

BARBAROUS AND INEFFECTIVE: A Blueprint for Challenging Criminalization of People with Mental Illnesses and Psychiatric Disabilities

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Federal, state, and local governments have criminalized mental illness by failing to fund necessary community-based mental health services while incarcerating people for behaviors arising from unmet mental health needs. This Article aims to provide a practical blueprint for a litigation-based decriminalization strategy that can be used by both impact litigation lawyers working towards systemic reform and by public defenders and others challenging arrests, convictions, and incarceration of individual clients. The legal theory draws on existing but largely overlooked U.S. Supreme Court precedent supporting the proposition that criminalizing persons with mental illness contravenes the fundamental values of our criminal justice system. Incorporating this legal theory into both individual criminal defense work and impact litigation has the potential to stem the tide of criminalization of mental illness and catalyze policy change on behalf of one of the most vulnerable populations in our country. If successful, this litigation would dismantle the practice of using jails and prisons as proxy mental health care providers, and drive the creation of community-based services.

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Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing. . . . [T]he prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.

—*Robinson v. California*, 370 U.S. 660, 668 (1962)
(Douglass, J., concurring).

Introduction

Despite the extreme polarization of today's political discourse in the United States, a remarkable consensus has emerged on opposite ends of the political spectrum: America must find a way to treat, rather than criminalize, people with mental illnesses or psychiatric disabilities.¹ Republican party favorites, such as Newt Gingrich and the Koch brothers, have called for mental health services rather than prison.² Hillary Clinton highlighted a lack of facilities offering mental health treatment in her nomination acceptance speech at the Democratic National Convention.³ Endorsements of decriminalization of persons with mental illness by such strange bedfellows reflect an increasing recognition that warehousing people because of a psychiatric disability violates the baseline decency we have agreed to as a society, as well as the values enshrined in our Constitution and federal laws, such as the Americans with Disabilities Act (ADA), which we aspire to see borne out in reality.

Yet, the path toward substituting non-punitive-based mental health services for incarceration is far from clear. Community-based services require funding; funding requires legislation and budget allocations; legislation and budget allocations require affirmative acts by elected officials. There is rarely political will to undertake reforms perceived to decrease criminal sanctions for people whom the public still generally fears. Instead, political will usually results in decreases, rather than increases, in funding for social services, particularly in this era of widespread state and municipal budget deficits.

Although a minority of municipalities have taken steps to decriminalize—or at least offer alternatives to criminalization—for people with mental illness,⁴ many jurisdictions simply will not voluntarily adopt

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1. See *infra* notes 2–3 and accompanying text. Different language is used by Eighth Amendment-focused case law, legal advocacy communities, and ADA-focused advocacy communities. See *infra* notes 5–6 and accompanying text. The Eighth Amendment doctrine generally encourages advocates and parties to frame issues in terms of medical illness and need, while the ADA doctrine frames issues in terms of disability. See *infra* notes 16–18 and accompanying text. Use of one term or the other in this article does not reflect any particular preference, and which verbiage to use in litigation ultimately depends on choices by attorneys and litigants.
 2. See, e.g., Laura Freeman, *MCM Foundation Hopes to Bring Mental Illness “Out of the Shadows,”* STOW SENTRY (July 22, 2016, 12:51 AM), <http://www.stowsentry.com/news%20local/2016/07/22/mcm-foundation-hopes-to-bring-mental-illness-out-of-the-shadows> [https://perma.cc/86DG-7MHM]; see also Yvonne Wenger, *Koch Industries Sponsors Session on Mass Incarceration at Baltimore Conference*, BALT. SUN (Aug. 4, 2016, 9:42 AM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-ci-koch-brothers-20160803-story.html> [https://perma.cc/U9XU-BXPA].
 3. Los Angeles Times Staff, *Transcript: Hillary Clinton’s DNC Speech, Annotated*, L.A. TIMES (July 28, 2016, 9:15 PM), <http://www.latimes.com/politics/la-na-pol-hillary-clinton-convention-speech-transcript-20160728-snap-htmlstory.html> [https://perma.cc/7ALS-M7Q3].
 4. Examples include mental health courts, discussed in DARRELL STEINBERG ET AL., WHEN DID PRISONS BECOME ACCEPTABLE MENTAL HEALTHCARE FACILITIES? 10

and fund sufficient policies and programs to make decriminalization of mental illness a reality any time soon. Where political actors are unlikely to do the right thing on their own, litigation-driven reform becomes a necessary tool.

However, advocates have struggled to develop impact litigation strategies directly challenging the criminalization of people with mental illness for a variety of reasons. The Constitution offers no clearly enumerated basis for equal protection of such persons, regardless of whether the discriminatory impact is framed using a medical model (“mental illness”) or a disability model (“psychiatric disability”).⁵ Stakeholders—individuals with such diagnoses, their families, service providers, and advocates—differ strongly in their opinions about how to describe the complex problem of criminalization, desired solutions, and acceptable approaches for seeking change. Conflicts and distrust between various stakeholders are particularly hard to bridge when it comes to determining what the legal standard should be for civil commitment and involuntary treatment of persons with mental illness—or if such an option ought to exist at all.⁶ Moreover, disability rights lawyers and prisoners’ rights lawyers have historically been disconnected, each operating largely within their own fields and approaching clients from different perspectives.

This Article therefore aims to provide a practical blueprint for a litigation-based decriminalization strategy that can be used by both impact litigation lawyers working towards systemic reform and by public defenders and others challenging arrests, convictions, and incarceration of individual clients. The following legal theory is firmly grounded in existing, but largely overlooked, U.S. Supreme Court precedent supporting the proposition that criminalizing persons with mental illness contravenes the fundamental values of our criminal justice system. Incorporating this legal theory into both individual criminal defense work and impact litigation has the potential to stem the tide of criminalization of mental illness and catalyze policy change on behalf of one of the most vulnerable populations in our country. If successful, this litigation would dismantle the practice of using jails and prisons as proxy mental health care providers, or simply as places to warehouse persons with serious mental illness.

I use California counties as an example ripe for such litigation because of the particular climate there resulting from a mixture of elimination of public services, resistance to criminal justice reform, class action litigation forcing a reduction in state prison population with a corresponding increase in county detention, and the existence of some funding sources for community-based services. However, these elements,

(2015).

5. *See supra* note 1.

6. *See infra* Part I. For example, advocates representing individuals with mental illness successfully fought for a high legal bar to involuntary commitment, but some advocates representing families of individuals with mental illness critique this high legal bar as preventing them from obtaining needed treatment for their loved ones.

which give rise to the legal theory articulated below, also exist in some combination in many other jurisdictions with federal courts that range in friendliness to criminal reform efforts.

I. The Scope of the Decriminalization Challenge

Across the country, we lock up hundreds of thousands of people with serious mental illnesses/psychiatric disabilities in jails and prisons, rather than provide them with the treatment they need.⁷ The unmet need for mental health services for people involved with or at risk of becoming involved with the criminal justice system is at a crisis level nationwide. A 2009 psychiatric journal observed that “[f]or people with serious mental illnesses and complex disabling conditions, criminal justice involvement is an expectation—not an exception . . . [T]he system is organized for failure, with jail as the ultimate safety net.”⁸ Headlines in major newspapers have announced: *Trend Persists of Prisons as Mental Health Housing*,⁹ *Inside a Mental Hospital Called Jail*,¹⁰ *The Mentally Ill, Behind Bars*,¹¹ and *American Jails Have Become the New Mental Health Asylums*.¹² With each spate of gun violence, there is often a public and legislative call to adopt policies that further villainize, marginalize, and criminalize people

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7. The number of people incarcerated with a “serious” mental illness (schizophrenia, schizo-affective, bipolar disorder, major depression, brief psychotic disorder) was estimated to be 356,000 in a 2014 joint report by Treatment Advocacy Center and the National Sheriff’s Association. TREATMENT ADVOCACY CENTER, THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY (2014). An article in *The Journal of Legal Studies* estimated that in 2009 there were 316,000 “severely mentally ill people” in U.S. prisons and jails. Steven Raphael & Michael A. Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, 42 J. LEGAL STUD. 187, 188 (2013). A 2015 article estimates 350,000 prisoners with serious mental illness in the United States. STEINBERG ET AL., *supra* note 4, at 7. The most recent report on mental health of prison and jail populations by the Bureau of Justice Statistics, a program of the U.S. Department of Justice, in 2006, estimated 1,265,400 persons with “a mental health problem” in state, federal, and local prisons or jails. DORIS J. JAMES & LAUREN E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006).
 8. *Jailing is Failing People with Mental Illness*, 60 PSYCHIATRIC SERV. 723, 723 (2009).
 9. Dan Thompson, *Trend Persists of Prisons as Mental Health Housing*, DAILY MAIL (Apr. 14, 2014, 5:13 PM), <http://www.dailymail.co.uk/wires/ap/article-2604668/Trend-persists-prisons-mental-health-housing.html> [<https://perma.cc/DF42-ZGEV>].
 10. Nicholas Kristof, Opinion, *Inside a Mental Hospital Called Jail*, N.Y. TIMES (Feb. 8, 2014), <https://www.nytimes.com/2014/02/09/opinion/sunday/inside-a-mental-hospital-called-jail.html> [<https://perma.cc/Q7U5-QBBV>].
 11. Editorial, *The Mentally Ill, Behind Bars*, N.Y. TIMES (Apr. 6, 2014), <https://www.nytimes.com/2014/04/07/opinion/the-mentally-ill-behind-bars.html> [<https://perma.cc/6AVY-4U7Z>].
 12. Thomas Dart, *American Jails Have Become the New Mental Asylums—and You’re Paying the Bill*, GUARDIAN (May 28, 2014), <https://www.theguardian.com/commentisfree/2014/may/28/sp-american-jails-mental-health-funding> [<https://perma.cc/A22R-62ST>].

with mental illness.¹³ We continue to see a lack of political will to provide the appropriate and necessary array of mental health services in the community, and the people most directly affected by the failure of community services lack the power to make political change. Even with public and political consciousness beginning to embrace the overall idea of reining in United States criminal justice policies, resulting reforms are likely to leave people with psychiatric disabilities behind—literally behind bars.¹⁴

The resistance of state and local governments to policy-driven reform makes litigation a crucial tool for challenging the criminalization of mental illness. Counties that do not provide accessible community mental health services, but, at the same time, incarcerate individuals with mental illness for low-level offenses symptomatic of or correlating with unmet mental health needs are essentially criminalizing mental illness.¹⁵ Counties that incarcerate people for behaviors predictably resulting from health conditions that the counties have chosen not to treat through public resources essentially make arrest and incarceration an almost inevitable conclusion for many people without resources to otherwise obtain appropriate care. In the words of the U.S. Supreme Court, this “make[s] it a criminal offense for a person to be mentally ill.”¹⁶

The result of treatment failures both outside and inside the criminal justice system is a population of individuals with mental illness chronically caught in the revolving door of the criminal justice system who never receive appropriate mental health treatment. Civil rights advocates have justifiably focused lawsuits on obtaining adequate mental health treatment for persons incarcerated in jails and prisons. However, even in the “best” case scenario—when counties and states actually provide meaningful mental health treatment to people incarcerated in jail or prison settings—punishing people for mental illness and providing treatment *only* in those settings is not only unwise from a treatment perspective, but also violates both the Eighth Amendment’s prohibition on cruel and

13. See, e.g., Jonthan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM J. PUB. HEALTH 240, 241 (2014).

14. For example, despite the massive reduction in prison population in California ordered by federal courts in 2011 that in large part resulted from a class action lawsuit on behalf of state prisoners with serious mental illness, the actual population reduction measures implemented did not significantly reduce the numbers of incarcerated persons with serious mental illness in the prisons; rather, their percentage of the state prison population as a whole has continued to increase. See *infra* note 97 and accompanying text.

15. Sometimes these “offenses” are behaviors that legislators have made a public policy choice to categorize as criminal, but could easily be categorized differently. For example, when persons experiencing symptoms of mental illness shout at police officers or are unable to follow their instructions, without engaging in any violence at all, the officers may charge them with “terrorist threats” or “resisting arrest.” Similarly, “disorderly conduct” is a catch-all charge often applied to persons with mental illness who are unable to conform their public behavior to demanded norms.

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

unusual punishment¹⁷ and the American with Disabilities Act's requirement that people be treated in the least restrictive setting possible.¹⁸ Thus, we need impact litigation targeted directly towards obtaining appropriate mental health treatment outside jails and prisons so as to help end, rather than ameliorate, the cycle of incarceration. The legal theory presented in this Article would pioneer that litigation. The theory posits that counties providing insufficient mental health services outside a jail or prison setting cannot legally incarcerate people for low-level offenses nor parole or probation violations resulting from unmet mental health needs.

II. A Litigation Theory for Challenging Criminalization of Mental Illness

The legal theory advanced in this Article posits that state or local jurisdictions violate the Eighth Amendment (or the Fourteenth Amendment, for individuals in pretrial detention) when they criminalize behavior arising directly from untreated mental illness and simultaneously do not provide adequate and accessible mental health services in the community. Further, pursuant to the U.S. Supreme Court's 1999 decision in *Olmstead v. L.C. ex rel. Zimring*,¹⁹ the Americans with Disabilities Act requires that people with disabilities be provided treatment and services in the least restrictive environment—but jails and prisons are surely the most restrictive.

A. *The Third Prong of the Eighth Amendment: Limits on What Can Be Criminalized and Punished*

The Eighth Amendment prohibits cruel and unusual punishment in three ways: “First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such.”²⁰ The third prong of the Eighth Amendment's cruel and unusual punishment prohibition “differs from the first two in that it limits what the state can criminalize, not how it can punish.”²¹ The litigation strategy discussed in this Section is grounded in the Eighth Amendment's third prong and focuses on how behaviors symptomatic or often associated with untreated

17. *Id.*

18. As explained further below, *infra* notes 62–64 and accompanying text, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) established that the ADA requires people with disabilities to be treated in the least restrictive setting appropriate to their needs, taking into account the resources available. By design, carceral settings are the most restrictive types of settings in which our society places people.

19. 527 U.S. 581.

20. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (citations omitted).

21. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1128 (9th Cir. 2006) *vacated on other grounds*, 505 F.3d 1006 (9th Cir. 2007).

mental illness have been increasingly criminalized in the shift from mental asylums to jails and prisons.

1. The Supreme Court's Decisions in *Robinson* and *Powell*

The U.S. Supreme Court has already laid groundwork for finding that criminalization of people for low-level offenses resulting from untreated mental illness violates the Eighth Amendment. In its 1962 decision in *Robinson v. California*,²² the Court relied on the third prong of the Eighth Amendment's prohibition on cruel and unusual punishment to strike down a California statute making it a crime to be a narcotics addict.²³ The Court observed:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.²⁴

Concurring, Justice Douglas emphasized the unconstitutionality of levying criminal punishment for symptoms of mental illness:

Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing. . . . [T]he prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.²⁵

Six years after *Robinson*, the Supreme Court again considered the issue of cruel and unusual punishment in the context of addiction in *Powell v. Texas*.²⁶ In *Powell*, a divided Court²⁷ declined to overturn a lower court's public intoxication conviction of a defendant who claimed that his status as an alcoholic should preclude criminal liability for this act.²⁸ Some lower courts have subsequently interpreted *Powell* as severely

22. 370 U.S. 660 (1962).

23. *Id.*

24. *Id.* at 666.

25. *Id.* at 668, 678 (Douglas, J., concurring) (citation omitted).

26. 392 U.S. 514, 535 (1968).

27. The opinion of the Court in *Powell* was joined by only four Justices, including Justices Black and Harlan, who also issued a joint concurrence. Justice White did not join in the opinion of the Court and wrote a separate concurrence, and Justices Fortas, Douglas, Brennan, and Stewart joined in a dissent.

28. 392 U.S. 514.

restricting the reach of *Robinson*. However, a close reading of *Powell* shows that it does not undermine the fundamental principle articulated in *Robinson*: that the Constitution does not permit the State to criminalize medical conditions. *Powell* is a narrow decision by a divided Court in which the opinion of the Court rests in large part on the dearth of evidence presented by the defendant about his claimed condition of chronic alcoholism and whether he could have avoided being in a public place while intoxicated.²⁹ The Court characterized the evidence in the record as conclusory and undeveloped, ultimately holding that the record did not establish whether or not this defendant actually suffered from alcoholism to the degree that he could not refrain from being drunk in public.³⁰ The Court also deemed there to be a lack of evidence in the record sufficient to establish scientific consensus regarding whether alcoholism was a disease, what its symptoms were, and how to treat it.³¹ Given this context, the Court declined to overrule the defendant's conviction for public drunkenness in the lower court³²:

We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication.³³

Powell did not foreclose the possibility that such a conviction might violate the third prong of the cruel and unusual punishment prohibition. Rather, Justice Marshall, writing for the Court, held, "It is simply not yet the time to write the Constitutional formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers."³⁴ Justice White, in a concurrence, identified the central question as "whether volitional acts brought about the 'condition' [of alcoholism] and whether those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'"³⁵ He wrote,

Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless Robinson is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an

29. *Id.* at 532–35.

30. *Id.* at 535.

31. *Id.* at 526–31.

32. *Id.* at 535.

33. *Id.*; cf. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1134–35 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007) ("We also note that in the absence of any agreement between Justice White and the plurality on the meaning of *Robinson* and the commands of the Cruel and Unusual Punishment Clause, the precedential value of the *Powell* plurality opinion is limited to its precise facts.")

34. 392 U.S. at 537.

35. *Id.* at 550 n.2 (White, J., concurring).

irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.³⁶

Justice Fortas, writing for the four Justices in dissent who would have overturned the conviction, acknowledged that the location element of the public intoxication crime charged in *Powell* “covers more than a mere status. But the essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid.”³⁷ Thus, the outcome of *Powell* speaks more to the case at hand than the Court’s reluctance to scrutinize the criminalization of mental illness.

2. The Ninth Circuit’s Consideration of the Third Prong of the Eighth Amendment

Although there is no precedential Ninth Circuit holding squarely on point, the Ninth Circuit has consistently indicated its openness to arguments based on the third prong of the Eighth Amendment. In 2003, the ACLU of Southern California used the logic of *Robinson* to challenge a Los Angeles municipal ordinance that criminalized sleeping on public streets.³⁸ The ACLU did not challenge the County’s ability to criminalize sleeping on public streets generally, but, rather, argued that because fewer shelter beds were available in Los Angeles than the number of chronically homeless individuals Los Angeles had essentially criminalized the status of being homeless.³⁹ In other words, even if all of the chronically homeless individuals tried to avail themselves of beds off the streets, they would not all be able to do so because Los Angeles provided an insufficient supply of beds. The Ninth Circuit found this argument persuasive, originally holding:

Los Angeles has encroached upon Appellants’ Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless. A closer analysis of *Robinson* and *Powell* instructs that the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment.⁴⁰

The Ninth Circuit held that *Robinson* and *Powell*, taken together, delineate:

[T]wo considerations relevant to defining the Cruel and Unusual Punishment Clause’s limits on the state’s power to criminalize. The first is the distinction between pure status—the state of being—and pure conduct—the act of doing. The second is the distinction between an involuntary act or condition and a voluntary one. Accordingly, in determining whether the state may punish a particular

36. *Id.* at 548–49 (White, J., concurring).

37. *Id.* at 567–68 (Fortas, J., dissenting).

38. *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

39. *Id.*

40. *Id.* at 1132.

involuntary act or condition, we are guided by Justice White's admonition that "[t]he 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.'"⁴¹

The Court of Appeals decision was later vacated because the parties reached a settlement, and therefore, the precedential value of *Jones* is limited.⁴² However, *Jones* shows arguments under the third prong of *Ingraham's*⁴³ Eighth Amendment doctrine can be effective in the Ninth Circuit. Moreover, the holding in *Jones* is consistent with dicta in other Ninth Circuit cases that briefly considered the third prong of the Eighth Amendment in the context of mental illness.⁴⁴ For example, in *United States v. Kidder*,⁴⁵ the court wrote:

Kidder argues that his actions were caused by his mental illness and drug addiction and that the involuntary nature of his actions renders them immune from criminal punishment of the sort imposed here. . . . Although this difficult issue was squarely raised in *Powell*, no majority opinion emerged. We need not decide this issue because the procedural posture of this case bars Kidder from raising it.⁴⁶

Likewise, in *United States v. Butler*,⁴⁷ the Ninth Circuit observed that there were "five justices in *Powell* who voted for the proposition that in certain circumstances non-volitional acts could not be punished consistently with the Eighth Amendment" and the court indicated that a party may prevail on this argument by establishing "a nexus between the proscribed act and the condition giving rise to the involuntary compulsion."⁴⁸

A federal court in the Northern District of California similarly cited the possibility of establishing a nexus between conduct and status, but rejected the Defendant's claim in that case that bank robbery "is integral to and an avoidable result of' being mentally ill."⁴⁹ However, in *Lehr v. City of Sacramento*,⁵⁰ a federal court in the Eastern District of California rejected the majority's reasoning in *Jones* and held that conduct "derivative of a status" was punishable in a homeless-sleeping ordinance case.⁵¹

41. *Id.* at 1136.

42. *Jones*, 505 F.3d 1006.

43. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

44. Because of the procedural status of these cases, which all challenged individual criminal convictions, the Ninth Circuit addressed the argument in a very limited manner.

45. 869 F.2d 1328 (9th Cir. 1989).

46. *Id.* at 1332.

47. 894 F.2d 410, 1990 WL 4676 (9th Cir. 1990) (unpublished).

48. *Id.* at *3-4; *see also* *Joshua v. Adams*, 231 F. App'x 592, 594 (9th Cir. 2007) ("[Defendant's status as a schizophrenic] . . . may have been appropriate as part of his defense at trial, but is misplaced in our habeas review.").

49. *United States v. Sarver*, No. 05-CR-006731 JSW, 2006 WL 1390421, at *2 (N.D. Cal. May 18, 2006).

50. 624 F. Supp. 2d 1218 (E.D. Cal. 2009).

51. *Id.* at 1226-34.

3. Application of the Eighth Amendment's Third Prong in the Litigation Blueprint

It has been more than half a century since *Powell* was decided, and we have considerably more understanding of mental illness now than we did in 1968, in terms of both science and human empathy. We also have a wealth of evidence about the lack of appropriate mental health treatment in jails and prisons, and the debilitating consequences for the mentally ill when they cycle in and out of carceral custody. We know that carceral punishment often makes people sicker, and always disrupts attempts to find stability in their lives. Incarcerating people with mental illness does not make society safer and is, in fact, more costly than the alternatives that do.⁵²

These developments bring us within the ambit of the Supreme Court's insight in *Robinson* that the appropriate question is not the degree of punishment, but whether punishment is appropriate at all: "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."⁵³ The evolution of scientific understanding of mental illness also gives credence to Fortas's dissent in *Powell*:

It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a "revolving door"—leading from arrest on the street through a brief, unprofitable sojourn in jail, back to the street and, eventually, another arrest. The jails, overcrowded and put to a use for which they are not suitable, have a destructive effect upon alcoholic inmates. Finally, most commentators, as well as experienced judges, are in agreement that "there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the enforcement of the laws against drunkenness."⁵⁴

This Article's proposed Eighth Amendment theory can be used by criminal defense lawyers representing individual criminal defendants and by impact litigators on behalf of multiple plaintiffs or a class. In the case of individual defendants, lawyers would need to present evidence that 1) their client has been diagnosed with mental illness; 2) adequate mental health treatment in the community was unavailable to their client; 3) the behavior(s) for which their client was charged arose from the client's

52. See, e.g., ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., TASK FORCE FOR CRIMINAL JUSTICE COLLABORATION ON MENTAL HEALTH ISSUES: FINAL REPORT 4-5 (2011) (citing studies showing supportive, treatment, and diversion programs for people with mental illness substantially reduces costs and increases public safety) [hereinafter JUDICIAL COUNCIL REPORT]; STEINBERG ET AL., *supra* note 4, at 10 (2015).

53. *Robinson v. California*, 370 U.S. 661, 667 (1962).

54. *Powell v. Texas*, 392 U.S. 514, 564-65 (1968) (Fortas, J. dissenting).

unmet mental health need; and 4) preferably, that the client's symptoms are responsive to treatment when offered (thus making concrete the link between the government's failure to provide publicly-funded mental health treatment and the result for the particular client).

To use this Eighth Amendment theory on behalf of a class or group of plaintiffs in affirmative impact litigation, litigants should present evidence that 1) the plaintiffs have been diagnosed with mental illness, 2) the plaintiffs have been repeatedly arrested for non-violent⁵⁵ offenses;⁵⁶ 3) medical records and expert testimony establish that the criminalized behaviors are symptomatic or predictable corollaries of untreated mental illness; and 4) the specific defendant municipal or state jurisdiction has a lack of treatment services in the community that are actually available to for people involved in or at risk of becoming involved in the criminal justice system. In a well-selected test case, plaintiffs would also show that the defendant jurisdiction made an affirmative decision to allocate funding to expanding jails and law enforcement resources, rather than community treatment and services.⁵⁷ Such a funding decision supports a finding of *Monell* liability on the Eighth Amendment claim because it demonstrates an official policy decision by the jurisdiction.⁵⁸ This blueprint also expects plaintiffs to provide extensive evidence of the history over the past seventy years of the transinstitutionalization of people with serious mental illness from asylums and mental health hospitals to prisons and jails on the federal, state, and local levels.⁵⁹ Finally, plaintiffs would address, through expert testimony and statistics, the very points raised by the Supreme Court in *Powell* about the ineffectiveness of jail or prison as a deterrent for behaviors symptomatic

55. Strategically, this does not have to be limited to "non-violent" offenses as typically set forth in criminal laws, but can encompass charges that are considered "violent" offenses in which the behavior did not in reality present violence or threat of violence to others.

56. A series of arrests establishes standing for injunctive relief by showing that the plaintiffs are at risk of further harm, and also demonstrates the negative consequences of failure to provide effective community-based treatment.

57. This will also be key for the *Olmstead* argument, as detailed *infra* notes 62–64 and accompanying text.

58. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

59. The concept of transinstitutionalization as used herein is not meant to suggest that the exact same population once housed in psychiatric hospitals are now in prisons, but, rather, that (a) jails and prisons are now the default mental health treatment providers in many communities and states, especially for people without economic resources; and (b) behaviors associated with untreated mental illness have been increasingly criminalized so that people who would have been institutionalized in asylums or mental health hospitals in years past have been "transinstitutionalized to prisons and jails." Steven Raphael & Michael A. Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, 42 J. LEGAL STUD. 187, 189 (2013); see, e.g., Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 87–88 (2011).

of mental illness, and the gross inappropriateness of jails and prisons as settings for effective therapeutic treatment.⁶⁰

A lawsuit presenting these elements will demonstrate that the defendant county's policies, when situated in historical and social context, have created the scenario the *Robinson* Court found unthinkable in 1962: mental illness has been made a criminal offense, with jails and prisons as the only safety net for obtaining treatment.⁶¹

B. The “Least Restrictive Setting” Requirement of the Americans with Disabilities Act

*Olmstead v. L.C. ex rel. Zimring*⁶² established that the Americans with Disabilities Act requires people with disabilities to be treated in the least restrictive setting appropriate to their needs, “taking into account the resources available.”⁶³ In the past decade, disability rights advocates have successfully used *Olmstead* to pressure states and local governments to move people with disabilities from isolated institutions to more integrated community settings.

Olmstead has not yet been applied by federal courts in any cases involving jails or prisons. Plaintiffs raised an argument that *Olmstead* requires treatment in a setting other than jail in two cases of pre-trial detainees who died in jail custody while awaiting transfer to state hospitals (one for mental health evaluation and one for restoration of competency), but the courts in both cases held that the issue was not properly in play.⁶⁴

In *Winters v. Arkansas Department of Health & Human Services*,⁶⁵ the decedent, Mr. Winters, had been arrested for trespassing while he was in the midst of a psychotic episode, and he died in jail while awaiting transfer to a state mental health hospital for evaluation. Considering a case for damages brought on behalf of Mr. Winters after his death, the Eighth Circuit found that because Winters had been in jail pending mental health evaluation, no determination had yet been made about the services required or the setting for treatment.⁶⁶

The district court in *Winters* had more squarely considered the *Olmstead* claim. The court extensively detailed the defunding of an inpatient hospital and of community mental health placements in northwest Arkansas, which had left only one inpatient mental health hospital in the entire state and a dearth of community mental health placements in

60. STEINBERG ET AL., *supra* note 4, at 7.

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

62. 527 U.S. 581 (1999).

63. *Id.* at 592.

64. *Winters v. Arkansas Dep’t of Health & Human Servs.*, 491 F.3d 933, 936–37 (8th Cir. 2007); *Cheek v. Nueces County Tex.*, No. 2:13-CV-26, 2013 WL 4017132, at *18 (S.D. Tex. Aug. 5, 2013).

65. 491 F.3d at 936–37.

66. *Id.* at 935–37 (“The district court properly distinguished the situation at hand, noting that Mr. Winters was awaiting transfer to the State Hospital for a decision about his appropriate placement . . .”).

the region.⁶⁷ However, the *Olmstead* claim in *Winters* appeared to focus on the argument that the jail was an inappropriate treatment placement for Winters and that the ADA was violated when Winters was not immediately transferred to inpatient care at the hospital.⁶⁸ The plaintiff did not argue that Winters should have been treated in a community setting, nor that a failure to fund and provide community treatment options left his mental illness untreated.⁶⁹ As a result, although the district court was clearly sympathetic to the “serious problems in part exemplified by the facts of this case,” the court also noted that its role was limited to “only [] the case and controversy presented to it by the pleadings, the evidence and the applicable laws.”⁷⁰ Thus, the district court ultimately concluded:

[W]hile the *Olmstead* case has deservedly had an immense positive impact in the mental health field, it is abstract to the facts of this case. The civil commitment order here . . . was to get [Winters] into the hands of mental health experts “for evaluation” to determine what treatment, if any, would be required. . . . The “more restrictive, less restrictive” placement standard simply does not arise in this context.⁷¹

Likewise, in *Cheek v. Nueces County*,⁷² the detainee died while awaiting transfer to a facility that would assist with restoration of his competency to stand trial.⁷³ The district court found, “[n]either the Congressional concern nor the Supreme Court’s holding [in *Olmstead*] apply to this case, where Gregory would be segregated and isolated whether he remained in the county jail or was transferred to the state mental health institution.”⁷⁴

Prisoners’ rights lawyers have been working in recent years to incorporate ADA principles into the treatment of persons with mental illness within jails and prisons. The Civil Rights Division of the U.S. Department of Justice applied an ADA analysis in a findings letter regarding treatment of people with disabilities in the Pennsylvania prison system, and concluded that unjust isolation of people with mental illness in solitary confinement and similar segregated settings violates federal law.⁷⁵ Additionally, in several cases, advocates have made the argument that the ADA applies within the prison system to require that people with serious mental illness are not unfairly subjected to increased custodial restrictions based on their mental illness, although no courts appear to have ruled squarely on that issue.⁷⁶

67. *Winters v. Ark. Dep’t of Health & Human Servs.*, 437 F. Supp. 2d 851, 887–88 (E.D. Ark. 2006).

68. *Id.* at 892.

69. *Id.* at 894–95.

70. *Id.* at 888.

71. *Id.* at 895–96.

72. No. 2:13-CV-26, 2013 WL 4017132 (S.D. Tex. Aug. 5, 2013).

73. *Id.* at *1.

74. *Id.* at *18.

75. Letter from U.S. Dep’t of Justice to Gov. Tom Corbett (May 31, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf [<https://perma.cc/6UFG-HABA>].

76. See, e.g., Notice of Motion and Motion for Enforcement of Court Orders and

The litigation strategy proposed in this Article would build on the Supreme Court's holding in *Olmstead* that "unjustified institutional isolation of persons with disabilities is a form of discrimination" cognizable under the ADA.⁷⁷ In *Olmstead*, the Supreme Court endorsed Congress's determination when enacting the ADA that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."⁷⁸ And, the ADA's opening provisions specifically highlight that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization" and that "individuals with disabilities continually encounter various forms of discrimination . . . [and] segregation."⁷⁹ While opponents will argue that incarcerated people have committed some criminal act that justifies their institutional isolation, litigants can mobilize the history of transinstitutionalization over the past half-century to pierce that objection by showing that behaviors formerly addressed as requiring mental health treatment are now treated as criminal justice issues.

In this proposed litigation strategy, the *Olmstead* argument has two levels, each of which go hand-in-hand with the Eighth Amendment claim outlined above (which was not made in *Winters* or *Cheek*). First, the social science evidence presented by experts will show that the United States, and the specific defendant state or local municipality against whom the litigation is brought, have created a social and criminal justice infrastructure that elects to incarcerate people with mental illness rather than treat them in community and short-term in-patient psychiatric settings.⁸⁰ Sec-

Affirmative Relief Re: Improper Housing and Treatment of Seriously Mentally Ill Prisoners in Segregation at 20–22, *Coleman v. Brown*, No. 2:90-CV-00520-LKK-JFM (E.D. Cal. Apr. 23, 1990).

77. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

78. *Id.* at 588–89 (quoting 42 U.S.C. § 12101 (1999)).

79. *Id.*

80. Litigants should also consider arguing that incarcerating people for symptoms they cannot control and cannot realistically avoid without access to treatment violates the substantive Due Process Clause of the Fourteenth Amendment. The arguments and evidence supporting the Eighth Amendment and ADA claims will also demonstrate that the government's actions in criminalizing and incarcerating—rather than treating—persons with mental illness under these circumstances are oppressive and abusive. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 845–49 (1998) (holding that the substantive component of the Due Process Clause is violated by government action when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."); *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) ("The Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression.") (internal citations omitted); *see also Seegmiller v. Laverkin City*, 528 F.3d 762, 766–69 (10th Cir. 2008) ("In its substantive mode, the Fourteenth Amendment provides protection against arbitrary and oppressive government action This strand of substantive due process is concerned with preventing government officials from 'abusing their power, or employing it as an instrument of oppression.'").

ond, litigants will present evidence of decisions made by the jurisdiction to spend funds that were available to fund community-based mental health services or treatment on jail expansion, law enforcement, or other criminal justice activities instead. For a well-selected defendant, litigants will likely be able to establish that the jurisdiction knew of a high prevalence of mental illness and associated mental health needs in its the population at risk of incarceration, but the jurisdiction chose not to serve those needs in the community.⁸¹

C. *The Goal of the Litigation: Decriminalization and Community-Based Mental Health Services*

This litigation strategy aims to reduce the number of people with mental illness in jail and prison, and to maximize their chances of successfully reintegrating into the community. A lawsuit would primarily seek declaratory and injunctive relief prohibiting the defendant jurisdiction from charging people with serious mental illness with certain categories of offenses, unless and until the jurisdiction creates meaningful opportunities for accessing publicly-funded mental health treatment. As in similar kinds of civil rights litigation, plaintiffs should request that the court order the jurisdiction to create a remedial plan that accounts for plaintiffs' constitutional rights and public safety rather than dictate the specific solution the jurisdiction must enact.⁸²

Litigation should ideally induce the jurisdiction to provide an array of community-based mental health services, and to account for the relationship of mental illness to behavior in ways that do not punish the status of being mentally ill. Potential relief in addition to the funding of community-based mental health services may include policies requiring, for example, that police officers must offer the mentally ill transport to mental health treatment prior to arrest; that the prosecutor's office must engage in a formalized consideration of the relationship of mental illness to the alleged offense prior to charging, and that this process be directly reviewed by the District Attorney or senior-level designees; and that diversionary treatment programs, including those treating patients for dual diagnoses of mental illness and substance abuse, be made available as alternatives to incarceration.⁸³

III. California Counties: A Prime Target for Litigation

California offers a fertile climate for test litigation seeking to force counties to provide public mental health services in the community rather than in a jail setting. First, employing this litigation strategy in California would capitalize on the opportunity created by the U.S. Supreme Court's

81. Examples are discussed in Part III, *infra*.

82. The balance between executive, legislative, and judicial branches of government is generally held to require federal courts to defer to the legislative and executive branches in crafting the specifics of public policy, including determinations of how to alter existing policies to comply with Constitutional requirements. *Turner v. Safley*, 482 U.S. 78, 84–85 (1987).

83. See JUDICIAL COUNCIL REPORT, *supra* note 52.

2011 decision in *Brown v. Plata*.⁸⁴ In *Plata*, the Court ruled that California had to substantially reduce the population of its severely overcrowded prisons, in part because overcrowding prevented the State from providing constitutional levels of mental health care to prisoners.⁸⁵

The State's policy response to this decision, referred to as "Realignment," established that a category of individuals referred to as "non-non-nons" (non-violent, non-serious crimes, non-sex offenders) could no longer be sent to State prisons and, instead, were made the responsibility of the counties.⁸⁶ Both parolees and persons with new convictions in these categories remain in county jail facilities rather than being transferred to state prisons.⁸⁷ As part of Realignment, California earmarked money for criminal justice reform, creating a funding stream from the State to counties to help the counties address these populations.⁸⁸ Some California counties have used Realignment funds to create or expand an array of community-based services options for forensic and at-risk populations.⁸⁹ However, many counties have affirmatively chosen to spend their Realignment dollars solely or largely on jail expansion and law enforcement rather than funding mental health and related support services in the community.⁹⁰ Evidence of such decision-making by counties—found, for example, in their budget documents, agendas and minutes of their legislative bodies, and applications for State funding—makes them especially good targets for this kind of litigation.

For example, the 2012 budgets (the most recent year for which this data is available) for California counties show that six of the twenty-five counties receiving the most Realignment funding allocated less than five percent of Realignment funds for health, treatment, or services.⁹¹ Two of these counties allocated zero Realignment funds for health, treatment, or services.⁹² Sacramento County, the eighth largest county in the state and the seat of the state capital, was one of those two counties.⁹³ Sacramento allocated almost half of its Realignment funds to add jail capacity, and the rest to the probation and sheriff's departments.⁹⁴ The Realignment budget distribution reflects affirmative choices by counties about how to allocate resources for the forensic population, including the segment with mental illness.

84. 563 U.S. 493 (2011).

85. *Id.* at 517–22.

86. Public Safety Realignment Act of 2011, ch. 15, A.B. 109, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

87. *Id.*

88. *Id.*

89. This includes people who have been charged with, convicted of, and/or pleading to criminal offenses, people who have been incarcerated, people on probation or parole, and people at risk of becoming so.

90. American Civil Liberties Union, PUBLIC SAFETY REALIGNMENT: CALIFORNIA AT THE CROSSROADS (2012).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

This pattern of funding allocation supports the litigation theory proposed in this Article, which posits that criminalization without community services reflects a policy choice by counties to punish mental illness and provide treatment only in the severely restrictive jail setting. Additionally, Realignment funding, as well as potential funding streams made available by the Affordable Care Act, provide an important means for getting past an initial atmospheric “but where is a money-strapped county supposed to get the money?” question.

Second, transinstitutionalization is a particular problem in California, where community services promised to replace statewide mental health services and institutions cut in the Reagan Era never materialized.⁹⁵ This dearth of services, paired with California’s infamous “tough on crime” approach, sentencing laws, and budget woes have led to a huge increase in the number of people with mental illness warehoused in California’s prisons.⁹⁶ Overall, California has the second highest prison and jail population in the United States and one of the highest recidivism rates.⁹⁷ The percentage of people with mental illness in that overall population continues to rise today, as do funding cuts for mental health services. As of 2014, forty-five percent of California State prisoners were identified as having serious mental illness, up from reported estimates of nineteen percent in 2007 and twenty-five percent in 2012,⁹⁸ and the percentage of jail inmates with mental illness is estimated to be even higher.⁹⁹ However, from 2009 to 2012, California reduced mental health funding by \$765 million, more than a fifth of its mental health budget.¹⁰⁰ There are more than five times as many people with serious mental illness in the state prisons alone than in the state psychiatric hospitals.¹⁰¹ And parolees with mental health issues are at seventy percent higher risk of “technical violations” other than absconding than those without mental health issues, which a task force for the Judicial Council of California concluded was likely a result of lacking access to services that support their transition back into the community.¹⁰²

Finally, the passage of Proposition 47 by California voters on November 4, 2014, also provides additional context for a lawsuit brought

95. Steinberg et al., *supra* note 4, at 5–6.

96. *Id.*

97. American Civil Liberties Union, *supra* note 88, at nn.2–3.

98. Steinberg et al., *supra* note 4, at 1. *See generally Inmates with Mental Illnesses Wait Months in Jail Before Treatment*, CALIFORNIA HEALTHLINE: DAILY EDITION (Mar. 20, 2017), <http://californiahealthline.org/morning-breakout/inmates-with-mental-illnesses-held-for-months-before-treatment> [https://perma.cc/42ZJ-682R] [hereinafter *Inmates Wait Months Before Treatment*].

99. The Bureau of Justice Statistics reported in 2006 that sixty-four percent of jail inmates had mental health problems. Approximately twenty-four percent of jail inmates reported symptoms meeting the criteria for a psychotic disorder. JAMES & GLAZE, *supra* note 7.

100. *Inmates Wait Months Before Treatment*, *supra* note 97.

101. Steinberg et al., *supra* note 4, at 7.

102. JUDICIAL COUNCIL REPORT, *supra* note 52, at 3.

against a California jurisdiction.¹⁰³ Proposition 47 was a state ballot initiative passed by voters that reduced certain drug possession and other nonviolent felonies to misdemeanors.¹⁰⁴ Similar to Realignment, Proposition 47 applies only to “non-non-nons,” excluding persons with prior convictions for serious, violent, and/or sex offenses.¹⁰⁵ Proposition 47 also created a “Safe Neighborhoods and Schools Fund” based on any savings to the state from the implementation of the Proposition, with the funds to be distributed to education, community corrections, and rehabilitation.¹⁰⁶ The passage of Proposition 47 thus demonstrates a shift in public opinion away from incarceration and towards treatment, and creates an additional potential funding source for community-based mental health services.

Applying relevant facts such as those outlined above to the litigation blueprint, California litigants would demonstrate that California and the county chosen, as well as the United States generally, have created a social and criminal justice infrastructure that elects to incarcerate people with mental illness rather than treat them in community and short-term inpatient psychiatric settings. Given Realignment and other funding streams such as Proposition 47, California litigants would present evidence that the selected county had a specific opportunity to consider how to spend State-allocated funds earmarked to address the re-integration of individuals who had been subject to State supervision and incarceration, and that the county chose to budget the money not for treatment, but for jail expansion and law enforcement. In California, litigants would likely be able to establish that the county knew that many of the people being returned to local supervision under Realignment had mental health needs, but the county elected not to serve those needs in the community. This subjective choice presents the court with clear evidence of a public policy decision to criminalize people with mental illness rather than treat them in the community, in violation of the Eighth Amendment and ADA.

Conclusion

While civil rights advocates in both the disability rights and prisoners’ rights legal communities have been understandably hesitant to risk the doctrinal gains made in the past two decades in presenting more novel arguments to the courts, we must mobilize all the resources we have to fight the criminalization of persons with mental illness. We must seize on growing public momentum for criminal justice reform to ensure that this population is not left behind the prison walls.

103. PROPOSITION 47: “THE SAFE NEIGHBORHOODS AND SCHOOLS ACT” 6 (2016), <http://www.courts.ca.gov/documents/Prop-47-Information.pdf> [<https://perma.cc/3LR8-SLS8>].

104. *Id.*

105. *Id.* at 10.

106. *Id.* at 6, 100.