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Suzanne Bouclin*

Identifying Pathways to and Experiences
of Street Involvement through Case Law

This research explores what can be learned about the experiences of street-involved people by reading cases that deal with people characterized on the record as “homeless.” The author builds on existing empirical research by reading a large body of cases to discuss pathways to and experiences of street involvement. She proceeds to more closely explore cases regarding people (1) who are identified in the cases as homeless, and (2) find themselves before the courts for having engaged in income generating activities. The author argues that cases constitute knowledge about street involvement in ways that may take us beyond what we already know from existing research. They can, for instance, reveal how cascading and compounding disadvantages are navigated on a daily basis, point to some of the ways in which people attempt to exhibit resiliency in the face of these experiences, and record how legal processes operate to stifle or hinder such expressions of agency.

La recherche vise à déterminer ce qui peut être appris sur les expériences des personnes itinérantes par la lecture d'arrêts de jurisprudence portant sur les personnes « sans-abris .» L'auteure part de la recherche empirique existante et examine un grand nombre de jugement afin d'explorer les voies qui ont mené à l'itinérance. Elle étudie de plus près les instances concernant des personnes (1) considérées comme étant des sans-abris, et qui (2) comparaissent devant les tribunaux pour s'être adonnées à des activités génératrices de revenus. Elle avance que les décisions constituent des connaissances sur l'itinérance. Elles peuvent, par exemple, mettre en évidence les facteurs qui facilitent ou contraignent des stratégies d'adaptation mais surtout montrent comment les processus judiciaires interviennent pour limiter et même étouffer ces expressions de résilience.

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Introduction

A wealth of empirical research links inadequate housing, mental illness, and chronic homelessness, and consequently, considerable support for a Housing First approach¹ to eradicating urban, adult homelessness.² Critical scholars have pointed out, however, that Housing First models of intervention are often coupled with legal practices and responses designed

1. Housing First is a series of assumptions about and methods to address homelessness. The overarching belief is that people who secure stable and appropriate housing first will be better equipped to deal with mental illness and addiction through additional supports and services as needed. It is often compared to the Treatment First model of intervention and care which begins with treatment and builds to “housing readiness.” See generally: Sam Tsemberis, *Housing First: The Pathways Model to End Homelessness for People with Mental Illness and Addiction* (Center City, MN: Hazelden Press, 2010).

2. Ontario, Ministry of Municipal Affairs and Housing, *Building Foundations: Building Futures: Ontario's Long-Term Affordable Housing Strategy* (Toronto: Queen's Printer for Ontario, 2010).

to remove homeless people from public spaces.³ In this article, I ask what can be learned about the experiences of street-involved people beyond their obvious lack of permanent and appropriate housing by reading cases that deal with people characterized on the record as “homeless?”⁴ Occasionally the cases fail to capture (or perhaps even erase)⁵ social, political, economic, and cultural contexts in which some street-involved people find themselves before the courts. Nevertheless, I examine how the cases can also become a source of knowledge about street involvement, one that may take us beyond what we already know from existing research. They serve as an additional record of how cascading and compounding disadvantages are navigated on a daily basis, point to some of the ways in which people attempt to exhibit resiliency in the face of these experiences, and reveal how legal processes operate to stifle or hinder such expressions of agency.

I build on existing empirical research by reading a large body of cases to discuss pathways to and experiences of street involvement. I proceed to more closely explore cases regarding people (1) who are identified on the record as homeless, and (2) find themselves before the courts for having engaged in income generating activities. I will first outline what

3. Fran Klodawsky, “Home Spaces and Rights to the City: Thinking Social Justice for Chronically Homeless Women” (2009) 30:6 *Urban Geography* 591 (arguing that the adoption of housing first in Toronto has undermined public protest by anti-poverty activists and street-involved people); Margot Young, “The Right to Housing and the Right to the City” (Presentation delivered at the Pacific Housing Research Network Housing Symposium, 17 October 2014) [unpublished] (a critical engagement with the conflicting ideological beliefs and strategies that inform Housing First models of economic justice and those which favour and protect a right to the city for everyone); see also: Nicholas Pleace, “The Ambiguities, Limits and Risks of Housing First from a European Perspective” (2011) 5:2 *European J Homelessness* 113. Some authors express concerns about the methodology used to justify Housing First interventions, see: Danielle Groton, “Are Housing First Programs Effective?: A Research Note” (2013) 40:1 *J Sociology & Social Welfare* 51; Jeannette Waegemakers Schiff & John Rook, *Housing First: Where is the Evidence?* (Toronto: Homeless Hub, 2012), online: <www.homelesshub.ca/sites/default/files/HousingFirstReport_final.pdf>.

4. Resiliency is not taken as a set of fixed attributes, but rather as a cluster of mechanisms, processes, competencies and capacities which shift over time and facilitate an individual’s ability to cope with stresses and adversity: Michael Rutter, “Psychosocial Resilience and Protective Mechanisms” (1987) 57:3 *American J Orthopsychiatry* 316; Miriam Stewart, Graham Reid & Colin Mangham, “Fostering Children’s Resilience” (1997) 12:1 *J Pediatric Nursing* 21. According to Wagnild and Young, resiliency may be characterized by equanimity, perseverance, meaningfulness, existential aloneness, and self-reliance: Gail M Wagnild & Heather M Young, “Development and Psychometric Evaluation of the Resilience Scale” (1993) 1:2 *J Nursing Measurement* 165 at 167-168. See also: Lynn Rew et al, “Correlates of Resilience in Homeless Adolescents” (2001) 33:1 *J Nursing Scholarship* 33 at 34 (“resilience includes a ‘bouncing back’ or recovery of an organism to baseline after added pressure or strain”).

5. In her examination of the colonial foundation of the Canadian legal system, Mary Ellen Turpel refers to its erasure and denial of Aboriginal peoples’ lives: Mary Ellen Turpel, “Home/Land” (1991) 10 *Can J Fam L* 17.

I understand as street involvement and explain why that concept better captures some of the complexities of people who experience homelessness.

I. *Street involvement as social condition and performance*

One of my starting assumptions is that, unlike some other identities recognized in law and explored by other authors in this collection (whether Métis,⁶ queer⁷, Canadian,⁸ or other collective identities⁹) the social group referred to as “the homeless” is better understood as a conglomeration of people experiencing a social condition¹⁰ but it is also an identity marker, and one that has different connotations depending on whether it is performed (self-enacted) or imputed (ascribed) by others.¹¹

Research at the intersection of identity theories and homelessness has started to deploy the category of “homeless person” in a heuristic fashion—to refer to a broad, heterogeneous group of people—rather than ascribing to homeless people a one-dimensional identity or presuming that the homeless are a distinct category.¹² Scholars highlight how people who are homeless construct and maintain concepts of self to resist stigma and to constitute subjectivities.¹³ These concepts of self for people who are deemed to be homeless rarely attach to homelessness itself, but, rather,

6. Brenda L. Gunn, “Defining Métis People as a People: Moving Beyond the Indian/Métis Dichotomy” (2015) 38:2 Dal LJ 413.

7. Emily Snyder, “Queering Indigenous Legal Studies” (2015) 38:2 Dal LJ 591 (proposing a queer indigenous framework for legal studies).

8. Eric M. Adams, “Canadian Constitutional Identities” (2015) 38:2 Dal LJ 311 (critically engaging with and historically locating Canada’s constitutional identity).

9. Frédéric Mégret, “Protecting Identity by Ignoring it?: A Critical Look at the French and Rwandan Paradoxes” (2015) 38:2 Dal LJ 549 (examining individual versus collective affirmations of identity).

10. This is similar to how people who are criminalized manage multiple identities which shape and reflect their status within and relationship to prison. Debra Parkes, “Prisoner as Identity: Law and its Limits,” paper presented at *Who Are We? The Quest for Identity in Law* at the Schulich School of Law, Dalhousie University, October 2014) [unpublished]. Unsurprisingly, a similar assemblage of people makes up the street-involved and incarcerated populations in Canada: Sylvia Novac et al, “A Revolving Door? Homeless People and the Justice System in Toronto” in J. David Hulchanski et al, eds, *Finding Home: Policy Options for Addressing Homelessness in Canada* (Toronto: Cities Centre Press, 2009), ch 7.1 at 4. The Mental Health Policy Research Group found that, in a sample of three hundred individuals in the adult shelter system, 73% of the men and 27% of the women had been arrested and 49% of the men and 12% of the women had been in prison at least once: cited in *ibid* at 2.

11. Cameron Parsell, “Homeless Identities: Enacted and Ascribed” (2011) 62:3 British J Sociology 442.

12. But see: *ibid* at 442 (arguing that people without permanent shelter express agency in the way they enact elements of the self and the associated experiences of homelessness. “Much homelessness research has had the consequence of isolating the ‘homeless person’ as a distinct category.”)

13. Anne R. Roschelle & Peter Kaufman, “Fitting In and Fighting Back: Stigma Management Strategies among Homeless Kids” (2004) 27:1 Symbolic Interaction 23; David A. Snow & Leon Anderson, “Identity Work Among the Homeless: The Verbal Construction and Avowal of Personal Identities” (1987) 92:6 American J Sociology 1336; Alice Farrington & W. Peter Robinson, “Homelessness and Strategies of Identity Maintenance: A Participant Observation Study” (1999) 9 J Community & Applied Social Psychology 175.

refer to “other life experiences or activities”¹⁴ that make anyone—stably housed or not—a complex normative being. Such experiences or activities include adherence to values and commitments, moments of inter-subjective exchange, membership to community (familial, religious, social, etc.), and real or perceived responsibilities towards others.

Unlike “homelessness,” however, “street involvement” may be a more appropriate heuristic device for understanding the lived experiences of people we generally refer to as, or imagine to be, homeless. Street involvement conveys a complex social problem resulting from cascading structural inequalities and personal circumstances rather than an identity *per se*.¹⁵ People who are street-involved make up an amorphous and heterogeneous group with shared socio-economic challenges, including extreme poverty,¹⁶ un/under-employment, insufficient access to health and social programs, lack of access to harm reduction or drug treatment programs, and a lack of appropriate and stable housing.¹⁷ These broad, institutional problems are compounded by personal experiences of violence,¹⁸ post-traumatic stress;¹⁹ racism; intergenerational trauma resulting from the residential school system;²⁰ problem gambling and associated debt,²¹ and

14. Cameron Parsell, “‘Homeless is What I Am, Not Who I Am’: Insights from an Inner-City Brisbane Study” (2010) 28:2 *Urban Policy & Research* 181 at 181.

15. There are no complete or reliable national statistics on homelessness across Canada: Stephen Gaetz, *Understanding Research on Homelessness in Toronto: A Literature Review* (Toronto: York University & Wellesley Central Health Foundation, 2004) at 2. A recent study estimates that 200,000 people in Canada are unsheltered, provisionally sheltered, or in transition housing: Stephen Gaetz et al, *The State of Homelessness in Canada 2013* (Toronto: Canadian Homelessness Research Network Press, 2013) at 5.

16. At least one case points to the fact that not all people who find themselves street-involved start off materially poor. For instance, a lawyer who had been suffering from a mood disorder and experienced two periods of homelessness was disbarred for unprofessional conduct, including failing to account for funds to a client: *Law Society of Upper Canada v Apostolopoulos*, 2012 ONLSP 133, [2012] LSDD No 168.

17. In *Children’s Aid Society of the City of Kingston and County of Frontenac v LK* (2004), 135 ACWS (3d) 432, [2004] OJ No 4942, [*Children’s Aid Society v LK*] for instance, a precariously housed family was rendered homeless after fire was set to their home.

18. See, for instance: Sandra Wachholz, “Hate Crimes against the Homeless: Warning-Out New England Style” (2005) 32:4 *J Sociology & Social Welfare* 141.

19. Annie Bergeron-Oliver, “The Number of Homeless Veterans in Canada is Soaring,” *iPolitics* (30 June 2014), online: ipolitics.ca/2014/06/30/the-number-of-homeless-veterans-in-canada-is-soaring/; see also: *Decision No 1327/12E*, 2012 ONWSIAT 1965, [2012] OWSIATD No 1945.

20. Terry L Mitchell & Dawn T Maracle, “Healing the Generations: Post-Traumatic Stress and the Health Status of Aboriginal Populations in Canada” [2005] *J Aboriginal Health* 14; Peter Menzies, “Homeless Aboriginal Men: Effects of Intergenerational Trauma” in Hulchanski et al, *supra* note 10, ch 6.2; Julia Hughes, “Instructive Past: Lessons from the Royal Commission on Aboriginal Peoples for the Canadian Truth and Reconciliation Commission on Indian Residential Schools” (2012) 27:1 *CJLS* 101.

21. Peter Ferentzy, WJ Wayne Skinner & Flora I Matheson, “Illicit Drug Use and Problem Gambling” [2013] *ISRN Addiction* 1.

a cycle of criminalization, incarceration/institutionalization, and release/deinstitutionalization without appropriate social support.²²

Street involvement more adequately describes the “life experiences or activities” associated with the street than the concept of homelessness does. Street involvement can reference an individual or a family’s relationship to physical shelter: living in temporary housing (missions, churches, youth hostels, women’s shelters, cars, etc.) or sub-standard housing (rooming houses, squats, etc.);²³ being mobile;²⁴ transitioning from rural communities or reserves to urban communities;²⁵ or re-entering a community after a period of imprisonment. Yet the “life experiences and activities” also give shape to street-involved peoples’ multiple and dynamic concepts and performances of self: occasional or long-term use of targeted services; support networks and drop-in day centres (as discriminating service-users), including detoxification centres, methadone maintenance

22. On the release from prison to homelessness ratio, see generally: The John Howard Society of Toronto, *Homeless and Jailed: Jailed and Homeless* (Toronto: John Howard Society of Canada, 2010), online: John Howard Society of Canada <www.johnhoward.ca/document/JHS-Toronto%20Report%20Homeless%20and%20Jailed.pdf>. On the relationship between homelessness and a criminal record, see: Legal Action Center, *Housing Laws Affecting Individuals with Criminal Convictions* (New York: Legal Action Center, 2000), online: The Homeless Hub <www.homelesshub.ca/resource/housing-laws-affecting-individuals-criminal-convictions>. For a comprehensive cartography and social history of dependent populations discharged from institutions, see: Michael J Dear & Jennifer R Wolch, *Landscapes of Despair: From Deinstitutionalization to Homelessness* (Princeton, NJ: Princeton University Press, 1987).

23. York Media Relations, “New Report Says 200,000 Canadians Experience Homelessness Each Year” (19 June 2013), online: York University <news.yorku.ca/2013/06/19/new-report-says-200000-canadians-experience-homelessness-each-year/>.

24. Kristin M Ferguson, Kimberly Bender & Sanna J Thompson, “Predictors of Transience Among Homeless Emerging Adults” (2013) 29:2 *J Adolescent Research* 213 at 214 (on the fact that the population of street-involved people who migrate are also referred to as “travelers,” “transgressives,” or, in the case of youths, “gutter punks”).

25. Much research around street involvement displays an urban-centric bias; however, there is increased research on rural homelessness and poor housing conditions on reserves. See, for instance: Evelyn Peters & Vince Robillard, “Urban Hidden Homelessness and Reserve Housing” in Jerry P White et al, eds, *Aboriginal Policy Research: Moving Forward, Making a Difference*, vol 4 (Toronto: Thompson Educational, 2013) 189; Caryl Patrick, *Aboriginal Homelessness in Canada: A Literature Review* (Toronto: Canadian Homelessness Research Network Press, 2014), online: The Homeless Hub <www.homelesshub.ca/sites/default/files/AboriginalLiteratureReview.pdf>. On the specificities of rural homelessness, see: Eden Grodzinski et al, *Rural Homelessness Study prepared for the County of Wellington* (September 2011), online: Wellington County <www.wellington.ca/en/socialservices/resources/wellingtoncounty_ruralhomelessnessstudy.pdf>.

services or safer consumption sites²⁶ (as self-care providers);²⁷ hospitals²⁸ or emergency health facilities²⁹ (as informed patients); mobile food units or food banks and community kitchens³⁰ (as consumers and providers);³¹ and coffee shops (as customers).³²

Finally, the concept of “street involvement” can better convey the resiliency, the exercise of autonomy and agency, and the expressions of normativity of people who are unstably housed. As I elaborate in a later section, one way street-involved people express and practice resiliency is by engaging in non-recognized work or income generation through creative means associated with life on the streets.³³ Street involvement is

26. Ottawa’s DUAL (Drug Users Advocacy League) works with people who use injection drugs within a harm-reduction framework that develops and, when possible, rebuilds relationships with family, friends, coworkers and neighbours: DUAL Ottawa, “Methadone in Ottawa” (6 December 2013), online: <dualottawa.ca/2013/12/06/methadone-in-ottawa>. See also: Suzanne Bouclin & Priyanka Vittal, “The Insite Decision and the Case for Supervised Consumption Facilities in Ottawa” (2012) 1:1 Can J Poverty L 91.

27. Dennis P Culhane & Stephen Metraux, “Rearranging the Deck Chairs or Reallocating the Lifeboats?: Homelessness Assistance and Its Alternatives” (2008) 74:1 J American Planning Association 111.

28. There is a clear association between street involvement and increased risk of health problems: Ferguson, Bender & Thompson, *supra* note 24 at 215.

29. Despite the street community’s greater need for health care, there exists little information on their use of health care facilities, the barriers they face when attempting to obtain care, or the appropriateness and effectiveness of the services they do receive. Research has shown that 32–54% of people who identified as having been homeless reported that they received care in an emergency department during that year (over three times the rate of use in the general population): Centre for Research in Inner City Health, “Health Care Utilization Among People Experiencing Homelessness” (2012), online: St Michael’s Hospital <www.stmichaelshospital.com/crich/projects/health-care-utilization-homeless/>.

30. See, for instance: South-East Ottawa Community Health Centre, “Community Kitchen,” online: <www.seochc.on.ca/programs-services/community-kitchen/> (until recently, the South-East Ottawa Community Health Centre offered participants access to a refrigerator, a space to put their food and access to a kitchen either on a 24-hour basis or within a more limited schedule).

31. According to Food Banks Canada, 794,738 Canadians used food bank services in March 2009, an 18% increase from the previous year; 49% of food bank users are families with children, 12% are of aboriginal ancestry, almost 5% identify as homeless, and 27% are living in social housing: Food Banks Canada, *HungerCount 2009* (Toronto: Food Banks Canada, 2009), online: <www.foodbankscanada.ca>.

32. Montreal-based *L’Itinéraire* provides a venue for the street-involved to write, edit, and distribute a collaboratively produced magazine in the context of a more holistic social reintegration strategy: Groupe communautaire L’Itinéraire, online: <itineraire.ca>.

33. See generally: Patrick Parnaby, “Disaster Through Dirty Windshields: Law, Order and Toronto’s Squeegee Kids” (2003) 28:3 Can J Sociology 281; Caroline Keenan, Vicky Maldonado & Bill O’Grady, “Working the Streets: an International Comparative Analysis of Income Generation among Street Youth” (2006) 58 Can Rev Social Policy 25; Stephen Gaetz & Bill O’Grady, “Work on the Streets” in David Levinson, ed, *Encyclopedia of Homelessness*, vol 2 (Thousand Oaks, CA: SAGE, 2004) 606 [Gaetz & O’Grady, “Work on the Streets”]; Bill O’Grady & Stephen Gaetz, “Street Survival: A Gendered Analysis of Youth Homelessness in Toronto” in Hulchanski et al, *supra* note 10, ch 3.4.

thus broader than homelessness and is a set of disaggregated, fluid markers that refer to modes of identification with and through life on the street.

II. *Research methods and data selection*

My research on street involvement began with a comprehensive literature review of scholarship and policy papers on homelessness and access to justice. The findings from this review have here been put in dialogue with quantitative and qualitative data collected through a database study of case law.³⁴ The database research is limited to reported Ontario court cases and Ontario administrative tribunal decisions between 2002 and 2012. Using the search terms *homeless*, *homelessness*, *street-involved*, *itinérance*, *sans-abris*, and *transient*, which reflect the discourse used in anti-poverty academic writing and activism,³⁵ my research team collected an initial sample of 5540 cases.³⁶ The data, composed of the text and narratives produced within these cases, were then analyzed in accordance with grounded theory principles.³⁷ Induction and open coding were used to delineate, compare, and categorize the research samples and to establish patterns among the cases.³⁸

34. The findings from this research will eventually be supplemented by data collected through qualitative methods, namely, interviews with street-involved people in Ontario on their legal needs.

35. One of the limitations of my findings is that judges and tribunal members may not deploy the same language as activists and academics in their decisions. For the use of «itinérance» or «personne en situation d'itinérance» (instead of «sans-abris»), see: Marie-Ève Sylvestre, Céline Bellot & Catherine Chesnay, «De la justice de l'ordre à la justice de la solidarité: une analyse des discours légitimateurs de la judiciarisation de l'itinérance au Canada» (2012) 81:2 *Dr et soc* 299. On the use of "street-involved" rather than "homeless," see: Suzanne Bouclin, *Street Law's Sites, Sights and Media* (PhD Thesis, McGill University Faculty of Law, 2011) [unpublished] [Bouclin, *Sites, Sights and Media*].

36. On November 30th, 2013, we initiated a search through the LexisNexis and Azimut databases for the indicated search phrases. The figures used are a "snapshot in time" of the total number of results returned for these search terms on that specific date. The content in the LexisNexis and Azimut databases is in constant flux as cases and judgments are added to the database. Consequently, should the same search be conducted today, the sample may not be identical to that which was generated on our search day.

37. I worked with a research team of students to code and analyze the cases. We read the body of cases with an openness to patterns, recurring issues, and "thematic networks" (what Attridge-Stirling refers to as "web-like illustrations" that "summarize the main themes constituting a piece of text") regarding the lives of street-involved people who found themselves before the courts. See: Jennifer Attridge-Stirling, "Thematic Networks: An Analytic Tool for Qualitative Research" (2001) 1:3 *Qualitative Research* 385 at 385.

38. Barney G Glaser & Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine, 1967); Barney G Glaser, *Theoretical Sensitivity: Advances in the Methodology of Grounded Theory* (Mill Valley, CA: Sociology Press, 1978); Barney G Glaser, *Doing Grounded Theory: Issues and Discussions* (Mill Valley, CA: Sociology Press, 1998); Barney G Glaser, *The Grounded Theory Perspective: Conceptualization Contrasted with Description* (Mill Valley, CA: Sociology Press, 2001); John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, 4th ed (Thousand Oaks, CA: SAGE, 2014); Anselm Strauss & Juliet Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (Newbury Park, CA: SAGE, 1990).

From the original sample, I excluded a significant number of cases. Some labour disputes,³⁹ human rights claims,⁴⁰ and workplace safety issues involving staff at homeless shelters,⁴¹ and other matters such as zoning disputes⁴² were not treated in the analyzed data set. These cases are nonetheless interesting to anti-poverty scholars, as they reveal the stressful conditions experienced by people working in the frontline care industries⁴³ and the animus toward the construction of care facilities in particular neighbourhoods.⁴⁴

I also excluded a number of false positives, in which search terms were featured within the decisions but did not refer to the condition of street involvement.⁴⁵ In one such case, a witness's history of donating food to "street youth" was used to help establish her credibility.⁴⁶ The term

39. For instance, one decision wrestled with whether a shelter for homeless people with mental health and additional issues is governed by labour legislation applicable to hospitals: *Canadian Union of Public Employees, Local 4895 v Bayfield Homes Ltd*, 2012 CanLII 8074 (ON LRB).

40. In a case before the Human Rights Tribunal of Ontario, for instance, a complainant alleged discrimination in hiring after being rejected for a counsellor position with the respondent facility: *Daley v Eva's Initiatives for Homeless Youth*, 2009 HRTO 160, [2009] OHRTD No 165.

41. The Workplace Safety and Insurance Appeals Tribunal, for instance, examined whether an intake worker in a homeless shelter should receive benefits for mental stress stemming from a hostile and poorly managed work environment: *Decision No 2674/08*, 2009 ONWSIAT 217, [2009] OWSIATD No 237.

42. *Hastings Corp v Toronto (City) Chief Building Official*, [2004] OTC 147, 129 ACWS (3d) 196 (ON Sup Ct), aff'd (2004), 188 OAC 282, 36 CLR (3d) 28 (ONCA) (building permits for two temporary housing/counselling facilities for refugees); *Ottawa Salus Corp v Municipal Property Assessment Corp* (2002), 61 OR (3d) 597, [2002] OJ No 2682 (ON Sup Ct) (shelter seeking a municipal tax exemption); *Sun Life Assurance Co of Canada v Burlington (City)* (2007), 57 OMBR 280, [2007] OMBD No 1277 (dispute involving the conversion of a rental property into condominiums).

43. On the stress and working conditions of those working within the care industry, see generally: Ann MacDonald, *The Costs and Benefits of Compassion for Ottawa's Frontline Shelter Workers* (MA Thesis, Saint Paul University Faculty of Human Sciences, 2009) [unpublished]; Cheron D Sutton-Brock, *Homelessness: An Evaluation of Resident Self-Efficacy and Worker Burnout within County Homeless Shelters* (DPA Thesis, Capella University School of Public Service Leadership, 2013) (Ann Arbor, MI: ProQuest, 2013).

44. See generally: Lois M Takahashi & Michael J Dear, "The Changing Dynamics of Community Opposition to Human Service Facilities" (1997) 63:1 J American Planning Association 79. See also: Ahmed M Bayoumi et al, *Report of the Toronto and Ottawa Supervised Consumption Assessment Study, 2012* (Toronto: St. Michael's Hospital and the Dalla Lana School of Public Health, University of Toronto, 2012) (response to proposed safer consumption sites in Toronto); Natasha Kuzmak & Larissa Muller, "Siting Homeless Shelters in Calgary: Impacts of the New Land Use Bylaw and the Local Development Process" (2010) 19:2 Can J Urban Research 1 (regarding Calgary's shift towards building homeless shelters in industrial rather than residential zones).

45. In a number of such cases, witnesses describe economically marginal areas as having significant homeless populations: *Re Blue Moon*, [2006] OAGCD No 194; *Re OCHO*, [2005] OAGCD No 426; *Re 1305333 Ontario Inc (cob O'Grady's Tap & Grill)*, [2008] OAGCD No 281; *Re 2109889 Ontario Inc (cob Harlem 1920)*, [2008] OAGCD No 264; *Re 6664849 Canada Ltd (cob 2000 Plus One Donuts & Deli)*, [2010] OAGCD No 44.

46. *2 For 1 Subs Ltd v Ventresca* (2006), 17 BLR (4th) 179, [2006] OJ No 1528 (ON Sup Ct) at para 64 (witness refers to donating food to the homeless).

“transient,” while yielding several relevant cases in relation to custody and access,⁴⁷ also appeared as a descriptor for a transitory or fleeting moment.⁴⁸ Similarly, “homeless” was occasionally a metaphor for people forced to find stable though temporary housing, rather than referring to the social condition of street involvement.⁴⁹

Nevertheless, even in cases in which street involvement was peripheral to the issue at hand, the judgments occasionally highlighted how a range of people find themselves on the street. For instance, in *Hogan v. Ontario (Minister of Health and Long Term Care)*, in which the applicant challenged Ontario’s insured health benefits scheme, expert witnesses provided evidence that Trans youth are overrepresented in the homeless population because of stigma and rejection by their families and face significant discrimination when trying to secure housing.⁵⁰ The case illustrates the specificity and diversity of youth homelessness but was excluded from my data set because neither the issue at trial, nor the parties at hand directly engaged questions relating to street involvement.

The remaining 957 cases were coded and categorized according to two themes which emerged through my data set: how a range of people experience street involvement and the scope of their engagement with the law when trying to generate income. Scholars who engage in case commentary tend to employ a case method, closely examining a particular case, analyzing it in detail, locating it in relation to specific precedents, and

47. A parent’s “transience” is a factor used to evaluate whether a child is in need of protection, and may be used as evidence of a lack of permanence, secure attachment or stability in the family unit; see, for instance: *CAS v Wing*, [2009] OJ No 5386 (ON Sup Ct); *Children’s Aid Society v LK*, *supra* note 17; *Children’s Aid Society of Toronto v CG*, 2012 ONCJ 423, [2012] OJ No 3140 [*Children’s Aid Society v CG*].

48. The term “transient” was used to describe a temporary physical ailment in at least one case: “transient back pain caused by prolonged sitting in a car that resolves when the driving ceases does not constitute an injury”: *Decision 2465/07*, 2008 ONWSIAT 1605 at para 94, [2008] OWSIATD No 1624.

49. A tenant, for instance, was temporarily obliged to stay with friends because her landlord would not let her move in on a specific day. While this was certainly a hardship for the tenant, she was gainfully employed and had sufficient social support to find friends with whom to stay: *File No TST-31143-12*, 2012 LNONLTB 1912. The tribunals generally refused to evict tenants who evidenced a genuine fear of becoming homeless: See *File No NOL-05144-11*, 2011 LNONLTB 2107; *File No NOL-13449*, [2005] ORHTD No 93; *File No TEL-51896*, [2005] ORHTD No 80 (in which the Board ordered that the tenant must maintain her apartment, but refused to terminate the tenancy at this time as the landlord requested); *File No TSL-16190*, 2008 LNONLTB 57 (in which the Board refused an eviction order but ordered that the tenant not admit a disruptive guest in to the complex); *File No TSL-78583*, [2006] ORHTD No 140; *File No SWL-11969-10*, 2011 LNONLTB 768; *File No CEL-24801-12*, 2012 LNONLTB 1807; *File No NOL-07311-12*, 2012 LNONLTB 283.

50. 2006 HRTO 32, [2006] OHRTD No 34 (see Dr. Raj’s testimony at para 329 and Kyle Scanlon’s testimony at para 331).

hypothesizing its future relevance and application.⁵¹ Such case comments can be extremely useful discussions of the application of doctrine, and in this paper, I do examine in closer detail a few cases that draw attention to the role lower court judges play in the constitution of knowledge about street involvement. However, here, I approach a large number of cases as a whole that constitute a story in themselves about street involvement and a record of social marginalization. I am primarily interested in what can be discovered or confirmed about pathways and experiences of street involvement by looking at the narratives about homelessness generated through a large body of cases. My reading of these cases, unlike a close reading of a particular case, provides a sense of the connections among people, places, events, and other elements of life, and, by extension, a sense of the relationships that exist among a variety of cases involving different people. In particular, my examination of a large body of cases has confirmed several of the overarching and shared pathways to street involvement found in other empirical research. It also presents additional findings about the unique experiences of daily legal regulation, especially regarding the income generating strategies in which street-involved people engage.⁵²

III. *Pathways to street involvement*

My reading of a large corpus of cases confirms and adds some specificity to what the empirical research of many anti-poverty scholars has revealed about the pathways to street involvement. The concept of homelessness, in the collective Western imagination at least, conjures the visible expression

51. I refer to close reading as the broad and ancient literary method of carefully and slowly reading a text with great attention to details therein. However, the notion of close reading in legal studies is more often associated with the New Criticism movement in the 1970s which deployed rhetorical analysis to understand the relationships between author, text and reader. In his discussion on the use of literary theories in legal methods, for instance, Zahr Said refers to close reading as “closely comparing the recitation of facts in the majority with the dissent’s version of events or the story put forth by the parties, and detecting significant rhetorical choices and noteworthy shifts in tone or style”: Zahr K Said, “Incorporating Literary Methods and Texts in the Teaching of Tort Law” (2012) 3 California LR Circuit 60 at 69.

52. Other legal scholars have also explored how large bodies of case law may be constitutive of the social context in which marginalized people experience violence. See, for instance, Elaine Craig, “Person(s) of Interest and Missing Women: Legal Abandonment in the Downtown Eastside” (2014) 60:1 McGill LJ 1.

of grizzly men who sleep rough.⁵³ However, as the Canadian Observatory on Homelessness has recently explained, being homeless is not just lacking shelter; a range of people with a diversity of experiences and subjectivities are affected, whether or not they identify or are identified as homeless.⁵⁴ In the following section, I outline what empirical studies have determined are the primary pathways to homelessness. I then show how the themes that emerge from my review of the case law—the link between institutional and historical racism and street involvement, gender differences on the street, the heterogeneity of the homeless population to name a few—often confirm other research. The case law, as I elaborate, also serves as an additional narrative of the challenges and issues street-involved people face, such as intergenerational housing instability, violence and victimization, and how legal structures and practices operate in ways that may attenuate expressions of resiliency, specifically, the assertion of legal subjectivities and non-normative forms of income generation.

1. *Indigeneity,⁵⁵ race, and racism*

Researchers and indigenous activists have long demonstrated the crisis of, and the cumulative impact of government policies on, Indigenous and

53. See: Bouclin, *Sites, Sights and Media*, *supra* note 35 (on how visual media constitute the figure of the homeless person). But see: United Kingdom, Department for International Development, *The Nature and Extent of Homelessness in Developing Countries: R7905 Project Report* (CARDO, Newcastle University, 2003) at ii (on how homelessness in developing countries is largely a result of the failure of the housing supply system to address the needs of the rapidly growing, employed, urban population who opt to sleep on the streets in order to send money to their families); Iman Bibars, “Street Children in Egypt: From the Home to the Street to Inappropriate Corrective Institutions” (1998) 10:1 *Environment & Urbanization* 201 (on the large percentage of children living and working on the streets in Egypt); Arpan Tulsyan, “Street-Side Story,” *India Together* (4 June 2008), online: <indiatgether.org/homeless-poverty> (on the use in India of the term “homelessness” to refer to anyone not living in a “census house,” in contrast to the criminalization of “beggars” under the *Bombay Beggary Prevention Act*, 1959, of people who solicit alms).

54. Canadian Observatory on Homelessness, *Canadian Definition of Homelessness* (Homeless Hub, 2012) at 1, online: <homelesshub.ca/sites/default/files/COHhomelessdefinition.pdf>, defines homelessness in part as follows:

Homelessness describes the situation of an individual or family without stable, permanent, appropriate housing, or the immediate prospect, means and ability of acquiring it. It is the result of systemic or societal barriers, a lack of affordable and appropriate housing, the individual/household’s financial, mental, cognitive, behavioural or physical challenges, and/or racism and discrimination. Most people do not choose to be homeless, and the experience is generally negative, unpleasant, stressful and distressing.

55. I use indigeneity or Aboriginal status to refer to the collective of cultures, nations, language groups and peoples of Indigenous ancestry, First Nations (people of Aboriginal ancestry who may be registered under the *Indian Act*, RSC 1985, c I-5), Métis (Indigenous descendants of the historic Métis Nation who are distinct from other Aboriginal peoples), and Inuit (Indigenous descendants of peoples who inhabited arctic regions in present day Canada, Greenland, and the United States). See generally: Darren E Lund, “Everyday Racism in Canada: Learning and Teaching Respect for Aboriginal People” (2006) 14:1 *Multicultural Education* 49.

First Nations people's housing and the direct link between such inadequate housing and aboriginal street-involvement.⁵⁶ As Peter Menzies writes,

There is increasing evidence that more than 140 years of social strategies aimed at the assimilation, segregation, and integration of generations of Aboriginal children into mainstream Eurocentric culture have resulted in personal, familial, community, and national trauma.⁵⁷

Longitudinal research indicates that Aboriginal people constitute between twenty and fifty per cent of the urban street-involved population.⁵⁸ In addition, over half of First Nations people on reserves live in sub-standard housing.⁵⁹ One of the results of damaging government policies is that Aboriginal people are at greater risk of socio-economic marginalization and housing inadequacies off-reserve; compared to their non-Aboriginal counterparts in urban settings, Aboriginal people have lower levels of formal, accredited education, higher unemployment rates, and lower individual and family incomes.⁶⁰

Furthermore, it is now generally accepted that Aboriginal and otherwise racialized groups are over-policed and consequently overrepresented within the criminal justice system.⁶¹ There are multiple, complex reasons for the overrepresentation of Aboriginal and otherwise racialized peoples in poverty-related case law; in criminal matters, for instance, people from

56. The Idle No More movement was in part fueled by frustration regarding the ongoing crisis in housing and infrastructure on First Nations reserves: Idle No More, "The Manifesto," online: <www.idlenomore.ca/manifesto>; Editorial, *The Star* (20 December 2012), online: <www.thestar.com/opinion/editorials/2012/12/20/why_idle_no_more_is_gaining_strength_and_why_all_canadians_should_care.html>.

57. Menzies, *supra* note 20 at 1-2.

58. Katherine AH Graham & Evelyn Peters, *Aboriginal Communities and Urban Sustainability* (Ottawa: Canadian Policy Research Networks, 2002) at 15-16.

59. Canada Mortgage and Housing Corporation, "2006 Census Housing Series: Issue 13—On-Reserve Housing Conditions" (October 2011) Research Highlight at 9. See also: Anna Durbin, "Canada's Response to the On-Reserve Housing Crisis: A Study of the Kelowna Accord" (2009) 7:2 *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health* 181; LaVerne Monette et al., "Housing Status and Health Outcomes in Aboriginal People Living with HIV/AIDS in Ontario: The Positive Spaces, Healthy Places Study" (2009) 2 *Can J Aboriginal Community-based HIV/AIDS Research* 41; Statistics Canada, "Aboriginal Peoples in Canada in 2006: Inuit, Métis, and First Nations, 2006 Census," Catalogue No 97-558-XIE (Ottawa: Minister of Industry, January 2008).

60. Patrick, *supra* note 25; Graham & Peters, *supra* note 58; Statistics Canada, "The Incarceration of Aboriginal People in Adult Correctional Services," by Samuel Perreault, in Juristat, Catalogue No 85-002-X (Ottawa: Statistics Canada, July 2009) at 12.

61. People of *Aboriginal* descent are overrepresented in the federal and provincial prison systems; while they represent 3% of the Canadian population, they account for 22% of all admissions to adult correctional services who were sentenced to custody: *ibid* at 5; Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991) vol 1 at 85 [*Report of the Aboriginal Justice Inquiry*]; *R v Gladue*, [1999] 1 SCR 688 at paras 58-65, 171 DLR (4th) 385 [*Gladue*].

racialized groups' facial features may make them more identifiable (and "known") to police officers.⁶² They are consequently "given much less latitude in their behaviour before the police take action."⁶³ People who are or have been incarcerated are more likely to be precariously housed, homeless, or otherwise street-involved when they are released from prison.⁶⁴

In my data analysis, I found that the racial or cultural background of the people who have matters before the courts is rarely made explicit in reported decisions. There are a few exceptions. One case features a street-involved man who attempted to use the formal legal system to address racial discrimination. His application, as I elaborate later, was unsuccessful.⁶⁵ The remaining cases that touched upon indigeneity referred to cases that invoke the application of the *Gladue* factors in the sentencing of criminal matters.⁶⁶ The most notable of these is *R. v. Ipeelee*, in which Manasie Ipeelee, a 39-year-old street-involved and transient Inuk man from Iqaluit with a history of addiction, had been convicted of committing a violent crime while intoxicated and had been found in breach of his long-term sentencing order.⁶⁷ Sharpe J., writing for a unanimous Court of Appeal, provides a window onto Ipeelee's engagement with the judicial system.

I feel compelled to add ... that the appellant's [A]boriginal background and

62. David M Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR (2d) 655; African Canadian Legal Clinic, *Anti-Black Racism in Canada: A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (Toronto: African Canadian Legal Clinic, July 2002) at 40; *R v Parks*, 15 OR (3d) 324 at 369, 65 OAC 122; *R v Williams*, [1998] 1 SCR 1128, 159 DLR (4th) 493 (judicial notice of systemic discrimination against Aboriginal people).

63. *Report of the Aboriginal Justice Inquiry*, *supra* note 61 at 107.

64. And people who are street-involved are more likely to be incarcerated: Greg A Greenberg & Robert A Rosenheck, "Jail Incarceration, Homelessness, and Mental Health: A National Study" (2008) 59:2 Psychiatric Services 170.

65. In *Diggs v Century Investigation and Security Services Inc*, 118 ACWS (3d) 155, [2002] OTC 873 (ON Sup Ct) [*Diggs*], the plaintiff, a homeless man and diabetic, alleged he was forcibly removed from a hospital after his treatment.

66. In *Gladue*, *supra* note 61, the Supreme Court of Canada confirmed that the *Criminal Code*, RSC 1985, c C-46, s 718.2(e) requires a restorative justice approach to sentencing to help address the drastic historical overrepresentation of people of Aboriginal ancestry within the criminal justice system. The Gladue (Aboriginal Persons) Court hears matters in which Aboriginal people find themselves before the courts; it hears bail applications and sentencing of Aboriginal people who have pleaded guilty to their charges: Jonathan Rudin, "Aboriginal Over-representation and *R v Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40:2 SCLR 687. On the Ontario courts that expressly implement and apply *Gladue* principles, see: Brent Knazan, "Time for Justice: One Approach to *R v Gladue*" (2009) 54:4 Crim LQ 431. Regarding *Gladue's* relevance to women racialized as Black, see: Sonia N Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2006) 56:4 UTLJ 285.

67. *R v Ipeelee*, [2009] OJ No 6413 (ON Ct J) (QL) [*Ipeelee* (ONCJ)].

the disadvantages he has suffered clearly provide insight into his sorry involvement with the criminal justice system. He grew up in Nunavut [sic]. His alcoholic mother froze to death when he was a child. He was raised by his grandparents, one of whom has died. His involvement with alcohol and crime started at an early age....[A]n older person sexually abused him when he was nine. He lost many close relatives while serving his penitentiary term and at this point, he appears to lack links with his own community. He was not released in his home community in Iqualuit [sic] because the Inuit-oriented facility there refused to accept him on the ground that he posed an undue risk of re-offending. The community correctional facility in Kingston has relatively little to offer by way of [A]boriginal services.⁶⁸

While sympathetic and conceding that Mr. Ipeelee's Aboriginal ancestry and difficult life circumstances provided insight into his ongoing involvement with the criminal justice system, the Ontario Court of Appeal ultimately determined that his Aboriginal status alone did not justify reducing his sentence.

The Supreme Court of Canada held that the lower courts had not adequately considered rehabilitation as a sentencing objective and reduced the three-year sentence to one year.⁶⁹ The Court was unequivocal that, barring an explicit waiver, the *Gladue* principles will apply to "every case involving an Aboriginal offender"; moreover, a failure to apply these principles shall constitute "an error justifying appellate intervention."⁷⁰ Unfortunately, the application of *Gladue* principles to address the overrepresentation of Aboriginal people in the criminal justice system has, as several commentators have argued, been seriously impeded by the *Safe Streets and Communities Act* which came into force in the fall of 2012.⁷¹

68. *R v Ipeelee*, 2009 ONCA 892 at para 14, 99 OR (3d) 419 (affirming the sentence imposed by Megginson J in *Ipeelee* (ONCJ), *supra* note 67).

69. *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 [*Ipeelee* (SCC)] (LeBel J writing for the majority).

70. *Ibid* at para 87 (per LeBel J).

71. Bill C-10, the *Safe Streets and Communities Act*, received Royal Assent on March 13th 2012 and amended the *Criminal Code*, *supra* note 66, and associated criminal justice acts, including the *Youth Criminal Justice Act*, SC 2002, c 1, and the *Controlled Drugs and Substances Act*, SC 1996, c 19. The omnibus crime bill has all but set aside rehabilitation as a sentencing objective and has created harsh new mandatory minimum sentences, eliminated a number of conditional sentences, and implemented longer wait times for people who have applied for pardons. See generally: Canadian Civil Liberties Association, *Brief to the Senate Committee on Legal and Constitutional Affairs regarding Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts* (16 February 2016), online: Parliament of Canada <<http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/PDF/Briefs/C10/CCLA-EN.pdf>>. On the Act's negative impact on Aboriginal offenders in particular: Ryan Newell, "Making Matters Worse: The *Safe Streets and Communities Act* and the Ongoing Crisis of Indigenous Over-Incarceration" (2013) 51:1 Osgoode Hall LJ 199.

In other areas of law, individual stories of racism, displacement, violence, and trauma are not explicitly mentioned in the case law.⁷² Whereas family law cases confirm other research findings⁷³ that family breakdown—separation of adults, absentee parents, or strained relationships between spouses or between parents and children—is one of the primary pathways to street involvement in adults and in youths,⁷⁴ the cases do not draw connections between the breakdown of family relationships and the forceful extraction of Aboriginal children from their families and communities through the residential school system. Cases do not refer to the ongoing forceful removal of Aboriginal, Métis, and Inuit children by family services and welfare agencies.⁷⁵ Finally, cases do not refer to the inadequate funding of on-reserve education, which forces children and youth from their homes into foster care or to urban areas to access otherwise unavailable services.⁷⁶ In short, reading the narratives within cases alone, as I have done here, is insufficient to show what is documented again and again in scholarly work: just as indigenous and racialized people are over-represented in the penal system, so too do they make up an overwhelming number of people who are street-involved. Future research should endeavour longitudinal and more quantitative

72. See also: Turpel, *supra* note 5.

73. Family breakdown and the disruptive legal issues that flow from it are also the justiciable problems most often faced by all Ontarians: Ontario Civil Needs Project, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project, 2010); Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013).

74. See, for instance: *Arrey v Takor*, 2010 ONSC 3972, 191 ACWS (3d) 1186 [*Arrey*]; *Atkinson v Ahmed*, 2012 ONSC 1908, [2012] OJ No 1271; *Cherry v Cherry*, 2005 ONCJ 170, [2005] OJ No 2042 [*Cherry*]; *Randall v McClellan*, 2012 ONCJ 96, [2012] OJ No 841 [*Randall*]; *Kemble v Roy*, 149 ACWS (3d) 1088, [2006] OJ No 2853 (ON Sup Ct) [*Kemble*].

75. On the intergenerational effects of residential schools, including the disruption of parent-child attachments, see Jean Lafrance & Don Collins, “Residential Schools and Aboriginal Parenting: Voices of Parents” (2003) 4:1 *Native Social Work J* 104. On the unique social and policy rationales for Métis children’s participation in residential schools, see Larry N Chartrand, Tricia E Logan & Judy D Daniels, *Métis History and Experience and Residential Schools in Canada* (Ottawa: Aboriginal Healing Foundation, 2006). On the abuse of Inuit children in residential schools, see “Residential Schools,” online: Pauktuutit Inuit Women of Canada <pauktuutit.ca/abuse-prevention/residential-schools/>.

76. But see *First Nations Child and Family Caring Society of Canada v Canada (Minister of Indian Affairs and Northern Development)* (18 March 2014), T1340/7008 (CHRT) (Memorandum of Fact and Law of the Complainant First Nations Child and Family Caring Society), online: <www.fncaringsociety.ca/sites/default/files/Caring%20Society%20-%20Closing%20Submissions.pdf>; Cindy Blackstock, “The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada Wins, Equality and Justice Lose” (2011) 33:1 *Children & Youth Services Rev* 187.

methods to identify the charges with which indigenous people who experience street involvement are most frequently charged.⁷⁷

2. *Gender and sexuality*

Research has shown that the absolute number of homeless people remains higher among men than among women.⁷⁸ My data confirm that women frequently find themselves homeless after the breakdown of familial relationships,⁷⁹ particularly in cases in which they are survivors of, and may be fleeing, violence⁸⁰ or sexual abuse.⁸¹ The case law also gives some specificity to the forms of gendered and cascading marginalization experienced by street-involved women: criminalized drug use may often be an outcome of periods of unstable housing; unstable housing and street involvement may be a means of escaping, or a direct result of, sexual abuse; sexual violence may be inflicted by a person already occupying a position of trust and to whom one might expect vulnerable women to turn for stability and support, such as a former teacher,⁸² a counsellor,⁸³ or a family member.⁸⁴

In the scholarship, women's street involvement is often referred to as "invisible."⁸⁵ Women's homelessness tends to be episodic, as women strive

77. See, for instance, the Aboriginal Administration Of Justice Charges Research Project which recently published findings based on their quantitative and qualitative research on the risk and preventative factors within the Aboriginal probation clients with a view to develop a strategy to address the reality that indigenous people are over-represented in the criminal justice system: BearPaw Research Native Counselling Services of Alberta, "Aboriginal Administration of Justice Research Project: Aboriginal Probation Client Qualitative Research Report," online: <justice.alberta.ca/publications/Documents/AAOJ-NCSA-CLIENT-SURVEY-FINALAug2012.pdf>.

78. In the face of such statistics, feminist scholars warn against reducing homelessness to a quintessentially "male space" in which homeless women appear "in a shadowy way, if at all." Julia Wardhaugh, "The Unaccommodated Woman: Home, Homelessness and Identity" (1999) 47:1 *Sociological Rev* 91 at 104.

79. See, for instance: *Arrey*, *supra* note 74; *Randall*, *supra* note 74; and *Kemble*, *supra* note 74.

80. *Warren v Kingston & Frontenac Housing Corp*, 2009 HRTD 2191, [2009] OHRD No 2083.

81. *AR v Abel*, 2011 ONSC 4350, 198 ACWS (3d) 39.

82. *Ibid*.

83. *R v Nazim*, 2008 ONCJ 485, 79 WCB (2d) 422 [*Nazim*].

84. See, for instance: *Children's Aid Society vs LK*, *supra* note 17 (in an application for Crown wardship of children, both parents had abusive upbringing and had been rendered homeless when fire was set to their home; when trying to find an appropriate caregiver, it came to light that LK's father (grandfather of the children at issue) had sexually assaulted LK in the past and could not be considered an adequate guardian for his grandchildren). The Court determined that "There [was] a substantial risk that the children would be sexually exploited if returned to the care of their parents. Other adults known to the parents [had] sexually abused some of the children": at para 7. In *R v Goldsmith*, 2008 ONCJ 277, 78 WCB (2d) 113 [*Goldsmith*], the complainant was sexually assaulted by the volunteer matched as his Big Brother.

85. Carolyn Whitzman, "Making the Invisible Visible: Canadian Women, Homelessness, and Health Outside the 'Big City,'" in Hulchanski et al, *supra* note 10, ch 4.3; see also: Anne J Kisor & Lynne Kendal-Wilson, "Older Homeless Women: Reframing the Stereotype of the Bag Lady" (2002) 17:3 *Affilia J Women & Social Work* 354 at 356-357.

for safety while also avoiding criminalization out of fear of having their children taken by child protection agencies.⁸⁶ The cases tend to provide a clearer picture of how street-involved women experience “visible” homelessness differently than men do.⁸⁷ For instance, they are particularly vulnerable to violence,⁸⁸ this is especially the case for women who are members of substance use populations.⁸⁹ The experience of Ms. Valerie Valen, a street-involved drug user, exemplifies the daily violence to which people on the street may be exposed. She was beaten by three men for trying to stop them from brutally murdering a sleeping homeless man.⁹⁰ As Ewaschuk J., writes:

Ms. Valen was a drug addict [...and] a passer-by who witnessed the accused Hall and Deganis savagely beating Mr. Crouch and who demanded that they desist their cravenly conduct. In reward for her brazen intrusion into their business, the accused Hall and Deganis, and later also Ibrahim, brutalized Ms. Valen, the innocent bystander who attempted to act as a Good Samaritan [...] Both Hall and Deganis had the physical coordination to repeatedly punch and kick...Ms. Valen with military precision.⁹¹

Research also shows that street-involved women who work in the sex trades also face unique challenges to ensuring their safety and well-being. Many street-level sex workers distrust the police—in no small part because of a well-founded belief that they risk being arrested themselves should they

86. YWCA Canada, *Housing First, Women Second? Gendering Housing First*, Brief from the Homes for Women Campaign (28 October 2013), online: <ywca.ca/data/publications/00000066.pdf>.

87. Jon May, Paul Cloke & Sarah Johnsen, “Alternative Cartographies of Homelessness: Rendering Visible British women’s experience of ‘visible’ homelessness” (2007) 14:2 *Gender, Place & Culture* 121 (on the growing number of, and specificities regarding, “visibly homeless” women in Britain).

88. *Ipeelee* (SCC), *supra* note 69 at para 9 (which makes reference to the accused’s past conviction for the sexual assault of a 50-year-old homeless woman).

89. Suzanne L Wenzel, Paul Koegel & Lillian Gelberg, “Antecedents of Physical and Sexual Victimization among Homeless Women: A Comparison to Homeless Men” (2000) 28:3 *American J Community Psychology* 367.

90. *R v Hall*, [2005] OJ No 5885 (ON Sup Ct).

91. *R v Hall*, [2008] OJ No 1965 at paras 2 and 4 (ON Sup Ct) [*Hall* (2008)].

disclose their victimization⁹²—and generally do not report experiences of violence.⁹³ This reality is occasionally reflected, though perhaps somewhat superficially, in the case law. Boswell J. describes one such woman in *R. v. Buchanan*:

The Complainant [Ms. KM] is a person who has had an unfortunate life, to say the least. She lives on the streets, prostitutes herself to earn a living, which she quickly squanders on her drug addiction. She has had to take care of herself on the streets, living by her wits since she was a teenager. *She has had numerous run-ins with the law and it was apparent during her evidence that she is not entirely trusting of the administration of justice. Given the circumstances of her life, it is understandable why she would be apprehensive about the likelihood of seeing justice done.*⁹⁴

That case also revealed that street-involved women who engage in sex work may not report violence they experience in order to avoid criminal charges. Ms. K.M. was an outdoor sex worker who was forcibly confined, robbed, burnt with a cigarette and sexually assaulted by a man “she saw periodically at crack houses around Oshawa” and who wanted access to her “stash” of Oxycontin.⁹⁵ Ms. K.M. did not press charges against the man who assaulted her because “she was afraid of the Defendant and/or his friends and she was afraid of being labelled a ‘rat.’”⁹⁶ At trial it became clear that the Ms. K.M. did not want to report the incident.⁹⁷ The charges from the assault stemmed instead from Ms. K.M.’s arrest for breach of

92. Naomi Sayers, “I Was Honest with Police about My Work and the Fact That I Sometimes Did Drugs. I Didn’t Think I’d be Charged with Assault,” *NOW* (12 November 2014), online: <nowtoronto.com/features/i-was-honest-w_police/>. See also: Anna-Louise Crago, *Arrest the Violence: Human Rights Abuses Against Sex Workers in Central and Eastern Europe and Central Asia* (Sex Workers’ Rights Advocacy Network, 2009), online: Open Society Foundations <www.opensocietyfoundations.org/sites/default/files/arrest-violence-20091217.pdf> (distrust of the police (at 47); how women experience assaults at the hands of police and how such experiences of police abuse and/or intimidation decreases the likelihood of reporting (at 19)); and Shari Allinott et al, *Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws* (Vancouver: Pivot Legal Society, 2004), online: <www.pivotlegal.org/voices_for_dignity> (in its collection of affidavits from sex workers, the authors found that sex workers experience being blamed for their assaults (at 16) and experience an overarching fear and distrust of police (at 25)); Vicky Bungay et al, “Structure and Agency: Reflections from an Exploratory Study of Vancouver Indoor Sex Workers” (2011) 13:1 *Culture, Health & Sexuality* 15; Steven P Kurtz et al, “Barriers to Health and Social Services for Street-Based Sex Workers” (2005) 16:2 *J Health Care for the Poor & Underserved* 345.

93. Susan Scott, *All Our Sisters: Stories of Homeless Women in Canada* (Peterborough: Broadview Press, 2007); see also: Carol Corinne McNaughton & Teela Sanders, “Housing and Transitional Phases Out of ‘Disordered’ Lives: The Case of Leaving Homelessness and Street Sex Work” (2007) 22:6 *Housing Studies* 885; Suzanne Bouclin, “Regulating Sex Work in Canada” [2012] 3 *Public L* 387.

94. *R v Buchanan*, 2010 ONSC 2116 at para 45, [2010] OJ No 1448 [*Buchanan*] [emphasis added].

95. *Ibid* at paras 1 and 9.

96. *Ibid* at para 16.

97. *Ibid* at paras 16, 19, 45.

recognizance (which could have led to incarceration); her arresting officer noticed the burn marks and initiated a report.⁹⁸

Research has found that street-involved women face further particular challenges, such as parenting under the constant surveillance of child and family services.⁹⁹ The cases confirm women's especial vulnerability to homelessness as a result of poverty following the breakdown of relationships. Some women living in precarious situations demonstrate a fear of becoming homeless due to their partners' mismanagement of funds,¹⁰⁰ and often do become homeless when forced to leave their family homes.¹⁰¹ Further, women sometimes feel safer being homeless—even with all the associated stresses, risk of violence, and possible negative health outcomes—than living in violent domestic situations.¹⁰² Yet other cases show how women may remain in violent domestic situations because they have no possible alternative living arrangement for themselves or their children.¹⁰³

3. *Citizenship and street involvement*

The cases do not reflect the reality that immigrants, refugees, and other newcomers are one of the fastest growing segments of the street-involved and homeless population in Canada. Researchers have shown that for new Canadians and refugee families, street involvement may arise from discrimination in housing based on race, culture, language, religion, and mental health,¹⁰⁴ or, in the case of immigrant youth, because of intergenerational conflict over cultural differences.¹⁰⁵ Research has also

98. *Ibid* at paras 19-20.

99. On the regulation of homeless parents and the labeling of poor mothers as “bad mothers,” see generally: Gladys Fonfield-Ayinla, “Commentary: A Consumer Perspective on Parenting While Homeless” (2009) 79:3 *American J Orthopsychiatry* 299.

100. *Cherry*, *supra* note 74.

101. *Kemble*, *supra* note 74.

102. *Cherry*, *supra* note 74; and *R v Jenkins*, 2010 ONSC 6751, 91 WCB (2d) 673 (regarding a woman rendered homeless for eight to nine months after fleeing her abusive spouse).

103. In *R v Brincat*, the complainant moved in with Michael Brincat and stayed with him despite his jealousy and periods of violence because she had been “evicted and had no place to live with her children at the time”: *R v Brincat*, 2010 ONCJ 643 at paras 2, 5, 9, 25, 92 WCB (2d) 20.

104. Regarding how street-involved people with multiple racial and cultural identities navigate stigma and discrimination, see: Suzanne Zerger et al, “Differential Experiences of Discrimination among Ethnoracially Diverse Persons Experiencing Mental Illness and Homelessness” (2014) 14 *BMC Psychiatry* 353. On discrimination in housing generally, see: Sylvia Novac et al, “Housing Discrimination in Canada: What Do We Know about It?” (December 2002) Centre for Urban and Community Studies Research Bulletin No 11.

105. Centre for Addiction and Mental Health & Children's Aid Society of Toronto, *Hidden in Our Midst: Homeless Newcomer Youth in Toronto—Uncovering the Supports to Prevent and Reduce Homelessness* (November 2014), online: CAMH <www.camh.ca/en/research/news_and_publications/reports_and_books/Documents/Hidden%20in%20Our%20Midst%20Final%20Report_Nov%202014.pdf>.

found that homeless newcomers face a gamut of legal issues including citizenship, employment, and family matters that often go unaddressed.¹⁰⁶

The cases in my data set, however, are altogether silent on the intersection between homelessness, citizenship, and access to justice. This is a finding in itself, pointing to one of the challenges of any research or policy-making around addressing absolute or relative street involvement: in my case the search terms I used and the cases these search terms yielded. Definitions and approaches continue to begin with homelessness as the fundamental feature of street involvement and consequently the more recognizable forms of housing precarity (single men, with addictions, living on the street) rather than less visible people who navigate multiple markers of identity (in this case, race, culture or citizenship). This failing may stem entirely from my search terms. In addition, or perhaps alternatively, the fact that my data are silent on the intersection of citizenship, discrimination, and street involvement may be in itself a finding about the overall invisibility of the experiences of homeless immigrants and refugees in official legal records including case law.

4. *Youth street involvement and homelessness among elderly persons*

Researchers and service providers have documented that people between 16 and 24¹⁰⁷ make up one of the fastest growing segment of street-involved people in Canada.¹⁰⁸ In fact, it is estimated that almost one third of the homeless population are youths.¹⁰⁹

Cases indicate that much of this increase is related to patterns of interrupted education, trauma from child welfare and correctional

106. For hardships faced by migrants and immigrants, see Mary Stratton, "The View from the Street" *LawNow* 35:2 (November/December 2010) 6 at 7, online: <www.lawnow.org/wp-content/uploads/2012/08/LawNow35-2.pdf>.

107. "Youth" generally refers to young people between the ages of 16 and 24: Jeff Evenson, *Youth Homelessness in Canada: The Road to Solutions* (Raising the Roof, 2009) at 12, online: <www.raisingtheroof.org/raisingtheroof/media/raisingtheroof/media/documents/roadtosolutions_fullrept_english.pdf>.

108. Jeff Karabanow, Alexa Carson & Philip Clement, *Leaving the Streets: Stories of Canadian Youth* (Halifax: Fernwood, 2010) at 9; Canadian Children's Rights Council, *Homeless Youth in Canada*, online: Canadian Children's Rights Council <www.canadiancrc.com/Homeless_Children_and_Youths_in_Canada.aspx>.

109. "101 Things You Need to Know about Youth Homelessness" *Homeless Hub* (2011), online: Homeless Hub <www.homelesshub.ca/resource/101-things-you-need-know-about-youth-homelessness>.

systems.¹¹⁰ Research has found that in Ontario, one quarter of homeless youth identify as members of the Lesbian, Gay, Bi, Trans, Queer and Two-spirited (LGBTQ2) community;¹¹¹ many experience discrimination in the shelter system or a lack of appropriate support services because of their sexual orientation, gender identity, or gender performance.¹¹²

The case law tells stories of youth who generally leave home because of abuse or neglect in childhood or because of deprivation from caregivers,¹¹³ but these cases do not always address the matter of how many of these abusive or neglectful parents may themselves be survivors of institutional violence, or how many may be struggling with addiction, mental health concerns, or other traumas.¹¹⁴

While other research has found that people aged 60 and over remain a smaller percentage of visibly street-involved people in Canada, their absolute numbers are on the rise.¹¹⁵ No cases explicitly address how old age and homelessness intersect, but there are a few that give insight into elderly people's pathways to homelessness. In two cases, for instance, homelessness occurred after the vulnerable elderly person was defrauded by a relative and forced onto the street.¹¹⁶

110. *R v JMC*, [2004] OTC 643, 63 WCB (2d) 92 (the defendant, who was ultimately given a dangerous offender designation, had, among other things, a deeply troubled scholastic career: at age five, his kindergarten teacher, to whom he was close, was murdered; he was the same year diagnosed with Attention Deficit Disorder and transferred to and from a number of schools for children with "behavioural difficulties" (at para 18); was homeschooled until he set fire to the basement, and sent at age six to a CAS residential treatment facility. At the time of the trial, it was unclear whether the defendant, aged 23, had completed grade 8).

111. That number has been estimated at between 25 and 40% nationally: Toronto Foundation, *Toronto's Vital Signs 2014 Report* (2014), online: <torontosvitalsigns.ca/full-report.pdf> at 42; See also: BC Housing, *Maintaining Housing Guidebook for Emergency Shelter & Outreach Service Providers* (British Columbia: September 2012) at 13-15, online: <www.bchousing.org/resources/Partner_Resources/Program_Resources/Maintaining_Housing_Guidebook/Maintaining_Housing_Guidebook.pdf>.

112. BC Housing, *supra* note 111.

113. For instance, in *Goldsmith*, *supra* note 84, the complainant detailed his spiral into drug addiction and homelessness as a result of the sexual assault he experienced at the hands of the accused. In *Children's Aid Society v LK*, *supra* note 17, an application for Crown wardship, both parents had been sexually abused as children.

114. Sean Kidd & Golan Shahr "Resilience in Homeless Youth: The Key Role of Self-Esteem" (2008) 78:2 *American J Orthopsychiatry* 163.

115. Vicky Stergiopoulos & Nathan Herrmann, "Old and Homeless: A Review and Survey of Older Adults Who Use Shelters in an Urban Setting" (2003) 48:6 *Can J Psychiatry* 374 at 375. The number of elderly homeless people in Toronto has recently doubled; they now represent approximately 16% of the street-involved population: Eric Andrew-Gee, "Homeless Seniors Doubled in Four Years: Toronto study," *Toronto Star* (31 July 2013), online: <www.thestar.com/news/gta/2013/07/31/homeless_seniors_doubled_in_four_years_toronto_study.html>.

116. *R v Kaziuk*, 2012 ONCJ 34, 98 WCB (2d) 759; *Miller v Miller*, 2011 ONSC 7239, 211 ACWS (3d) 156.

5. *Intergenerational homelessness*

The cases document the fact that homeless parents have themselves frequently been child wards of the state.¹¹⁷ Child protection agencies, former spouses,¹¹⁸ and other family members¹¹⁹ regularly bring up a given parent's history of homelessness as a means of establishing poor parenting skills or instability sufficient to demonstrate that the parent should not have custody.¹²⁰ Though a parent's transience is only one among several factors considered when assigning crown wardship, other factors—substance use, neglect, domestic violence, and unsatisfactory plans of care for children—tend to overlap with street involvement.¹²¹ The trend in these cases is for children of parents who have a history of street involvement and who are dealing with addiction to be deemed “at risk,” be removed from their homes, and/or become Crown wards.¹²² In a few cases, however, where a street-involved or formerly street-involved parent could establish having made “concerted efforts”¹²³ to “bring [their] own life under control”¹²⁴ and to hone their parenting skills, access and even custody have occasionally been restored.¹²⁵ What constitutes good parenting, however, is steeped in

117. See, for instance: *Catholic Children's Aid Society of Hamilton v LS & WD*, 2011 ONSC 5850, 208 ACWS (3d) 92 (regarding a mother who, at the time of child protection proceedings, was homeless and had a long history of Society involvement as a child and as a parent).

118. See, for instance: *Noorhoff v McGraw*, 2011 ONSC 1296, [2011] OJ No 4089 [*Noorhoff*] (regarding an application by a mother to have the father's access to their children varied because of his history of transience and inability to secure permanent and stable housing); *Randall*, *supra* note 74 (in which the father cited the mother's brief period with their children in a homeless shelter as a reason to grant him sole custody).

119. *Fobert v Smith*, 2011 ONSC 1002, 198 ACWS (3d) 131 [*Forbert*] (in which a paternal grandmother held to be a stabilizing force in the child's life was given custody). But see: *Children's Aid Society of Algoma v H (KA)* (2003), 124 ACWS (3d) 1097, 2003 CanLII 52552 (ON Ct J) [*Children's Aid Society of Algoma v KAH*] (application for Crown wardship; the grandmother applied for custody but the court held that it was not in the child's best interests to have to reattach to another primary caregiver at this stage).

120. See, e.g., *Fobert*, *supra* note 119; see also: *Noorhoff*, *supra* note 118; *Randall*, *supra* note 74; *Arrey*, *supra* note 74.

121. See, for instance: *Children's Aid Society v KAH*, *supra* note 119 (father's demonstrated aggression at para 45); *Children's Aid Society of Ottawa v MR*, 2012 ONSC 622, [2012] OJ No 328 (father's violence at para 79).

122. *Lennox and Addington Family and Children's Services v SW*, 2010 ONSC 2585 at paras 6, 13-15, 22, 47-51, 58-62, 106, 188 ACWS (3d) 719; *Children's Aid Society of Owen Sound v AL*, [2008] OJ No 5133; *Catholic Children's Aid Society of Hamilton v JT*, 2012 ONSC 3893, [2012] OJ No 3274; *Children's Aid Society v CG*, *supra* note 47.

123. *Catholic Children's Aid Society of Toronto v LF*, 119 ACWS (3d) 605 at para 28, 2002 CanLII 52564.

124. *Ibid*; see also: *Children's Aid Society of Algoma v SC*, 2007 ONCJ 740; *Children's Aid Society of Toronto v MW*, 2004 ONCJ 127, 132 ACWS 713 [*Children's Aid Society v MW*].

125. Marlee Kline, “Child Welfare Law, ‘Best Interests of the Child’ Ideology, and First Nations” (1992) 30:2 *Osgoode Hall LJ* 375; Susan M Barrow & Nicole D Laborde, “Invisible Mothers: Parenting by Homeless Women Separated from Their Children” (2008) 25:3 *Gender Issues* 157.

liberal ideology, particularly the notion that “good” mothers self-effacingly and selflessly attend to the needs of others without state intervention or assistance; this ideology of “good” mothering is embedded in the gendered and racialized legacy of colonialism, which in turn shapes and reflects the ideology itself.¹²⁶

A number of cases also give insight into how families navigate street involvement and homelessness, seeking shelter in abandoned buildings¹²⁷ or church basements¹²⁸ and the pressure such precarity can have on sustaining relationships and familial bonds.

6. *Mental health*

A recurring theme in the research that is accurately reflected in the case law is the nexus between street involvement (and its associated stigma) and mental health concerns. While it is true that mass deinstitutionalization in the 1970s increased the overall number of street-involved people who had existing mental health problems,¹²⁹ it is less often acknowledged in scholarship that homelessness or street involvement itself may be what triggers instabilities or deteriorates mental health.¹³⁰ A few cases support the view that there is a mutually constitutive relationship between health and street involvement. For instance, in deciding that damages suffered by a tenant were a direct consequence of the landlord’s breach of her obligations under the *Landlord and Tenant Act*, Nancy Fahlgren, adjudicating member of Ontario’s Landlord and Tenant Board, noted that:

As a result of his homelessness [the tenant] has swollen feet, is always tired and unable to concentrate....The effects of his homelessness have, without a doubt, impacted on him both physically and mentally.¹³¹

The case law also reveals that street-involved and homeless people in Ontario face a variety of legal challenges—including criminal charges,¹³²

126. Amy Salmon, “Aboriginal Mothering, FASD Prevention and the Contestations of Neoliberal Citizenship” (2011) 21:2 *Critical Public Health* 165.

127. *Young v Halverson* (2006), 150 ACWS (3d) 849, [2006] OJ No 3492.

128. *File No TNT-33787-12*, 2012 LNONLTB 1737.

129. Dear & Wolch, *supra* note 22; Adriana Foster, James Gable & John Buckley, “Homelessness in Schizophrenia” (2012) 35:3 *Psychiatric Clinics of North America* 717.

130. On stigma regarding treatment and addiction, see generally: Daniel Buchman & Peter B Reiner, “Stigma and Addiction: Being and Becoming” (2009) 9:9 *American J Bioethics* 18; Robin Room, “Stigma, Social Inequality and Alcohol and Drug Use” (2005) 24 *Drug & Alcohol Rev* 143; Suzanne Bouclin & Joëlle Pastora Sala, “Une analyse de la réglementation des personnes itinérantes selon un perspective pothienne de la discrimination” (2013) 25:1 *CJWL* 1; Patricia A Gorzka, “Homeless Parents’ Perceptions of Parenting Stress” (2007) 12:1 *J Child & Adolescent Psychiatric Nursing* 7.

131. *File No TNT-11384-10*, 2011 LNONLTB 818 at paras 23-24.

132. See for instance: *Ipeelee* (SCC), *supra* note 69.

family law matters,¹³³ and housing instability¹³⁴—which are both directly and indirectly associated with mental health concerns, but which also often arise because of involuntary treatment and deinstitutionalization without proper supports.¹³⁵ Indeed, a significant number of the cases that fell into my data set (58 of the 957 cases treated) were matters before the Consent and Capacity Board (CCB), an independent body comprised of lawyers, psychiatrists, and members of the public that conducts hearings in the area of health care, consent, and information protection.¹³⁶ People before the CCB experience cascading marginalization because of mental health problems, substance abuse or dependence,¹³⁷ and prior conflict with the criminal law.¹³⁸ The CCB reviews files of “patients” under its jurisdiction, especially, for our purposes: (1) patients who may be subject to involuntary treatment orders; (2) who have been deemed incapable of consenting to treatment; or (3) who have been found incapable of managing their property. When the CCB reviews such a patient’s files, it may confirm or revoke these findings of incapacity. In the majority of cases, the CCB confirms rather than revokes forced treatment orders or findings of incapacity.¹³⁹ People who have been or are at risk of becoming homeless are largely found to be incapable of consenting to treatment,¹⁴⁰ incapable of managing property,¹⁴¹ and unable to budget for housing.¹⁴² In almost half the cases (26 out of 58), patients’ involuntary treatment statuses were confirmed.¹⁴³

133. See, for instance: *Children’s Aid Society of Toronto v SA*, 2008 ONCJ 348, 170 ACWS (3d) 354.

134. See for instance: *File No NOL-05144-11*, 2011 LNONLTB 2107 at para 8.

135. Dear & Wolch, *supra* note 22; Foster, Gable & Buckley, *supra* note 129.

136. The Board conducts hearings under the *Mental Health Act*, RSO 1990, c M.7, the *Health Care Consent Act, 1996*, SO 1996, c 2, the *Personal Health Information Protection Act, 2004*, SO 2004, c 3, the *Substitute Decisions Act, 1992*, SO 1992, c 30, and the *Mandatory Blood Testing Act, 2006*, SO 2006, c 26. See: *Consent and Capacity Board*, online: <www.ccbboard.on.ca>.

137. See for instance: *Re PL*, [2004] OCCBD No 32 [PL]; *Re PC*, [2004] OCCBD No 107; *Re CR*, [2004] OCCBD No 268 [CR].

138. See for instance: *Re CR*, [2004] OCCBD No 137; *Re RB*, [2004] OCCBD No 535; *Re RM*, [2005] OCCBD No 157.

139. The CCB confirmed or upheld involuntary patient status in 26 decisions. See for instance: *PL*, *supra* note 137 and *CR*, *supra* note 137. These decisions contrast with the decision in *Re E*, [2006] OCCBD No 130 [*Re E*] in which Ms. E was found capable of managing her property on discharge from hospital despite an earlier finding of incapacity (at para 1) and despite a history of homelessness (at para 19).

140. In twelve cases, the finding of incapacity to consent to treatment was upheld. See, for instance, *Re MM*, [2005] OCCBD No 159 and *Re MS*, [2004] OCCBD No 456.

141. Eleven decisions found or confirmed findings of incapacity to manage property. See for instance: *Re TF*, [2004] OCCBD No 81; *Re LC*, [2004] OCCBD No 362; and *Re JL*, [2004] OCCBD No 512. But see: *Re E*, *supra* note 139.

142. See for instance: *Re MF*, [2005] OCCBD No 389; and *Re BJM*, [2005] OCCBD No 358.

143. See for instance: *PL*, *supra* note 137; *CR*, *supra* note 137; and *Re BH*, [2004] OCCBD No 109.

7. *Violence and victimization*

Some research has begun to explore how people who are street-involved are far more likely to be victims of violence than perpetrators.¹⁴⁴ The cases also poignantly reveal the extent to which street-involved people are vulnerable to violence. Some document assaults between street-involved people over particular “turf.”¹⁴⁵ Others show how street-involved women risk being sexually victimized, whether on the street¹⁴⁶ or in shelters.¹⁴⁷ There are also cases of assaults by strangers, which courts tend to qualify as “completely random acts of violence.”¹⁴⁸ In 2001, two men were convicted of killing Joseph Pace, “a smallish 44-year-old homeless man” with mental and physical disabilities who was “loitering” outside of a donut shop.¹⁴⁹ Mr. Pace’s body was found in a pedestrian tunnel near the donut shop:

His face was disfigured and covered in blood. His shirt had been removed. There were abrasions over his right eye and both eyes were swollen. Post mortem examination disclosed five or six blows to the head and neck area, one fractured Mr. Pace’s larynx and another resulted in a subdural hemorrhage that caused his death. The medical experts could not say which blow caused his death, but did indicate that a subdural hemorrhage could be caused by a relatively minor blow such as a punch to the nose. Mr. Pace also had bruising on his chest and back and had suffered two broken ribs.¹⁵⁰

Similarly, in 2005, three men serving as members of a reserve unit of the Canadian Armed Forces kicked and beat to death Mr. Paul Crutch, a 59-year-old homeless man who was sleeping on a park bench.¹⁵¹ The men

144. Suzie Forell, Emily McCarron & Louis Schetzer, *No Home, No Justice?: Legal Needs of Homeless People in NSW*, vol 2 at 75 (Sydney: Law and Justice Foundation of New South Wales, 2005) (referring to a 1998 study which found that 58% of the 157 respondents—homeless people living in inner-city Sydney—had been seriously attacked or assaulted while on the street). See also: Stratton, *supra* note 106 at 8; Stephen Gaetz, Bill O’Grady & Kristy Buccieri, *Surviving Crime and Violence: Street Youth and Victimization in Toronto* (Toronto: Homeless Hub, 2010) at 16-17, online: <jfey.org/wp-content/uploads/2013/10/SYLS_Surviving_the_Streets_2010.pdf>.

145. *R v JS*, 2011 ONCJ 344, [2011] OJ No 3234 (in which both the assailant and the victim of the assault were homeless).

146. *Ipeelee* (SCC), *supra* note 69 (in which the judge refers to a homeless man’s past conviction for the sexual assault of a homeless woman).

147. *Nazim*, *supra* note 83.

148. *R v Ibrahim*, [2005] OTC 918 at para 10, 69 WCB (2d) 456.

149. *R v Oliver* (2005), 194 OAC 284 at para 11, 194 CCC (3d) 92 (sentencing appeal dismissed).

150. *Ibid* at para 13.

151. *Hall* (2008), *supra* note 91.

were found to have had an established animus towards street-involved people,¹⁵² as Ewashuck J wrote during the sentencing hearing:

I also find beyond a reasonable doubt that the accused Hall and Deganis, fueled by excessive alcohol, intentionally beat Mr. Crouch simply because he was a homeless person whom they hated and despised. The accused's elitist attitude that they were superior to worthless, homeless persons must be condemned.¹⁵³

In such cases, the reported decision serves as a document and an archive of some of the violence encountered by street-involved people on a daily basis. Stories such as these may be difficult to relay through empirical research (because of researchers' obligation to protect participants from negative outcomes or experiences of relaying these stories) and may be more vivid than what can be appropriately circulated in mainstream media.

8. *Performing legal subjectivities as a means of expressing resiliency*

Instances of victimization aside, examining a large body of case law also helps illustrate that street-involved people's lives are far more complex than the discursive label "homeless" permits. Importantly, the cases reveal other, perhaps more empowering, legal subjectivities adopted by street-involved people who assert their rights as tenants in subsidized housing,¹⁵⁴ who articulate and claim rights as anti-poverty activists,¹⁵⁵ or who

152. "The alleged motive for this attack is that the accused disapproved of homeless people and wanted to rid the area surrounding the home of their unit from the presence of such people" (per Nordheimer J): *R v Ibrahim*, 2005 CanLII 37594 [*Ibrahim*] (successful application for interim release despite the Crown's insistence that members of the homeless community might "reasonably view any release of the accused with both suspicion and unease": *R v Ibrahim*, 2005 CanLII 37594).

153. *Hall* (2008), *supra* note 91 at paras 13-14 (appeal of sentence dismissed). Hall and Deganis each received a ten-year sentence for manslaughter and a one-year sentence for assault causing bodily harm (served consecutively). Ibrahim was sentenced to nine months' imprisonment for assault causing bodily harm and three months for accessory after the fact (served consecutively): *ibid* at paras 24-26.

154. The tribunals generally refused to evict tenants who establish a genuine fear of becoming homeless: *File No NOL-05144-11*, 2011 LNONLTB 2107; *File No NOL-13449*, [2005] ORHTD No 93; *File No TEL-51896*, [2005] ORHTD No 80; *File No TSL-16190*, 2008 LNONLTB 57; *File No TSL-78583*, [2006] ORHTD No 140.

155. Anti-poverty activists have been arrested in connection with protests that intersect with homelessness: *R v Rimke* (2005), 65 WCB (2d) 95, [2005] OJ No 1837 (ON Sup Ct); *Collis v Toronto (City) Police Services Board*, [2004] OJ No 4037 (ON Sup Ct (Sm Cl Ct)); *R v Lee-Popham*, [2002] OJ No 2494 (ON Ct J); *R v Clarke* (2003), 61 WCB (2d) 134, [2003] OJ No 3883 (ON Sup Ct); *R v Katoch*, 2009 ONCA 621, 253 OAC 87; *R v Semple*, 2004 ONCJ 55, 119 CRR (2d) 295; *Zareian v Durham Regional Police Services Board* (2006), 147 ACWS (3d) 507, [2006] OJ No 1296 (ON Sup Ct). In *Batty*, several Occupy Toronto activists sought a declaration that a trespass notice was unconstitutional: see *Batty v Toronto (City)*, 2011 ONSC 6862, 108 OR (3d) 571. These decisions appear in my search results generally because activists—whether homeless at the time or not—describe their involvement in social movements as a form of support for homeless or street-involved people.

present themselves as applicants before the Human Rights Tribunal.¹⁵⁶ Occasionally, cases exhibit the complexities of, and assumptions about, community and belonging that are reproduced and recycled in judicial reasoning as well as in housing policies founded on behavioural restrictions and incentives.¹⁵⁷ In a challenge to an eviction from a facility which housed people with mental illness who risked homelessness, a tenancy was reinstated on the condition that the tenant “not let drug dealers and users and prostitutes into the residential complex.”¹⁵⁸ The tenant, while successful, was simultaneously cut off from people with whom he shared normative commitments, responsibilities, and entitlements as members of a community. On the one hand, maintaining relationships with such people may in fact be part of an effective harm reduction strategy. On the other, these same people, who may be a source of friendship or community to one tenant, may also interfere with the reasonable enjoyment of other tenants, who may be striving to constitute communities which are not organized around criminalized behaviours.

A series of cases demonstrate that some street-involved people want to exercise their legal rights and believe that the courts remain a venue through which they can voice what they experience as injustice. These cases illustrate some of the barriers faced by marginalized people, especially those with mental illness, who try to access justice through the courts; they also illustrate many access to justice advocates’ worst fears about vulnerable self-represented litigants.¹⁵⁹

156. *XY v Toronto Housing Connections*, 2011 HRTO 1989, [2011] OHRTD No 1966; *Barton v Loft Community Centre*, 2009 HRTO 647, [2009] OHRTD No 666; *Munroe v Ottawa (City)*, 2012 HRTO 511, [2012] OHRTD No 501; *Weiher v Polhill*, 2003 HRTO 13, 47 CHRR D/104; *O’Brien v Ottawa Mission*, 2010 HRTO 1033, [2010] OHRTD No 1027; *Millien v 1474367 Ontario Inc.*, 2010 HRTO 1146, [2010] OHRTD No 1130; *Scharf v Kiriakakis*, 2010 HRTO 1142, [2010] OHRTD No 1153; *Heron v Toronto Community Housing Corp.*, 2010 HRTO 2322, [2010] OHRTD No 2319; *McAllister v By-de-Molen Co-operative Homes*, 2012 HRTO 1029, [2012] OHRTD No 1013.

157. On “housing first” models of intervention into street involvement as an “advanced liberal way of governing subjects,” see: Cecilia Hansen Löffstrand & Kirsi Juhila, “The Discourse of Consumer Choice in the Pathways Housing First Model” (2012) 6:2 *European J Homelessness* 47 at 47. See also: Deborah K Padgett, “Choices, Consequences and Context: Housing First and its Critics” (2013) 7:2 *European J Homelessness* 341.

158. *File No SOL-73477-RV*, [2007] LNONLTB 50 at para 14.

159. Self-represented litigants (SRLs) are people who directly engage with formal legal processes without the assistance of trained and accredited legal counsel. The United Kingdom, Australia and New Zealand refer to “litigants in person” and the United States “pro se” or “pro per” litigants. In the Canadian context, financial constraints remain the primary factor in not having legal representation. See: Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants” (Law Society of Upper Canada, May 2013); Trevor CW Farrow et al, “Addressing the Needs of Self-Represented Litigants in the Canadian Justice System: A White Paper Prepared for the Association of Canadian Court Administrators” (Toronto: Association of Canadian Court Administrators, 2012).

For instance, in *Farrell v. Salvation Army*, a self-represented street-involved plaintiff had been employed by and resided at the Hope Shelter Emergency Hostel.¹⁶⁰ Mr. Farrell alleged the Salvation Army and its directors (in addition to several dozen other officers and employees) were responsible for the fact that he lost his job.¹⁶¹ He claimed over a million dollars in damages. The defendants successfully secured an order striking out portions of the statement of claim in their entirety, but Mr. Farrell was granted leave to amend certain pleadings.¹⁶² The case is interesting on a number of levels because Mr. Farrell challenges taken-for-granted assumptions about homeless people. First, he had full-time employment but was nonetheless forced to live in a shelter.¹⁶³ Second, the case demonstrates how procedural rules can be used to exclude already marginalized plaintiffs. Justice Allen outlines the logic behind the rules around pleadings and amended pleadings:

Courts applying Rule 25 have taken a dim view of pleadings so incoherent and tedious as to make them indecipherable to the defendant. Defendants are entitled to know with certainty the case they have to meet. The plaintiff has the onus of ensuring their pleadings satisfy the rules governing pleadings drafting. A defendant should not have to undertake the task of parsing through unintelligible, longwinded pleadings to attain an understanding of the claim....If the minimum level of material fact is not reached, the appropriate remedy is to strike out the pleading.¹⁶⁴

Justice Allen ultimately determined that Mr. Farrell's claim was "a lengthy, repetitive, arduous and a confused mix of statements that allege a host of wrongs by [the Defendants]."¹⁶⁵ Moreover, it suffered from a number of drafting deficiencies, including an incoherent statement of material facts and no appropriate fact disclosure and did not comply with the "special direction" in the rules of civil procedure regarding pleadings of fraud, misrepresentation, and breach of trust.¹⁶⁶

Similarly, in *Pozderka v. North York General Hospital*, Ms. Pozderka, initiated a number of actions for damages against the respondent hospital where she received medical and psychiatric treatment.¹⁶⁷ Regarding Ms. Pozderka's self-representation, Martel J. wrote:

160. 2011 ONSC 317, 197 ACWS (3d) 343.

161. *Ibid* at paras 1-3.

162. *Ibid* at para 43, granted 60 days to amend pleadings at para 44.

163. *Ibid* at para 3.

164. *Ibid* at para 7 (references omitted).

165. *Ibid* at para 8.

166. *Ibid*.

167. *Pozderka v North York General Hospital*, [2008] OJ No 3059 at para 6 (Sup Ct).

At various times the Plaintiff received medical and psychiatric care, was subject to competency proceedings, was hospitalized and was homeless. She is currently unemployed and receiving, or seeking (I am not sure which from her comments) social assistance. Nonetheless, after careful questioning of the Plaintiff at the commencement of the motions, I determined that she is capable and competent to represent herself.¹⁶⁸

She claimed that she was assaulted and sexually assaulted while in the care of the hospital and that the Ontario Provincial Police “failed to investigate her complaints with respect to the alleged assault.”¹⁶⁹ Her claim was dismissed because she missed the limitation period for bringing an action against a public hospital and did not set out a clear cause of action.¹⁷⁰

Finally, in *Diggs v. Century Investigation and Security Services*, a Black street-involved man with physical and mental health problems alleged that a male hospital security officer and a male nursing staff assaulted him when they forced him to leave the premises after treatment.¹⁷¹ Mr. Diggs was homeless and on the day in question, he had had his monthly allocation of insulin stolen from him.¹⁷² He was treated by Mount Sinai hospital staff over two days and, in his file it is noted that he requested that his chest be examined because he believed he had “frost around [his] heart.”¹⁷³ Once Mr. Diggs stabilized, he was reassessed by a doctor, and was discharged. On a number of occasions, the hospital staff asked Mr. Diggs to get dressed and leave. He refused and, according to Cameron J., became “obnoxious and profane.”¹⁷⁴ A security guard was dispatched, approached Mr. Diggs, and asked him to leave.¹⁷⁵ When Mr. Diggs refused again, the guard warned him that he would be forced to physically escort him out of the building.¹⁷⁶ Mr. Diggs lay down on the floor and the guard began to drag Mr. Diggs along the floor.¹⁷⁷ Mr. Diggs jumped to his feet and “started flailing his arms.”¹⁷⁸ The guard then took hold of Mr. Diggs’s arms, held them behind his back, and physically removed him from the premises.¹⁷⁹ Shortly thereafter, Mr. Diggs attempted to lodge a complaint with the hospital regarding his treatment by the security guard. He filed a

168. *Ibid* at para 20.

169. *Ibid* at para 16.

170. *Ibid* at para 11.

171. *Diggs*, *supra* note 65.

172. *Ibid* at para 6.

173. *Ibid* at para 7.

174. *Ibid* at para 9.

175. *Ibid* at para 12.

176. *Ibid* at para 12.

177. *Ibid* at para 12-13.

178. *Ibid* at para 13.

179. *Ibid* at para 13.

complaint form indicating that he suffered injury when being ejected from the hospital.¹⁸⁰ He also met with the hospital's patient relations facilitator and indicated that he hoped the guard would be disciplined.¹⁸¹ A few weeks later, he returned to the hospital and challenged the security guard to a fight; he was physically removed from the premises.¹⁸² Several months passed before Mr. Diggs commenced an action for damages of five million dollars for injuries he claimed to have sustained when he was physically assaulted by the hospital staff.¹⁸³ A month later he reduced the amount sought to two million dollars.¹⁸⁴ Almost a year later, he submitted an Amended Fresh Statement of Claim in which he alleged that he was both physically and sexually assaulted by hospital staff.¹⁸⁵ He documented events in a letter which he sent to the security company's lawyer, indicating that he would transmit the letter to every hospital in Canada:¹⁸⁶

On January 1st, 1999 while still a patient at the Mount Sinai Hospital, I got dragged [*sic*] out of my bed by a security guard that works for Century Investigation and Security Co. The same guard by the name [* *] not only dragged [*sic*] me when I was still asleep on the hospital bed but took part in a rape near the south doors of the Mount Sinai. He assisted a male nurse in the rape. Before the rape took place, the security guard called me a nigger and a fucking asshole. I was so shocked by Mr. [*]'s behavior. At this time there is a police investigation and a civil trial in the very near future in relation with the rape and with the racist remarks and acts of violence. The other violent act was that I did suffer and still feel pain to my neck due to the brutal acts by the security guard. My reason for this notification to you is to make you aware of the type of people that work for Century Investigations and Security Company.¹⁸⁷

The letter was sent to at least three other hospitals.¹⁸⁸ Mr. Diggs's action in tort (damages for assault) was dismissed but the security company's counterclaim for defamation was successful.¹⁸⁹ The court ordered Mr. Diggs to pay \$4000 in general damages and \$2000 in punitive damages.¹⁹⁰ The judgment reads as far removed from reality: Mr. Diggs's behaviour during the trial would, by Cameron J's account, "lead a reasonable

180. *Ibid* at para 17.

181. *Ibid* at para 18.

182. *Ibid* at para 19.

183. *Ibid* at para 20.

184. *Ibid* at para 21.

185. *Ibid* at para 22.

186. *Ibid* at para 65.

187. *Ibid* [names deleted].

188. *Ibid* at para 66.

189. *Ibid* at paras 64, 71.

190. *Ibid* at para 72.

person to conclude that he is mentally unstable”;¹⁹¹ and yet, there was no assessment made of the complainant’s capacity to understand proceedings, beyond the judge’s assertion that “Mr. Diggs is an intelligent person and can compare and distinguish evidence.”¹⁹² It is also highly inconceivable that Mr. Diggs will ever be in a position in terms of assets or income available to pay the judgment debt, and the judgment certainly renders Mr. Diggs vulnerable to future legal entanglements should he ever be in a position to pay. It is also difficult to read this decision without assessing it from a critical race perspective: a racial slur appears in the judgment five times when entirely unnecessary to understanding the context of the claim; Mr. Diggs is described as “over 6 ft. tall” and “about 200 lbs,”¹⁹³ harkening the archetypal menacing Black man, with less focus on the security guard, who is presumably white (as no reference was made to his race) and in full uniform (and quite reasonably intimidating by that fact alone).

These cases involving self-advocating street-involved persons aside, street involvement most often remains attached to particular kinds of legal identities. For instance, street-involved people struggling with mental illness who come into conflict with the law become “involuntary patients,”¹⁹⁴ and, as I elaborate in the next section, street-involved people who attempt to generate some form of income are often ascribed labels and corresponding legal identities that reflect and shape common assumptions about people who are street-involved, as “aggressive panhandlers,” or “squeegee kids,” or as “drug users/dealers/traffickers.”

9. *Income generation and subsistence strategies*

Research has documented how Canadian street-involved people engage in income generation through a range of prohibited means or through a range of strategies generally associated with a life on the streets.¹⁹⁵ The scope of such income generation includes entertaining and busking, panhandling, holding doors, squeegeeing (cleaning car windows),¹⁹⁶ binning (collecting

191. *Ibid* at para 4.

192. *Ibid* at para 4.

193. *Ibid* at para 13

194. See for instance: *Re AJ*, [2004] OCCBD No 539 at para 1; *Re C*, [2006] OCCBD No 43 at para 1; *Duroche v Somal*, 2012 ONSC 1555 at para 3, [2012] OJ No 1055.

195. There are variances among different jurisdictions. In the United States, for instance, street-involved people may engage in the sale of blood and plasma: Kristin M Ferguson et al, “Correlates of Street-Survival Behaviors in Homeless Young Adults in Four U.S. Cities” (2011) 81:3 *American J Orthopsychiatry* 401. In Kenya, street youth may recycle metals, carry luggage, or watch cars: Rebecca Sorber et al, “Social and Economic Characteristics of Street Youth by Gender and Level of Street Involvement in Eldoret, Kenya” (2014) 9:5 *PLOS ONE*, online: <journals.plos.org/plosone/article?id=10.1371/journal.pone.0097587>.

196. See generally: Parnaby, *supra* note 33.

waste such as empty cans and bottles to supplement income),¹⁹⁷ doing odd jobs for small businesses (such as putting out the trash),¹⁹⁸ and engaging in licensed or unlicensed street trading and vending.¹⁹⁹ This work may be their only source of income, but more often than not it is an additional source of income, supplementing paid employment or some form of social assistance insufficient to cover their basic needs.²⁰⁰ These modes of navigating life on the street are often “judicialized”²⁰¹ or “criminalized”²⁰² through non-criminal provincial and municipal charges.

Matters dealing with such provincial or municipal offences related to income-generation rarely become the object of reported case law and consequently are not captured in my data set.²⁰³ Instead, the majority of cases where people come into contact with the law for generating income, involved people who could be coded as being part of an informal

197. In Vancouver, see: “Vancouver Hires Bidders to Recycle Olympic Cans,” *CBC News* (18 December 2009), online: <www.cbc.ca/news/canada/british-columbia/vancouver-hires-bidders-to-recycle-olympic-cans-1.832857>. In San Francisco, see: Teresa Gowan, “American Untouchables: Homeless Scavengers in San Francisco’s Underground Economy” (1997) 17:3/4 *Intl J Sociology & Social Policy* 159.

198. Andrew Seymour, “Crack-Addicted, Hearing-Impaired Panhandler Fights Tories’ Victim Surcharge,” *Ottawa Citizen* (20 November 2014), online: <ottawacitizen.com/news/national/ottawa-panhandler-and-shawarma-shop-trash-man-fights-tories-victim-surcharge>.

199. Keenan, Maldonado & O’Grady, *supra* note 33.

200. Nicola S Chopin & J Stephen Wormith, *Count of Saskatoon’s Homeless Population: Research Findings* (Saskatoon: Community-University Institute for Social Research, 2008) (regarding the fact that most street-involved people hold some form of employment, whether recognized work or not. The study, conducted in Saskatoon, found that nearly half the shelter users surveyed held formal employment, with most of those working full-time: *ibid* at 33).

201. The term refers to the processes through which street-involved people are brought into the penal system not necessarily by way of criminal regulation, but through provincial legislation regulating “safe streets” and through by-laws regulating the solicitation of alms, for instance. Ontario’s *Safe Streets Act, 1999*, SO 1999, c 8 [SSA], has been interpreted and applied by police officers to criminalize street-involved people’s income-generating strategies, especially panhandling and squeegeeing. A coalition of anti-poverty activists failed to have the SSA struck down as unconstitutional in *R v Banks*, 2007 ONCA 19, 84 OR (3d) 1, aff’g (2005), 248 DLR (4th) 118, [2005] OTC 26 (Sup Ct), aff’g (2001), 55 OR (3d) 374, 205 DLR (4th) (ON Ct J), appeal to SCC refused, 31929 (23 August 2007). There is renewed momentum to have the SSA repealed and a constitutional challenge is being prepared: Stephen Gaetz, “It’s Time to Repeal the Safe Streets Act!,” *Homeless Hub* (10 December 2014), online: <www.homelesshub.ca/blog/its-time-repeal-safe-streets-act>; Andrew Seymour, “Ticket Defence Program to Fight Back on Behalf of Homeless,” *Ottawa Citizen* (2 February 2015), online: <www.ottawacitizen.com/news/local-news/ticket-defence-program-to-fight-back-on-behalf-of-homeless> [Seymour, “Ticket Defence Program”].

202. There is a significant body of interdisciplinary work on the criminalization of street involvement and homelessness, but a trail-blazing text remains: Lorne Sossin, “The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement” (1996) 22:3 *NYU Rev L & Soc Change* 623. More recently: Diane Crocker & Val Marie Johnson, eds, *Poverty, Regulation and Social Justice: Readings on the Criminalization of Poverty* (Halifax: Fernwood, 2010).

203. I elaborate below, see *infra* notes 232-235. But see, *Banks*, *supra* note 201 (squeegeeing).

“economy of addiction”²⁰⁴—an underground economy organized around the circulation of objects and money in exchange for access to regulated (prescription) and unregulated (prohibited) drugs.²⁰⁵ Yet a significant amount of research contradicts the taken-for-granted assumption that people become homeless because they are addicts; it is, at least just as frequently, the experience of street involvement and homelessness itself which often leads to substance use.²⁰⁶

The cases also provide narratives regarding the pathways to addiction that are as diverse as the people who find themselves within its economy. A serious workplace injury may lead to a reliance on, and ultimately an addiction to, prescription drugs²⁰⁷ or other substances²⁰⁸ to manage pain. People may also use drugs as a form of self-medication to dull experiences of sexual violence or other traumas.²⁰⁹ My data also feature street-involved people charged with offences and crimes directly or indirectly connected to the prohibition of particular substances and addiction to regulated drugs, especially prescription opioids (such as oxycodone and its derivatives). Such offences and crimes include the sale of regulated or unregulated drugs,²¹⁰ petty theft (to support a heroin habit),²¹¹ and robbery (to sustain non-medical prescription or otherwise illicit drug use or while under the influence of drugs).²¹² Two cases connect outdoor transactional sex and

204. In the early 2000s in Vancouver, for instance, compact discs were integrated into this economy because they were stolen, traded, and sold with relative speed and ease: Will Straw, “Exhausted Commodities” (2000) 25:1 *Can J Communication* 175 at 180. On street-involved women’s unique negotiation of the drug economy: Kay Levine & Virginia Mellema, “Strategizing the Street: How Law Matters in the Lives of Women in the Street-Level Drug Economy” (2001) 26:1 *Law & Soc Inquiry* 169. See also: O Hayden Griffin III & Bryan Lee Miller, “OxyContin and a Regulation Deficiency of the Pharmaceutical Industry: Rethinking State-Corporate Crime” (2011) 19:3 *Critical Criminology* 213 (OxyContin as currency and symbol of social capital among drug users); Gaetz & O’Grady, “Work on the Streets,” *supra* note 33 at 607 (on the sale of drugs to generate income).

205. See, for instance: *R v Davis*, 2012 ONSC 6486, [2012] OJ No 5479 (regarding the sale of a car which served as his home to purchase crack cocaine).

206. Timothy P Johnson et al, “Substance Abuse and Homelessness: Social Selection or Social Adaptation?” (1997) 92:4 *Addiction* 437; Eugenia Didenko & Nicole Pankratz, “Substance Use: Pathway to Homelessness? Or a Way of Adapting to Street Life?” (2007) 4:1 *Visions British Columbia’s Health & Addictions* J 9.

207. *Decision No 1327/12E*, 2012 ONWSIAT 1965, [2012] OWSIATD No 1945 (in which a worker became homeless, depressed, and addicted to prescription pain killers and alcohol after a workplace injury).

208. *Decision No. 1571/09*, 2009 ONWSIAT 2229, [2009] OWSIATD No 2193 (in which a worker used cannabis to manage pain).

209. *Goldsmith*, *supra* note 84.

210. *R v Letemplier*, 2012 ONSC 4125, 102 WCB (2d) 518 [*Letemplier*] (regarding the sale of crack to an undercover police officer).

211. *Ibid* (accused engaged in theft to support a heroin addiction).

212. *R v Neganoban*, [2005] OTC 362, 65 WCB (2d) 515 [*Neganoban*] (in which the accused checked himself out of a rehabilitation facility in the morning and by midday had robbed a donut shop under the influence of crack and valium).

drug use.²¹³ In *Buchanan*, an outdoor sex worker who sold sexual services to sustain a drug habit was physically and sexually assaulted by a man who wanted to gain access to her supply.²¹⁴ She neither sought hospital care nor reported the matter to police. Her decision is unsurprising, according to Levine and Mellema, who have studied street-involved women's complex negotiations when they experience violence in the context of their work within the drug economy:

The law is an ineffective tool of empowerment for women in our inner cities. Women who have difficulty perceiving themselves as victims and voicing their grievances publicly cannot effectively mobilize the law; they instead follow the ethic of survival, which requires them to remain strong in the face of adversity.²¹⁵

Indeed, Boswell J. recognized Ms. Buchanan's lack of confidence in the justice system to enact justice; he wrote that "given the circumstances of her life, it is understandable why she would be apprehensive about the likelihood of seeing justice done."²¹⁶

Other cases paint a difficult picture, confirming that street-involved people who use drugs (frequently turning to crack cocaine, heroin/opioids, marijuana, or alcohol) often have overlapping addictions.²¹⁷ They also document how race, poverty, and criminalized substance use interact in ways that reinforce or sustain a cycle of homeless, addiction, and custody. In one such case, Mr. Johnson, a man of mixed heritage (Métis and Black) engaged in "low level trafficking" to support his drug habit and had passed the better part of his adult life cycling from the street to custody as a result. In this case, Mr. Johnson sold 20 dollars' worth of cocaine to an undercover police officer, was charged with and pleaded guilty to trafficking.²¹⁸ He was held in pre-sentencing custody for twelve months.²¹⁹ Unfortunately for Mr. Johnson, the *Truth in Sentencing Act* which limits the credit for "time served" that can be granted to a person found guilty

213. *Buchanan*, *supra* note 94; *Bedford v Canada (Attorney General)*, 2010 ONSC 4264 at para 120, 102 OR (3d) 321.

214. *Buchanan*, *supra* note 94.

215. Levine & Mellema, *supra* note 204 at 189.

216. *Buchanan*, *supra* note 94 at para 45.

217. *Letemplier*, *supra* note 210; *R v JS*, 2011 ONCJ 344, 95 WCB (2d) 638; *Neganoban*, *supra* note 212; *R v SNW*, 2012 ONSC 3363, 103 WCB (2d) 328; *Children's Aid Society of London and Middlesex v LA*, 140 ACWS (3d) 132, [2005] OJ No 2284 (ON Sup Ct); *Children's Aid Society of the Niagara Region v BD*, 145 ACWS (3d) 853, [2006] OJ No 389 (ON Sup Ct); *Children's Aid Society v MW*, *supra* note 124.

218. *R v Johnson*, 2011 ONCJ 77, 268 CCC (3d) 423 [*Johnson*].

219. *Ibid* at para 1.

came into force four days before his arrest.²²⁰ Previously, a two-day credit could be applied for each day spent in pre-sentencing custody but under the new regime the conventional metric would be one-to-one or a 1.5 day of credit for each day served in pre-sentence custody where circumstances so justify. Mr. Johnson's counsel argued that the new legislation infringed his equality rights under the *Canadian Charter of Rights and Freedoms*.²²¹ Specifically, counsel presented evidence regarding the prejudicial effect of the new act on racialized people, and Aboriginal and Black offenders in particular, who are already over-represented in remand and sentenced populations and argued that this disparity in sentencing amounts to differential treatment based on race.²²²

Justice Green conceded that while "a disproportionate number of black and native persons may be captured by the amendments," the laws do not "distinguish the Applicant from other offenders on the basis of his heritage, either in intent or effect."²²³ He was not persuaded that the act infringed on the defendant's equality rights because the argument, "logically pursued" would render "much of criminal law—or, at minimum, those statutory instruments bearing on penal sanctions—vulnerable to s. 15 challenge on the same footing [which] hardly seems tenable."²²⁴

Conclusion

The purpose of this research was to draw narratives from published court cases to complement and add nuance to existing accounts of the pathways to and experiences of street involvement. The manner in which legal norms, institutions, processes, and concepts construct and reinforce the vulnerability and marginalization of street-involved persons raises the question of whether the legal system is ever an appropriate venue for addressing the inequalities defining street involvement.

I wish to highlight a few limitations to my research in order to identify future avenues of study. First, by focusing only on reported (published) decisions, I have not been able to include data from the Drug Treatment

220. *Truth in Sentencing Act*, SC 2009, c 29.

221. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at ss 15, 7.

222. *Johnson*, *supra* note 218 at para 128.

223. *Ibid* at para 130.

224. *Ibid*.

Court (DTC).²²⁵ This limitation would seem to exclude the lived reality of many street-involved people who navigate drug use and addiction whose experiences have not been mediated by interactions with courts. However, the DTC itself already excludes a large number of street-involved people from its jurisdiction. Individuals may only apply to a DTC under strict conditions.²²⁶ First, their crime must be non-violent;²²⁷ second, it must be “motivated by addiction;” and third, offenders must plead guilty and agree to complete a treatment program in exchange for receiving non-custodial sentences.²²⁸ Participants are only allowed to “graduate” once from the DTC.²²⁹ Such policy choices effectively ignore what harm reduction and drug user advocates have long documented, namely that drug use can rarely if ever be “completely eliminated.”²³⁰ Moreover, the program disqualifies anyone who is currently serving a conditional or intermittent sentence, and a large number of street-involved people find themselves in that position.²³¹

A second limitation of my findings is that they do not reflect the full gamut of provincial and municipal tickets street-involved people receive for generating income through low threshold work such as panhandling. Ticketing is among the dominant governance mechanisms used to regulate every aspect of a street-involved person’s life. I am, in a related research project, in the process of compiling data on the kinds of tickets issued

225. Generally, “the designation ‘unpublished’ does not mean that an opinion is secret...[but rather describes] opinions or orders not published in bound volumes” and still available to any person who pays a fee at the office of the clerk of the courts: Johanna S Schiavoni, “Who’s Afraid of Precedent?: The Debate over the Precedential Value of Unpublished Opinions” (2002) 49 UCLA L Rev 1859 at 1861; see also: KK DuVivier, “Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions” (2001) 3:1 J App Pr & Pro 397. In the context of the Drug Treatment Court, decisions are unpublished presumably to preserve anonymity and to encourage voluntary engagement. For a discussion of drug treatment courts as facilitative and repressive, see: Dawn Moore, Lisa Freeman & Marian Krawczyk, “Spatio-Therapeutics: Drug Treatment Courts and Urban Space” (2011) 20:2 Soc & Leg Stud 157.

226. Toronto Drug Treatment Court, “Eligibility Requirements,” online: TDTC <www.tdtk.ca/courtprocess/eligibilitycriteria> [TDTC, “Eligibility Requirements”].

227. *Ibid.* Commercial trafficking is considered a violent offence, in this context of the Drug Treatment Court; this reality effectively excludes a large number of street-involved people given that most people charged with trafficking offences in Canada are “poor, street-level dealers” and usually “people of colour”: Susan C Boyd, “Representations of Women in the Drug Trade” in Gillian Balfour & Elizabeth Comack, eds, *Criminalizing Women: Gender and (In)justice in Neo-Liberal Times* (Halifax: Fernwood, 2006) 131 at 131.

228. TDTC, “Eligibility Requirements,” *supra* note 226.

229. *Ibid.*

230. Non Prescription Needle Use Initiative, *Working with People who Use Drugs: A Harm Reduction Approach* (Edmonton: Canadian Liver Foundation, 2007) at 3.

231. Stephen Gaetz & Bill O’Grady, *The Missing Link: Discharge Planning, Incarceration and Homelessness* (Toronto: The John Howard Society of Ontario, 2006), online: <www.johnhoward.on.ca/wp-content/uploads/2014/09/the-missing-link-aug-2007.pdf> at 6-7.

to street-involved people in Ottawa, which include tickets for everything from aggressive panhandling to having open liquor in a public place to not having a proper light on a bicycle.²³² With rare exceptions for those street-involved people with the mental, physical, and financial resources to challenge tickets, these minor offences are tried *in absentia* before a justice of the peace.²³³ There is, consequently, no published record of these decisions. However, the absence of these decisions from the present research does not render the research irrelevant to the everyday ways in which street-involved people are regulated. Rather, the cases confirm my other findings by revealing truths about daily interactions between street-involved people and the police in criminal matters. People with addictions are stopped especially often by the police for minor offences, such as urinating in public²³⁴ or “riding a bicycle the wrong way on a one-way portion of a major downtown street,”²³⁵ with the possibility of being charged for ancillary criminal offences, especially breach of recognizance or long-term supervision orders.

Nevertheless, a few cases that I have held up for a closer reading help to draw attention to the role lower-court judges play in the constitution of knowledge about street involvement. As mentioned, occasionally the cases, or the judges deciding them, fail to acknowledge the social, political, economic, and cultural contexts in which some street-involved people find themselves before the courts. However, a number of judges displayed empathy towards and an ability to perceive the lived experiences of street-involved people. In *R v. Batson* for instance, Justice Dianne M. Nicholas took judicial notice of social profiling of homeless people and conveyed her frustration with the use of legislative tools to harass and intimidate vulnerable citizens, in this case a Black street-involved man arbitrarily detained and searched without reasonable and probable grounds:

I have concluded that the reliance on the *Trespass to Property Act* in this case was disingenuous and, in all likelihood, for another purpose such as criminal investigation. There was no evidence to suggest he was trespassing on the property. The fact that he was urinating was inappropriate in a public place but did not justify what occurred. In fact,

232. Ticket Defence Program, “Client Intake Statistics” (Fall 2014) [unpublished, on file with author]; see also: Seymour, “Ticket Defence Program,” *supra* note 201.

233. Suzanne Bouclin, “Regulated out of Existence: A Case Study of Ottawa’s Ticket Defence Program” (2014) 11 *JL & Equality* 35 at 74.

234. *R v Batson*, 2007 ONCJ 136, [2007] OJ No 1227 [*Batson*] (in which police used their authority under Ontario’s *Trespass to Property Act*, RSO 1990, c T.21, to approach and search a man who was found urinating against a wall; he was charged with possession of crack cocaine).

235. *Ipeelee* (ONCJ), *supra* note 67 (accused was charged with cycling while intoxicated in breach of the alcohol abstinence conditions of his long-term supervision order).

no charge was ever laid in relation to any trespass. As a judge, I am dealing with a growing number of cases where officers are relying on the *Highway Traffic Act*, and in this case, the *Trespass to Property Act*, to justify detentions of citizens in situations which attract suspicion and require close scrutiny.²³⁶

In *ETF*, a homeless youth in pre-trial custody for possession of crack cocaine was assaulted by one of the youths with whom he shared a cell.²³⁷ Justice Weagant took great care to convey his disgust with the appalling conditions of youth detention centers, which house an overwhelming number of homeless youth on a short-term basis. He describes the Toronto Youth Assessment Centre, where a young person “slept on a mattress on the floor with a sheet but no pillow,” was left unsupervised, and did not receive basic health accommodations for his asthma, as a “hellish system reminiscent of both Dickens and Lord of the Flies.”²³⁸

My reading of these cases is partial and it is by no means a comprehensive survey of the legal needs of street-involved people in Ontario. However, by highlighting trends and shared experiences, examining a large body of case law as a narrative about homelessness can lend crucial support to other empirical research on the intersection of street involvement and the law. Specifically, the case law tell stories about the pathways to street involvement and simultaneously identify broader trends in the ways street-involved people, in every aspect of their lives, come into constant contact with formal legal processes. The cases also act as a counter-narrative to taken-for-granted assumptions about who experiences street involvement, and they tell stories of street-involved people’s resiliency in the face of exclusion and marginalization. Indeed, the cases reveal just how the legal system is ill-equipped and often exacerbates the spectrum of problems faced by street-involved people.

236. *Batson*, *supra* note 234 at para 2.

237. *R v ETF* (2002), 56 WCB (2d) 49 at paras 5-6, [2002] OJ No 4497.

238. *Ibid* at paras 10, 15.

