simon, *supra* note 4, at 640; Malone, *supra* note 1, at 754.

⁵³ Foote, *supra* note 4, at 626.

⁵⁴ Simon, *supra* note 4, at 640.

⁵⁵ Sherry, *supra* note 4, at 558 (citing Lacey, *supra* note 4, at 1203).

The rationale for the early American vagrancy laws reinforces the “theory that society must have a means of removing the idle and undesirable from its midst before their potential for criminal activity is realized.”⁵⁶

Eradicating visible idleness and vagrancy was at the top of the priorities list for the young colonies. The colonies used marking and visible labeling tactics in order to identify the impoverished and idle.⁵⁷ Cities and municipalities ensured that despite the racial divide between most vagrants and the enslaved, the vagrants carried visible badges of their status on their person as the enslaved did with their race.⁵⁸ In Maryland, each poor person assigned to a workhouse was “required to wear cloth badges of the letter ‘P’ and the first letter of their county on their shoulder.”⁵⁹ Failure to comply with the badge requirement “subjected the offender to reduction of their poor relief, whipping, or hard labor.”⁶⁰ The purpose of these markings was to distinguish the idle and vagrant from the rest of society, creating a second-class status for those who could not support themselves.⁶¹

The precise ways of dealing with the poor in colonial America gave wide discretion to local authorities and law enforcement to decide how they would deal with the visibly idle.⁶² Local authorities first went to the family members of the idle or vagrant person and asked them to care for their poor relatives.⁶³ If the family could not afford to care for them, the indigent person was then auctioned off for their labor, contracted to private parties, or sent to institutional care like almshouses, poorhouses, or houses of correction.⁶⁴

⁵⁶ Malone, *supra* note 1, at 755-56 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169, 171 (1972)).

⁵⁷ See, e.g., Quigley, *supra* note 2, at 126.

⁵⁸ Quigley, *supra* note 2, at 126 (citing Act of 1768, in *THE FIRST LAWS OF THE STATE OF MARYLAND* (John D. Cushing ed., 1981)); see also Quigley, *supra* note 2, at 115 n.13 (Slavery bound Black people to a permanent status of poverty and labor because of their color.).

⁵⁹ *Id.* at 126.

⁶⁰ *Id.*

⁶¹ See *id.* at 164.

⁶² Quigley, *supra* note 2, at 151-53.

⁶³ *Id.* at 119-20, 151.

⁶⁴ *Id.* at 117, 152-53.

The thread between these forms of relief is the need to subject the indigent to punishment or hard labor for the status of being poor.⁶⁵

C. Principle II: Forced Labor Is a Solution to Vagrancy

The early colonial vagrancy laws created systems of forced labor to extract labor from idle persons.⁶⁶ The colonies' primary vehicle for extracting labor from vagrant persons was auctioning or contracting the poor to private parties. At local gatherings or meetings, the community would put the poor up for evaluation and bidding.⁶⁷ Bidders would ask little for those they thought could work for their keep and more for those who could not work, were disabled, or were children.⁶⁸ In New Jersey, "the poor were sold or 'knocked off' to the lowest bidder, that is, to the individual who agreed to maintain them at the lowest cost to the town."⁶⁹ If a substantial portion of the poor possessed labor potentialities which might be exploited, the price was low. "The winning bidder received the sum of money stipulated in the bidding, in return for which he was to clothe and feed his charges."⁷⁰ Historians have referred to this practice of auctioning off the indigent as "a thinly disguised form of human slavery."⁷¹

The creation of forced labor systems in the colonial era reinforces the baseline expectation for all persons that they must work and indigency can be paid for through the labor of the poor.⁷² Under these laws, every person was a part of the "potentially laboring population" and controlling the movements and freedom of vagrant persons ensured that free labor could be concentrated and accessible.⁷³ The aim of the colonial laws regulating indigency and

⁶⁵ See *id.* at 120.

⁶⁶ See *id.* at 168.

⁶⁷ *Id.* at 152-53.

⁶⁸ *Id.*

⁶⁹ *Id.* at 153 (quoting PAUL TUTT STANFORD, GOVERNMENT AND THE NEEDY: A STUDY OF PUBLIC ASSISTANCE IN NEW JERSEY 32 (1941)).

⁷⁰ *Id.*

⁷¹ PAUL TUTT STANFORD, GOVERNMENT AND THE NEEDY: A STUDY OF PUBLIC ASSISTANCE IN NEW JERSEY 32 (1941).

⁷² See Quigley, *supra* note 2, at 151.

⁷³ Christopher Roberts, *Discretion and the Rule of Law: The Significance and Endurance of Vagrancy and Vagrancy-Type Laws in England, the British Empire, and the British Colonial World*, 33 DUKE J. COMPAR. & INT'L L. 181, 192 (2023).

vagrancy was to “dispose of the poor as cheaply as possible.”⁷⁴ The indigent paid back the systems designed to relieve the poor of their sufferings by trading their free labor for privately funded welfare.⁷⁵ Embedded in this practice is the idea that the poor are responsible for their station and their labor, not the wealth of others, and should pay for the charity bestowed on them.⁷⁶

Local authorities appointed “overseers of the poor” who were charged with maintaining the poor.⁷⁷ The use of the term “overseer” undoubtedly recalls the system of chattel slavery that coexisted at the same time as the extraction of forced labor from vagrants.⁷⁸ At the time of these poor laws, Black people “had no rights which the white man was bound to respect.”⁷⁹ Enslaved persons were the single largest class of indigent persons at the time of the founding, but they were expected to be cared for by their masters and were exempt from any relief provided to the poor.⁸⁰ However, while both systems extracted forced labor, chattel slavery rested on the principle that enslavement was an immutable characteristic, based on race, that one could not escape for life.⁸¹ Vagrants, often white, were able to escape their bondage by working for their freedom or being incarcerated while those enslaved could not.⁸² Additionally, the institution of slavery harmed the economy of work for both the enslaved and other indigent persons because skilled labor was often given to enslaved persons over white vagrants.⁸³ This resulted in few high-paying skilled labor jobs for indigent whites and no pay for the highly skilled labor provided by enslaved persons.⁸⁴

⁷⁴ Quigley, *supra* note 2, at 151 (citing ROBERT W. KELSO, *THE HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS, 1620-1920* 107 (1922)).

⁷⁵ Quigley, *supra* note 2, at 152-53 (citing PAUL TUTT STANFORD, *GOVERNMENT AND THE NEEDY: A STUDY OF PUBLIC ASSISTANCE IN NEW JERSEY* 32 (1941)).

⁷⁶ *Id.* at 153.

⁷⁷ *Id.* at 121.

⁷⁸ *Id.* at 116 n.13.

⁷⁹ *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1857).

⁸⁰ Quigley, *supra* note 2, at 172, 174.

⁸¹ *See id.* at 114, 116 n.13.

⁸² *Id.* at 116 n.13.

⁸³ *See id.* at 172; *see also id.* at 173 n. 402 (citing RICHARD B. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 459 (1946) (“While southern farmers had relied on servants for cheap unskilled labor, the upper classes increasingly turned towards slaves as the primary source for work.”)).

⁸⁴ *Id.* at 172-73.

The connection between the enslavement of Black Americans and the treatment of white vagrant persons is significant because it creates a shared language for the “bondage” experienced by the indigent during the colonial era and beyond. The language of enslavement is found throughout the vagrancy statutes, especially in the Southern states.⁸⁵ Corporal punishment, beatings, and public whippings were commonplace for those violating the vagrancy laws.⁸⁶ The same corporal punishments and beatings were true for the enslaved, if not worse.⁸⁷ In North Carolina, vagrants were ordered to be whipped “in the same Manner as Runaways,” intensifying the similarities between the beatings of runaway enslaved persons and vagrants.⁸⁸ The statute states:

And be it further Enacted, by the Authority aforesaid, That if any such Vagabonds shall be found in any County or Place, wandering, begging, or misordering him or herself, it shall be lawful for any Justice of the Peace of that County, and he is hereby impowered and required, by Warrant under his Hand, to cause such Vagabonds to be brought before him . . . and if it shall appear that he or she is under the Description of Vagabonds within this Act, the said Justice shall, by his Warrant, order and direct him or her to be conveyed and whipt, in the same Manner as Runaways are, from Constable to Constable, to the County wherein his Wife or Children do inhabit, or where he or she did last reside (as the Case shall be) and there delivered to a Justice of the Peace, who is hereby required to cause every such Vagabond to give sufficient Security for his or her good Behaviour, and for betaking him or herself to some lawful Calling, or honest Labour; and if he or she shall fail so to do, then to commit him or her to the common Jail of the County[.]⁸⁹

⁸⁵ *Id.* at 173-75.

⁸⁶ *Id.* at 112, 122, 126, 135, 138-39, 148, 159-60.

⁸⁷ Natalee Sibley, *Whipping: A Physical Punishment of Slaves*, CUNY ACAD. COMMONS (Mar. 26, 2018), <https://transatlanticarchivespring2018.commons.gc.cuny.edu/2018/03/26/whipping-a-physical-punishment-of-slaves/> [https://perma.cc/ETH5-9F3N].

⁸⁸ 1755 N.C. Sess. Laws 172.

⁸⁹ *Id.*

This shared language between vagrancy and enslavement served to, at the least, create similar systems of punishment that created secondary social status for the indigent, Black, and vagrant in society that still distinguished on the basis of race.⁹⁰ Nonetheless, despite the low status of vagrants, they still fared far better than the enslaved because of their race.⁹¹ While the enslaved were placed on the auction block to the highest bidder, vagrants were placed on the auction block to the lowest bidder because the Blackness of the enslaved was *the* commodity while the whiteness of the vagrant was merely coincidental.⁹²

*D. Principle III: Persons Visibly Idle and
Vagrant Must Be Removed*

As with modern anti-vagrancy ordinances, one of the underlying goals of colonial era vagrancy laws was to prevent foreign indigent persons from wandering into their community.⁹³ New Jersey enacted their vagrancy law “for the more effectual preventing any rogues, vagabonds, sturdy beggars, and other idle, strolling, disorderly person or persons, concealing him, her, or themselves, within any city.”⁹⁴ While in the South, North Carolina enacted their anti-vagrancy to “suppress wandering, disorderly and idle persons.”⁹⁵ These laws sought to control indigent persons for the purpose of crime prevention but, in turn, created a free labor source for the community through the incarceration of those offenders.⁹⁶ Once convicted for violating the vagrancy statute,

⁹⁰ THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 29-30 (1963).

⁹¹ Quigley, *supra* note 2, at 115-16.

⁹² Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1716-18 (1993) (discussing that despite the low status experienced by white vagrants and indentured servants, their whiteness created a property interest in maintaining the racial categories created by American chattel slavery).

⁹³ Sherry, *supra* note 4, at 567.

⁹⁴ Quigley, *supra* note 2, at 141 (alteration in original) (quoting Act of Aug. 12, 1758, ch. CXXXVIII, *microformed on* 19th Assembly of New Jersey, 9th Sess., Fiche 1, at 217 (Hein Microfiche)).

⁹⁵ *Id.* at 134 (citing Act of Apr. 19, 1784, ch. XXXIV, *in* 2 THE FIRST LAWS OF NORTH CAROLINA 508 (John D. Cushing ed., 1984)).

⁹⁶ ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH & AMERICAN LAW AND CULTURE, 1350-1870* 132 (Thomas A. Green ed., 1st ed. 1991).

states would then auction off the poor to the lowest bidder or place them in institutional workhouses where they provided involuntary labor as their penance for their poverty.⁹⁷

The fear of the “rogue and vagabonds” appears frequently throughout the colonies through laws that specifically address the “wandering poor.”⁹⁸ In eighteenth century South Carolina, the State banned vagrants from living in the state.⁹⁹ Under that law, vagrants are “persons wandering from place to place without any known residence, or residing in any city... who have no visible or known means of gaining a fair, honest and reputable livelihood.”¹⁰⁰ Inherent in this law is the understanding that the poor were the responsibility of whichever place created their deficiency, implying that vagrant or indigent persons couldn’t be a part of the community in which they found themselves.¹⁰¹ This pervasive myth of wandering and untethered unhoused or indigent persons continues from the Middle Ages, through the colonial era, and into our modern discourse.¹⁰²

III. PHYSICALITY AS AN INDICTMENT: APPLICATIONS OF THE COLONIAL PRINCIPLES IN THE 19TH AND 20TH CENTURIES

Throughout the nineteenth and twentieth centuries, the principles about vagrancy and indigency birthed from the colonial era were repurposed and applied in new areas of law.¹⁰³ Those areas include vagrancy laws through the Postbellum Black Codes and law enforcement arrest and displacement of unhoused persons in the 1990s and early 2000s. Through these laws, the three colonial era principles about idleness, vagrancy, and homelessness were repackaged to serve the needs of their time. The thread that binds these three colonial principles with their later applications is that

⁹⁷ Quigley, *supra* note 2, at 129.

⁹⁸ *Id.* at 122, 134, 140, 165.

⁹⁹ *Id.* at 165.

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 145.

¹⁰² *See* Christine H. Lindquist et al., *The Myth of the Migrant Homeless: An Exploration of the Psychosocial Consequences of Migration*, 42 SOCIO. PERSPS. 691, 692 (1999).

¹⁰³ *See* John K. Bardes, *Redefining Vagrancy: Policing Freedom and Disorder in Reconstruction New Orleans, 1862-1868*, 84 J. S. HIST. 69, 69-71 (2018) (“The Louisiana criminal code of 1855 defined vagrants as “all idle persons” who live “wandering.”).

the physical status of idleness, vagrancy, or indigency is the indictment of their criminality.

A. Applications I & II: Black Codes and Convict Leasing

Following the conclusion of the Civil War and ratification of the Civil War amendments, the South's source of free labor was now unconstitutional.¹⁰⁴ Unsurprisingly, states across the South adopted new vagrancy and loitering statutes to keep formerly enslaved persons in a new state of permanent legal bondage.¹⁰⁵ Without access to gainful employment or education, formerly enslaved persons would be arrested for vagrancy, loitering, idleness, or not carrying proof of employment.¹⁰⁶ Once incarcerated, these formerly enslaved persons were sold into a system of convict leasing where local business owners leased the labor of inmates at little to no cost.¹⁰⁷ These Black Codes worked to "subjugate newly freed slaves and maintain the prewar racial hierarchy."¹⁰⁸ Additionally, states began using forced labor as punishment for non-payment of court fees and fines.¹⁰⁹ These laws specifically targeted Black Americans and served to continue a hierarchy of racial subordination through forced labor.¹¹⁰

¹⁰⁴ See Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1267 (1992).

¹⁰⁵ See also *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 321 (2023) (Sotomayor, J., dissenting) (explaining how post-emancipation vagrancy prosecutions were part of a "system of free forced labor [that] . . . was designed to intimidate, subjugate, and control newly emancipated Black people"); *id.* at 388-89 (Jackson, J., dissenting) ("[V]agrancy laws criminaliz[ing] free Black men who failed to work for White landlords" were a "race-linked obstacle[] that the law . . . laid down to hinder the progress and prosperity of Black people" in the post-Reconstruction South).

¹⁰⁶ 1865 Miss. Laws, 90-93 (repealed 1866).

¹⁰⁷ Ellen Terrell, *The Convict Leasing System: Slavery in its Worst Aspects*, LIBR. OF CONG. BLOGS (June 17, 2021), https://blogs.loc.gov/inside_adams/2021/06/convict-leasing-system/ [<https://perma.cc/5HMK-94KW>].

¹⁰⁸ *Timbs v. Indiana*, 586 U.S. 146, 153 (2019).

¹⁰⁹ Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 681-85 (2003) (describing Black Codes' use of fines and other methods to "replicate, as much as possible, a system of involuntary servitude").

¹¹⁰ *Hicks v. State*, 76 Ga. 326, 328 (Ga. 1866) (noting that "the law of vagrancy should be rigidly enforced, against the colored population especially, because many of them do lead idle and vagrant lives . . .").

In Mississippi, the Black Code amended the states pre-existing vagrancy statute to specifically target “freedmen, free negroes, and mulattoes” in the State.¹¹¹ The statute reads:

Section 2. . . . [A]ll freedmen, free negroes and mulattoes in this State, over the age of eighteen years, found on the second Monday in January, 1866, or thereafter, with no lawful employment or business, or found unlawfully assembling themselves together either in the day or night time, and all white persons so assembling with freedmen, free negroes or mulattoes, or usually associating with freedmen, free negroes or mulattoes, on terms of equality, or living in adultery or fornication with a freedwoman, free negro, or mulatto, shall be deemed vagrants, and on conviction thereof, shall be fined in the sum of not exceeding, in the case of a freedman, free negro or mulatto, fifty dollars, and a white man two hundred dollars, and imprisonment at the discretion of the court, the free negro not exceeding ten days, and the white man not exceeding six months.¹¹²

This law is interesting because it singles out the formerly enslaved, a proxy-term for Black people, and any white persons who surround themselves with the formerly enslaved.¹¹³ Like the colonial era laws, the Mississippi Black Codes targeted a whole host of behaviors and actions beyond simply loitering, including adultery, assembling, fornication, and unemployment.¹¹⁴ Here, we see the burgeoning practice of sentencing guidelines based on race. While a Black man was fined no more than fifty dollars, a white man was fined no more than two hundred, and imprisonment could not exceed ten days or six months for Black and white men, respectively.¹¹⁵ These vagrancy laws included specific race-based categories that made being visibly “idle” and Black a crime.¹¹⁶

Under the Thirteenth Amendment, “neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the

¹¹¹ 1865 Miss. Laws 9191 (repealed 1866).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *See, e.g., id.* at § 1.

United States, or any place subject to their jurisdiction.”¹¹⁷ This language abolished chattel slavery in the United States but granted a unique exception – servitude as punishment for a crime.¹¹⁸

During Reconstruction, southern states used the enforcement of the Black Codes to incarcerate formerly enslaved persons for loitering, vagrancy, or other illegal acts under the Code.¹¹⁹ Once that person was “duly convicted” of a “crime,” then a “criminal conviction strip[ed] the offender of protection against slavery or involuntary servitude.”¹²⁰ The result was a set of “vagrancy laws . . . used after the Civil War to keep former slaves in a state of quasi slavery.”¹²¹ Much like the colonial era practices, here, private parties would bid for the labor of the incarcerated and use their labor “for some non-penological end, such as raising state revenue, generating private profits, or subjugating black labor.”¹²²

The profits from incarcerated labor created perverse incentives for law enforcement agencies to increase arrests under the Black Codes.¹²³ Sheriffs, who often depended on fees and fines to maintain their departments, had financial incentives to maximize arrests and ensure convictions.¹²⁴ Subsequently, arrests rose with the demand for labor, not crime.¹²⁵ Historian David Oshinsky found one occasion where:

¹¹⁷ U. S. CONST. amend. XIII.

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *Hicks*, 76 Ga. at 328 (noting that “the law of vagrancy should be rigidly enforced, against the colored population especially, because many of them do lead idle and vagrant lives”). Act of 1865, Ch. IV, § 2, 1865 Miss. Laws, pg. 82 (repealed 1866).

¹²⁰ James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1552-53 (2019).

¹²¹ *City of Chicago v. Morales*, 527 U.S. 41, 54 n.20 (1999).

¹²² Pope, *supra* note 120, at 1465.

¹²³ See *id.* at 1513-14.

¹²⁴ *Id.*; see also DENNIS CHILDS, *SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY* 86 (2015) (“[F]ar from being disinterested referees of the surety arrangement, local municipalities, courts, police, lawyers, and clerks were actually awash in the money and power generated at every stage of this particular vector of the overall trade in criminalized southern black bodies.”).

¹²⁵ RAY STANNARD BAKER, *FOLLOWING THE COLOR LINE: AMERICAN NEGRO CITIZENSHIP IN THE PROGRESSIVE ERA* 50 (1964) (attributing the “large number of arrests . . . in Georgia” to “the fact that the state and the counties make a profit” and that “the demand for convicts by rich sawmill operators, owners of brick-yards, large farmers, and others is far in advance of the supply.”).

[A] turpentine operator sat down with the local sheriff and drew up a “list of some eighty negroes known to both as good husky fellows, capable of a fair day’s work,” all of whom were arrested within a few weeks and convicted by a justice of the peace, a co-conspirator.¹²⁶

Private businesses saw their profits soar after adopting the use of convict labor.¹²⁷ Some of the largest and most profitable businesses today got their start from this convict leasing era.¹²⁸ While perverse property interest incentivized enslavers to keep their enslaved alive and healthy, employers utilizing convict labor did not have such incentives.¹²⁹ Working conditions for convict laborers were deadly and inhumane.¹³⁰

These conditions did not persist in the South alone.¹³¹ Municipalities and governments across the country adopted and amended their vagrancy laws during the postbellum era.¹³² Starting after the Civil War and well into Reconstruction, state legislatures throughout the North enacted new vagrancy laws; however, this group of laws were drafted by philanthropists with the goal of decreasing dependency on the State.¹³³ Thus began the now pervasive idea that forced or coerced labor would make a “worker” out of unhoused, indigent, or vagrant persons. A charity worker declared in 1876, “we come back to the old rule, the man who won’t work, shall be made to work.”¹³⁴ Historian Amy Dru Stanley notes that the North was not immune from the moral

¹²⁶ Pope, *supra* note 120, at 1514 (quoting DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 71 (1996)).

¹²⁷ See Terrell, *supra* note 107.

¹²⁸ See *id.* (“The Tennessee Coal, Iron and Railroad Company (TCI) one of the original 12 companies listed in the Dow Jones Industrial Index, was one of the largest users of prison laborers, mostly comprised of African Americans convicted of petty crimes. The number of convicts employed increased after United States Steel, the largest corporation in the world at the time (formerly known as U.S. Steel and USX), acquired TCI in 1907.”).

¹²⁹ See Pope, *supra* note 120, at 1514.

¹³⁰ *Id.* at 1508. (“The death rate among state-level convict laborers often reached or exceeded ten percent per year, and no Mississippi convict laborer survived more than ten years.”)

¹³¹ Stanley, *supra* note 104, at 1267.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

quandaries that both chattel slavery and then forced vagrant labor posed to their communities:

The punishment for begging devised by charity reformers did not only echo Elizabethan law, it also expressed the indigenous and contradictory legacy of slave emancipation. In the South, at the close of the Civil War, Yankee officials imposed penal sanctions against idleness and vagrancy, obliging former slaves to enter wage contracts, forcibly inculcating the habits of free labor. In the North, a similar conjunction of compulsion and contract swiftly appeared in rules against beggars. From Port Royal to Boston, it became a crime for propertyless persons to eke out a livelihood outside the market. For generations reformers and moralists had warned that almsgiving menaced free-market discipline. But the new statutes against beggars posed a fundamental ideological problem. In a nation just purged of chattel slavery and formally dedicated to the ideal of free contract, how could coercive labor codes be justified?¹³⁵

The vagrancy laws of the North echo their colonial counterparts, in substance and effect. In New York, at the instant sight or complaint of a vagrant or beggar, the person was arrested without a warrant, taken to the nearest municipal court, and held without bond until the time of trial.¹³⁶ Suspects were presumed guilty until they proved “a good account of themselves,” language that comes directly from the colonial era vagrancy laws.¹³⁷ Once convicted, the defendant was removed to businesses where they “were set at tasks such as hauling coal and brick, breaking stone, scrubbing, sewing, laying pipes, and making bricks, brushes, and shoes; less often they were hired out under private prison labor contracts.”¹³⁸ These laws are eerily like those of the colonial and Black Code eras. Most importantly, these laws all depend on someone making a visual determination of a person’s economic status. Many of the vagrancy statutes include the line, “without

¹³⁵ *Id.*

¹³⁶ *Id.* at 1278.

¹³⁷ *Id.* (citing Statement of Board of Police Justices, “*The Vagrancy Act and its Enforcement*,” in Association for Improving the Condition of the Poor, Annual Report, 36 (1879)).

¹³⁸ *Id.*

visible means of support” which necessitates identifying an offender based on how they look or appear.¹³⁹ Neither tattered clothes nor pockets devoid of money were enough to convict someone of being a vagrant, but the act of begging was “unimpeachable evidence of guilt.”¹⁴⁰

Under the Mississippi Black Codes, being guilty of visible vagrancy occurred under a far-reaching set of circumstances. Under Section 1 of the vagrancy amendment:

[A]ll rogues and vagabonds, idle and dissipated persons, beggars, jugglers, or persons practicing unlawful games or plays, runaways, common drunkards, common night-walkers, pilferers, lewd, wanton, or lascivious persons, in speech or behavior, common railers and brawlers, persons who neglect their calling or employment, misspend what they earn, or do not provide for the support of themselves or their families, or dependents, and all other idle and disorderly persons, including all who neglect all lawful business, habitually misspend their time by frequenting houses of ill-fame, gaming-houses, or tippling shops, shall be deemed and considered vagrants¹⁴¹

By simply night walking, misspending what they earn, or juggling, a person was guilty of violating the vagrancy statute.¹⁴² Through the combination of the high visibility and breadth of possible offenses, the Reconstruction era vagrancy laws created and sustained systems of forced labor because it increased visible scrutiny of those whose status as poor or Black made them violate the law. Violating the law for visibly existing as poor ensured a steady stream of forced labor for the Reconstruction economy decimated by the Civil War and loss of free labor from chattel slavery.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 1865 Miss. Laws 90 (repealed 1866).

¹⁴² *Id.*

B. Application III: Displacement of Unhoused Persons

The third colonial era principle that visibly vagrant, idle, or unhoused persons must be removed was applied throughout the nineteenth and early twentieth centuries through legal and law enforcement efforts to displace visibly unhoused persons from city streets. Displacement of vagrant persons began with the colonial era vagrancy laws.¹⁴³ Several states had laws that allowed the government to remove indigent persons “by the constable back to wherever they had prior legal settlement.”¹⁴⁴ If they were to return, they could face whippings, beatings, or fines.¹⁴⁵ The practice of displacing indigent persons reflects a desire to prevent the influx of crime believed to follow indigent and idle persons.¹⁴⁶ However, in practice, these tactics do little more than move the problem, chronic homelessness, from one location to another, and can bring life-threatening consequences to the displaced unhoused persons.¹⁴⁷

As the number of homeless persons soared in the late nineteenth century, public opinion about the unhoused shifted from pity to downright hostility.¹⁴⁸ By one estimate, the number of unhoused persons living on the streets of New York City increased 350% between 1981 and 1989.¹⁴⁹ The visibility of unhoused persons makes passerby deeply uncomfortable.¹⁵⁰ Unhoused persons are

¹⁴³ See Quigley, *supra* note 2, at 137.

¹⁴⁴ *Id.* at 137, 144, 147, 148.

¹⁴⁵ *Id.* at 148 (citing Act of 1798, in 2 THE FIRST LAWS OF THE STATE OF RHODE ISLAND 56 (John D. Cushing ed., 1983)).

¹⁴⁶ Simon, *supra* note 4, at 639-40.

¹⁴⁷ *Study Shows Involuntary Displacement of People Experiencing Homelessness May Cause Significant Spikes in Mortality, Overdoses and Hospitalizations*, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL (Apr. 10, 2023), <https://nhchc.org/media/press-releases/study-shows-involuntary-displacement-of-people-experiencing-homelessness-may-cause-significant-spikes-in-mortality-overdoses-and-hospitalizations/#:~:text=Today%20the%20Journal%20of%20the,and%20life%2Dthreatening%20infections%20as> [https://perma.cc/Q7YX-5RPV].

¹⁴⁸ See, e.g., Jeffrey Schmalz, *New Message to Homeless: Get Out*, N.Y. TIMES, Aug. 2, 1989, at A14.

¹⁴⁹ Paula Elaine Kay, Note, *A Tale of Two Cities: A Comparative Analysis of the Causes and Legal Responses to Homelessness in New York City and London*, 15 BROOK. J. INT'L L. 465, 466 (1989).

¹⁵⁰ Nicole Wetsman, *Why Experts Say Some Unhoused People are Unfairly Assumed to be Dangerous*, ABC NEWS (Oct. 17, 2023, 4:17 A.M.), <https://abcnews.go.com/Health/unhoused-people-perceived-dangerous/story?id=103751928> [https://perma.cc/WQR4-GURA].

seen with disgust and as less human than others.¹⁵¹ The public often has contradictory feelings about unhoused persons:

There is “a strong tendency for the public to link homelessness to deviant status.” A majority (53.5%) of people surveyed in 1990 agreed with at least one of the following statements: homeless people are “more dangerous than other people,” are “more likely to commit violent crimes than other people,” or “should be kept from congregating in public places in the interest of public safety.” More than one-third (37.1%) thought “homelessness frees a person from worries that other people have about jobs and families.”

Large percentages of opinion poll respondents have favored “criminalization” solutions, including involuntary hospitalization of mentally ill homeless people (favored by 86.6%), and prohibitions on panhandling (69.9%), setting up temporary shelter in public parks (69.1%) and sleeping overnight in public places (50.8%).

At the same time, a very high percentage of the public also believes that important causes of homelessness include structural factors related to housing (81.7%), the economic system (79.1%), and a lack of government aid (73.8%). The vast majority have “feelings of sadness and compassion for homeless people (85.8%) and say they feel angry that so many are homeless in a country as rich as the United States.”¹⁵²

In response to this range of feelings and public sentiment, law enforcement officers began using aggressive tactics to put unhoused people in their place, including mass arrest sweeps of visibly unhoused persons and burning the belongings of those sleeping outside.¹⁵³ One academic commenter suggested that if “the police appear to be helpless by limiting their activities to official due process responses, the atmosphere is created that essentially tells

¹⁵¹ Harris & Fiske, *supra* note 7, at 849 (Social science research paper that found that people see homeless people and those addicted to drugs as less than human.).

¹⁵² Wes Daniels, “*Derelicts, Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*,” 45 BUFF. L. REV. 687, 720-21 (1997).

¹⁵³ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1555-56 (S.D. Fla. 1992).

the marginal members of the community that anarchy prevails.”¹⁵⁴ The unhoused were compared to broken windows in an abandoned building, opening up holes for criminality and disorder.¹⁵⁵

Efforts to displace unhoused persons have brought constitutional challenges along with them. Much like the colonial era laws, efforts to mass arrest or displace visibly unhoused persons target the status of being poor or unhoused, not criminal conduct.¹⁵⁶ Punishment of a person solely for their status is unconstitutional cruel and unusual punishment under the Eighth Amendment.¹⁵⁷ The Supreme Court held in *Robinson v. California* that a California statute that criminalized addiction to narcotics was unconstitutional in violation of the Eighth Amendment’s protections against cruel and unusual punishment because it punished the status of addiction and not possession of illegal drugs.¹⁵⁸ The focus of the Court’s jurisprudence on status crimes primarily concerns the issue of voluntariness.¹⁵⁹ Any statute that criminalizes conduct that is entirely involuntary is a violation of an unhoused person’s constitutional rights.¹⁶⁰

This inquiry differs for unhoused persons rather than persons experiencing addiction like in the *Robinson* case because the nature of homelessness means that all basic life functions that are typically performed in the privacy of the home must be done in public.¹⁶¹ Because unhoused persons must eat, sleep, use the restroom, and perform all life sustaining activities in public, law enforcement officers use these behaviors as pretext to arrest unhoused persons.¹⁶² These displacement practices mirror the colonial era

¹⁵⁴ Gary W. Sykes, *Street Justice: A Moral Defense of Order Maintenance Policing*, 3 JUST. Q. 497, 509 (1986).

¹⁵⁵ James Q. Wilson & George L. Kelling, *Broken Windows*, ATL. MONTHLY, Mar. 1982, at 29, 35.

¹⁵⁶ *Arnold v. City & County of Denver*, 464 P.2d 515, 517 (Colo. 1970) (holding that vagrancy is a crime of status and can only be criminalized if paired with a criminal behavior).

¹⁵⁷ See, e.g., *Decker v. Fillis*, 306 F. Supp. 613, 617 (D. Utah 1969) (finding vagrancy ordinance invalid because it punished “economic condition or status,” and thus violated due process rights).

¹⁵⁸ 370 U.S. 660, 667 (1962).

¹⁵⁹ Simon, *supra* note 4, at 662.

¹⁶⁰ *Id.*

¹⁶¹ Pottinger, 810 F. Supp. at 1572.

¹⁶² *Id.* at 1562.

laws that authorized the displacement of vagrant persons.¹⁶³ Additionally, they reinforce the misguided idea that to maintain order and a crime-free city, visibly unhoused persons must be removed.¹⁶⁴

IV. MODERN APPLICATIONS

A. *Modern Background*

Throughout the nineteenth and twentieth centuries, cities and municipalities applied the colonial ideas about indigency and vagrancy through efforts to control, displace, and extract free labor from unhoused persons.¹⁶⁵ These laws criminalized the status of being indigent.¹⁶⁶ After the Supreme Court's decision in *Papachristou v. City of Jacksonville*, legislators could no longer regulate indigent persons for their status of being indigent.¹⁶⁷ Instead, legislators could now regulate their conduct or require that the status of indigency be paired with criminal behavior that warranted arrest.¹⁶⁸

This change opened the flood gates for laws criminalizing aggressive panhandling, loitering, sleeping outside, and soliciting funds near public roadways, actions most often taken by unhoused persons.¹⁶⁹ As those efforts continue to be litigated, cities and municipalities have created new programming to both remove visibly unhoused persons from the streets and extract labor from them, through work programs for the unhoused.¹⁷⁰ These work programs typically pick up visibly unhoused persons from public

¹⁶³ Quigley, *supra* note 2, at 131, 133, 141, 147-49.

¹⁶⁴ Simon, *supra* note 4, at 639-40.

¹⁶⁵ *Morales*, 527 U.S. at 53-54 n.20.

¹⁶⁶ Malone, *supra* note 1, at 756 n.19.

¹⁶⁷ *See generally* 405 U.S. 156 (1972) (holding that states could not punish people for their statutes – what they were – rather than for their conduct – what they did.); *Edwards v. California*, 314 U.S. 160, 174 (1941) (“[T]he theory of the Elizabethan poor laws no longer fits the facts.”).

¹⁶⁸ *Papachristou*, 405 U.S. at 163.

¹⁶⁹ Katie Pilgram Neidig, *The Demise of Anti-Panhandling Laws in America*, 48 ST. MARY'S L.J. 543, 544-46 (2017).

¹⁷⁰ Jenni Bergal, *Cities See Trash Cleanup Programs as a Way to Combat Homelessness*, STATELINE (Oct. 13, 2021, 12:00 AM), <https://stateline.org/2021/10/13/cities-see-trash-cleanup-programs-as-a-way-to-combat-homelessness/> [https://perma.cc/WJD2-MKRA].

spaces and put them to work for the city.¹⁷¹ These programs apply the colonial principle that work should be the baseline expectation for all persons and that labor is the solution to indigency.

*B. From Status to Conduct:
Papachristou v. City of Jacksonville*

In *Papachristou v. City of Jacksonville*, the Supreme Court of the United States struck down a municipal vagrancy ordinance as void for vagueness because it swept an unconstitutional array of protected conduct in its efforts to control illegal behavior.¹⁷² Any state or municipality has a compelling government interest in regulating criminal activity, violence, and disorder.¹⁷³ However, that government interest cannot extend unlimited law enforcement authority to arbitrarily “enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense.”¹⁷⁴ The Court goes on to distinguish the indigent by name and explains why they are especially susceptible to prosecution under the vagrancy statutes:

The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them. Nor are they protected from being caught in the vagrancy net by the necessity of having a specific intent to commit an unlawful act.¹⁷⁵

The Supreme Court held that the Jacksonville, Florida vagrancy ordinance at question in *Papachristou* was unconstitutional because the ordinance “fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,” and because it encourage[d] arbitrary and erratic arrests and convictions.”¹⁷⁶ The Jacksonville ordinance at

¹⁷¹ *Id.*

¹⁷² 405 U.S. at 162.

¹⁷³ *Id.* at 166-67.

¹⁷⁴ *Id.* at 166.

¹⁷⁵ *Id.* at 162-63.

¹⁷⁶ *Id.* at 162 (footnote omitted) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

issue in the case was explicitly “derived from [the] early English law” discussed above.¹⁷⁷ The *Papachristou* Court analyzed the history of the English poor laws that became colonial era vagrancy law and determined that the classifications created by the vagrancy statutes are “archaic” and no longer relevant to serve the needs of the twenty-first century.¹⁷⁸ The Court particularly rejected the distinction that these vagrancy laws create between rich and poor stating, “the rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.”¹⁷⁹

After *Papachristou*, local municipalities and governments could no longer depend on vagrancy statutes and ordinances to control the visibly unhoused or indigent in their community.¹⁸⁰ *Papachristou* prohibited regulation of the status of being indigent and instead encouraged communities to give fair notice of conduct that violates the law.¹⁸¹ The Supreme Court has repeatedly rejected regulations whose histories find root in the colonial vagrancy laws.¹⁸² Even as cities began passing anti-loitering measures to address homelessness and indigency, the Court found constitutional concerns.¹⁸³ For example, in *City of Chicago v. Morales*, the Court found that “while antiloitering ordinances have long existed in this country, their pedigree does not ensure their constitutionality.”¹⁸⁴ Without these ordinances, cities and

¹⁷⁷ *Id.* at 161.

¹⁷⁸ *Id.* at 161-62.

¹⁷⁹ *Id.* at 171.

¹⁸⁰ See e.g., *Morales*, 527 U.S. at 68.

¹⁸¹ *Id.* at 162.

¹⁸² See, e.g., *Edwards*, 314 U.S. at 174-75, 177 (rejecting theory of Elizabethan poor laws in striking down prohibitions against transporting indigent persons into the state); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (striking down one-year residency requirement for welfare assistance because its purpose – to deter migration of persons experiencing poverty – like its historical antecedents, was no longer constitutionally permissible); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (holding that although there is ancient historical precedent to support jailing someone for nonpayment of a fine, the equal protection clause does not authorize it); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966) (striking down Virginia’s poll tax, despite history of conditioning right to vote on a person’s wealth or property status).

¹⁸³ *Edwards*, 314 U.S. at 174-75, 177; *Shapiro*, 394 U.S. at 629; *Williams*, 399 U.S. 240-41; *Harper*, 383 U.S. at 669.

¹⁸⁴ *Morales*, 527 U.S. at 53 n.20.

municipalities have conceived of increasingly creative ways to reach the same end.

*C. Colonial Principles Applied in the Modern Era:
Unhoused Work Programs*

Colonial era vagrancy laws created a three-prong approach to indigency and vagrancy. First, all persons should be working.¹⁸⁵ Second, if an able-bodied person chooses not to work, they should be punished with work.¹⁸⁶ And third, that visibly vagrant persons should be removed from the public eye.¹⁸⁷ The modern work programs for the unhoused perfectly apply all three of these principles by coercing individuals out of panhandling and into manual labor that benefits the city or municipality.¹⁸⁸ Additionally, spokespersons for these programs often invoke ideas from the protestant work ethic values from the Founding Era that believe that work is an inherently positive force, especially for the unemployed.¹⁸⁹ These programs distract from the root cause of homelessness, the lack of affordable housing, and instead profit from the labor of the unhoused.¹⁹⁰ By focusing their attention on temporary manual labor instead of long-term solutions, these work programs reinforce the idea that labor is the solution to idleness and the reason that someone is unhoused is because they are not

¹⁸⁵ Quigley, *supra* note 2, 114 n.9 (“[S]ociety firmly needs to keep poor people laboring. This is for two reasons: first, someone is needed to perform low-paying, unpleasant tasks; secondly, there are so many working poor people that the authorities deem it impossible to assist all of them. Therefore, everyone who can work, must. Nonworking poor people are, if unable to work, to be pitied; if able to work, to be set immediately to work; and, if work is refused, severely and publicly punished.”).

¹⁸⁶ *Id.*

¹⁸⁷ Simon, *supra* note 4, at 640.

¹⁸⁸ *City Program Provides Dignity and Jobs to the Homeless*, CITY OF ALBUQUERQUE (June 29, 2018), <https://www.cabq.gov/mayor/news/city-program-provides-dignity-and-jobs-to-the-homeless> [<https://perma.cc/K6WE-8U3W>] (boasting about the pounds of garbage and waste collected for the City).

¹⁸⁹ Hudson & Coukos, *supra* note 49, at 4; Jasmine Ramirez, ‘Cash for Trash’ is Back: Program Paying Homeless to Pick Up Trash in Downtown San Diego, CBS8 (Sept. 21, 2022, 10:50 PM), <https://www.cbs8.com/article/news/local/cash-for-trash-back-program-paying-homeless-pick-up-trash-downtown-san-diego/509-7c86c11a-e274-4413-9b81-d349fe457a9a> [<https://perma.cc/A27J-3URP>] (reporting that picking up trash in the ‘Cash for Trash’ program improved “attitudes, demeanors and behaviors.”).

¹⁹⁰ Demsas, *supra* note 5.

working, not because of the systemic failures of the American housing system.¹⁹¹

These “work programs” often follow a similar structure. A van or bus will drive around to the areas most frequented by panhandlers and then offer to pick them up and take them to a worksite.¹⁹² Unhoused residents will then meet up with city officials to receive their work supplies.¹⁹³ From there, the unhoused persons will be paid a small hourly wage to complete the work.¹⁹⁴ In one case, the unhoused workers are not paid cash for their work but instead receive payment in the form of grocery gift cards or clothes.¹⁹⁵ The average wage for the work ranges from \$9 an hour to as high as \$20 in cities like Portland, Oregon.¹⁹⁶ All of the programs have unhoused persons doing manual labor like picking up trash, picking weeds, and walking up and down public roadways searching for trash.¹⁹⁷ This means that the disabled unhoused persons are unable to benefit from these programs.¹⁹⁸

¹⁹¹ Quigley, *supra* note 2, at 164.

¹⁹² Beth Musgrave, *This Van was Supposed to Help End Panhandling in Lexington. Is it Working?*, LEXINGTON HERALD LEADER (Feb. 9, 2018, 5:44 PM), <https://www.kentucky.com/news/local/counties/fayette-county/article199355229.html#storylink=cpy> [https://perma.cc/5YTT-TTKM].

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Bergal, *supra* note 170.

¹⁹⁶ Christelle Koumoué, *Program that Pays People Experiencing Homelessness to Pick Up Trash in Portland Proves Successful*, KGW8 (Sept. 27, 2022, 7:13 PM), <https://www.kgw.com/article/news/local/portland-nonprofit-program-people-experiencing-homelessness/283-f82c0c7c-4c49-4bad-a04f-2f6f3542a58c> [https://perma.cc/SAN8-FHK9]; See Musgrave, *supra* note 192.

¹⁹⁷ Lexington, KY., started paying panhandlers \$9 an hour to pull weeds and clean up trash around the city, making it one of the first cities to offer such a program. See Musgrave, *supra* note 192.

¹⁹⁸ The subject of disability and homelessness is vast and fascinating and far too big to address with this paper. For a primer on the subject, see Alicia Hancock Apfel, *Cast Adrift: Homeless Mentally Ill, Alcoholic and Drug Addicted*, 44 CATH. U. L. REV. 551 (1995).

Numerous cities across the country have adopted work programs for unhoused persons that pay people to pick up trash, weeds, or litter on the roadside. These programs exist in cities across the country like Albuquerque, New Mexico;¹⁹⁹ Lexington, Kentucky;²⁰⁰ Portland, Oregon;²⁰¹ Little Rock, Arkansas;²⁰² San Diego, California;²⁰³ Fort Worth, Texas;²⁰⁴ Mobile, Alabama;²⁰⁵ and Oakland, California.²⁰⁶ Harmless, and even admirable, on their face, these programs are advertised as solutions to panhandling, homelessness, and trash and litter concerns.²⁰⁷ Despite the lip service to job training, mentorship, and wrap-around services, at their core, these programs are coercing labor out of unhoused persons because they are only offering manual and menial labor to the program participants, benefitting the cities beautification efforts but not addressing the root cause of homelessness.²⁰⁸ Homelessness is “primarily a function of the broader housing-unaffordability crisis, which in turn is primarily a function of how

¹⁹⁹ CITY OF ALBUQUERQUE, *supra* note 188.

²⁰⁰ Musgrave, *supra* note 192.

²⁰¹ Koumoué, *supra* note 196.

²⁰² Tess Vrbin, *Little Rock offering pay to homeless for beautification work; program inspires other Arkansas cities*, ARK. DEMOCRAT-GAZETTE (Feb. 20, 2022, 4:54 AM), <https://www.arkansasonline.com/news/2022/feb/20/little-rock-offering-pay-to-homeless-for/> [<https://perma.cc/4XZA-GJR2>].

²⁰³ Ramirez, *supra* note 189.

²⁰⁴ Claire Ballor, *Fort Worth Pays Homeless to Help Clean Up City's Streets*, DALL. MORNING NEWS (Jan. 27, 2018, 4:38 PM), <https://www.dallasnews.com/news/2018/01/27/fort-worth-pays-homeless-to-help-clean-up-city-s-streets/> [<https://perma.cc/5NKB-MA28>].

²⁰⁵ Tyler Fingert, *City of Mobile Launching New Program to Pay the Homeless to Pick Up Litter*, FOX10 NEWS (June 23, 2022, 4:32 PM), <https://www.fox10tv.com/2022/06/23/city-mobile-launching-new-program-pay-homeless-pick-up-litter/> [<https://perma.cc/84VM-KR5W>].

²⁰⁶ Bergal, *supra* note 170.

²⁰⁷ CITY OF ALBUQUERQUE, *supra* note 188.

In partnership with St. Martin's Hospitality Center, the program transports individuals to a City of Albuquerque Solid Waste Management Department job site five days a week. The ten person crews have proven reliable and effective and work hard to beautify the City through cleaning up litter and pulling weeds. Since 2015, the crews have cleaned 894 City blocks and collected 256,741 pounds of waste. At the end of the workday, the workers receive their pay from St. Martin's and can get connected with other resources based on their needs.

Id.

²⁰⁸ Demsas, *supra* note 5.

difficult local governments have made building new housing” rather than an unwillingness to work.²⁰⁹

In Kentucky, a local non-profit drives a van emblazoned with a “End Panhandling Now” logo and picks up unhoused persons panhandling and offers them work as day laborers for the city.²¹⁰ In New Mexico, Albuquerque’s “There’s a Better Way” program picks up unhoused residents off the streets and transports them to day work with the City’s Solid Waste Management Department.²¹¹ The City brags that participants in this program “have cleaned 894 City blocks and collected 256,741 pounds of waste.”²¹² Both programs differ immensely from the forced labor seen in the colonial and Reconstruction eras because they are not auctioning off labor, and the unhoused persons in these programs can refuse to work or not engage with the programs.²¹³ However, these regimes of coerced labor work to produce the same outcomes as their colonial era counterparts, reenforcing social hierarchies based on the status of being indigent because they demand menial and manual labor from the unhoused in order to be able to “pay their rent” on the streets.

Just like the verbiage used in the Reconstruction era, proponents of these programs believe that by working, indigent or unhoused persons will be reformed or have “improved attitudes, demeanors and behaviors” from picking up garbage.²¹⁴ One program director, Romie Nottage, noted that she believes that for many unhoused persons their station in life “is what they choose.”²¹⁵ Her program does not provide cash to participants who pick up trash but will pick up their cell phone bills or pay for storage units.²¹⁶ The Fort Worth, Texas program requires the unhoused to collect trash around their own encampment sites for pay.²¹⁷ This again reinforces the idea that the unhoused are responsible for cleaning, maintaining, and beautifying the spaces they occupy in order to justify their existence.

²⁰⁹ *Id.*

²¹⁰ Musgrave, *supra* note 192.

²¹¹ CITY OF ALBUQUERQUE, *supra* note 188.

²¹² *Id.*

²¹³ See Quigley, *supra* note 2, at 129.

²¹⁴ Ramirez, *supra* note 189.

²¹⁵ Bergal, *supra* note 170.

²¹⁶ *Id.*

²¹⁷ Ballor, *supra* note 204.

The City of Mobile believes that their “Road to Work” program “is a really inexpensive way to do job training [and] get litter cleaned up off of our streets to make an improvement in our community.”²¹⁸ The language used by those promoting these work programs speaks to the underlying goal – coercing labor from the unhoused for menial, grunt work. The Cash for Trash program in San Diego claims to give “folks a reason to wake up [and an] opportunity to contribute to the cleanliness and overall environment around their surroundings.”²¹⁹ The paternalistic views inherent in these work programs reflect the colonial era principle the work is in and of itself the cure to indigency and that being unhoused is more a state of mind rather than a sociological phenomenon. These work programs, although innocent on their face to many observers, rely on an understanding of indigency and homelessness that places blame on the victims of societal failure rather than seeking to solve the problems that cause and entrench the causes of homelessness, poverty, and unemployment. By analyzing the history and tradition of laws surrounding homelessness and vagrancy in the United States, it becomes clear that focusing on the individual actions of the unhoused, the indigent, and the vagrant will not solve these societal issues, but serve to entrench them.

CONCLUSION

Vagrancy law is deeply rooted in the history and tradition of the United States of America. That history and tradition is one of dark, violent, and unjust treatment of those persons unable to support themselves: the unhoused, the idle, the vagrant, and the indigent. At its core, the history and tradition of how this country treats indigent and unhoused persons declares that it is the ultimate responsibility of the poor to alleviate their own suffering. This pervasive myth about poverty directly impacts how we approach eradicating homelessness today. By understanding the colonial era vagrancy laws, and how their principles are applied throughout history, activist and advocacy groups can avoid the pitfalls that these ideas present. This is demonstrated especially by

²¹⁸ Fingert, *supra* note 205.

²¹⁹ Ramirez, *supra* note 189.

the programs that extract labor from unhoused persons because they reinforce the idea that, at a baseline, people should be working, and that work in and of itself is a solution to poverty. In practice, however, these programs only continue chronic homelessness because they focus their efforts, resources, and time on the personal responsibility of unhoused persons and not the systems and structures that enabled their unhoused status.