

GRANTS PASS AND THE PATHOLOGY OF THE CRIMINAL LAW

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ABSTRACT

Last Term, the Supreme Court held that cities may, consistent with the Eighth Amendment, criminalize sleeping in public, even for people who have no other alternatives. That decision, City of Grants Pass v. Johnson, ostensibly rests on a formalistic distinction between criminalizing status, such as the status of homelessness, and criminalizing conduct, such as sleeping in public. This distinction fatally undermines the Eighth Amendment's "status crimes" doctrine. The majority opinion has been decried by homeless advocates as inhumane and counterproductive, and the case produced a pointed dissent that has been lauded by court watchers.

As this Essay explains, however, the outcome in Grants Pass was necessitated not by the merits of a thin status–conduct distinction, but by judicial deference to an ever-expanding criminal law. The dissent's preferred interpretation of the Eighth Amendment (in which the laws at issue impermissibly punish the "status" of homelessness) arguably implicates three distinct constitutional claims: one about the wrongfulness of punishing status, one about the wrongfulness of punishing involuntary conduct, and one about the wrongfulness of punishing in the absence of culpability. Once disaggregated, each of those claims proves to be in tension with contemporary criminal practices—neither status, nor involuntariness, nor lack of culpability currently prevents the infliction of criminal punishment. In other words, the dissent's preferred interpretation would have unsettled a considerable amount of criminal law. Grants Pass can therefore best be understood as revealing the Supreme Court's reticence to check states' expansive—and expanding—approaches to criminal liability.

So understood, the Grants Pass case provides an important supplement to the literature on criminal law's political pathology, demonstrating that a federal constitutional solution is likely out of reach under the current court. Just as legislatures and prosecutors drive expansive criminalization,

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expansive criminalization narrows the range of constitutional remedies, even for obvious injustices such as punishing the unhoused for sleeping. Prescriptively, the Essay calls for homeless advocates to step away from the Eighth Amendment and toward doctrines—particularly under state constitutions—that more explicitly engage with the agency of unhoused individuals.

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INTRODUCTION

Homelessness in America is currently at the highest rate ever recorded.¹ According to federal estimates, on a single night in 2024, more than 770,000 individuals lacked “a fixed, regular, and adequate nighttime residence.”² About 35% of those individuals were living unsheltered, sleeping in spaces not designed for human habitation.³ And these are likely extreme underestimates.⁴ The rise in homelessness is largely driven by social causes: the lack of affordable housing, stagnant wages, inadequate and costly medical care, a lack of social safety nets, and mass incarceration.⁵

1. See U.S. DEP’T HOUS. & URB. DEV., THE 2024 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 2 (Dec. 2024), <https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf> [https://perma.cc/87P9-TVXM] [hereinafter 2024 AHAR REPORT].

2. *Id.* at vii, 2.

3. See *id.* at 1–2.

4. The U.S. Department of Housing and Urban Development uses a narrow definition of homelessness that only captures individuals in shelters, transitional housing or public spaces. See *id.* at 1 (defining sheltered and unsheltered homelessness). The National Center for Homeless Education, which is funded by the U.S. Department of Education, uses a broader definition that includes people residing with others and people living in hotels, motels, and campgrounds. See NAT’L CTR. FOR HOMELESS EDUC., STUDENT HOMELESSNESS IN AMERICA: SCHOOL YEARS 2019–20 TO 2021–22, at 3 (2023), https://nche.ed.gov/wp-content/uploads/2023/12/SY-21-22-EHCY-Data-Summary_FINAL.pdf [https://perma.cc/6J36-5BZ4]. Under this latter definition, there are an estimated 1.2 million public school students who experience homelessness each year, to say nothing of the adults in their families. *Id.* at 4.

5. See *Homelessness Data and Trends*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, <https://www.usich.gov/guidance-reports-data/data-trends> [https://perma.cc/6JQ7-VE93].

Nationally, the primary response to rising homelessness has been criminalization.⁶ According to a study by the National Law Center on Homelessness and Poverty, now the National Homelessness Law Center, 51% of surveyed U.S. cities have laws against sleeping in public, and a whopping 72% of cities have laws against “camping” in public—using bedding, blankets, tents, or sometimes even vehicles to sleep.⁷ Grants Pass, Oregon, is one such city. It has a series of ordinances that effectively criminalize using any materials on public property “for the purpose of maintaining a temporary place to live.”⁸

In 2018, the U.S. Court of Appeals for the Ninth Circuit ruled that criminal penalties for involuntarily homeless individuals sleeping in public were “cruel and unusual” in violation of the Eighth Amendment to the U.S. Constitution.⁹ This applied whenever the unhoused population of a city exceeded the number of “adequate” and “practically available” shelter beds.¹⁰ In 2023, the Ninth Circuit reaffirmed this holding and extended it to unhoused individuals’ use of “rudimentary bedding supplies, such as a blanket, pillow, or sleeping bag.”¹¹ These holdings were grounded in what is now sometimes called the “status crimes doctrine.”¹² Originating in 1962, the status crime doctrine reflects the simple proposition that the Eighth Amendment forbids criminalizing individuals for their “status” rather than for their culpable conduct.¹³

This Term, in *City of Grants Pass v. Johnson*, the United States Supreme Court rejected the Ninth Circuit’s interpretation of the status crimes doctrine, freeing cities and states to resume their aggressive criminal approaches to combatting homelessness.¹⁴ In an opinion authored by Justice Gorsuch, the Court straightforwardly announced that “Grants Pass forbids actions” not “status,” and is therefore not in violation of the Eighth

6. See Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. 127, 135–41 (2023).

7. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019, at 12 (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/R8NE-8RP7>].

8. GRANTS PASS, OR., MUNICIPAL CODE § 5.61.010(A)–(B) (2024); see also *id.* §§ 5.61.020(A), 5.61.030, 6.46.090(A)–(B) (repealed 2024).

9. *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018), amended by *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

10. *Martin v. City of Boise*, 920 F.3d 584, 617–18, 617 n.8 (9th Cir. 2019). This latter requirement excluded shelters with, e.g., a “mandatory religious focus,” for fear of an Establishment Clause violation. *Id.* at 609–10.

11. *Johnson v. City of Grants Pass*, 72 F.4th 868, 889 (9th Cir. 2023), *rev’d*, 603 U.S. 520 (2024).

12. See, e.g., Edward J. Walters, Comment, *No Way Out: Eighth Amendment Protection for Door-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1619 (1995); Hannah Kieschnick, Note, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1573 (2018); Ryan P. Isola, Note, *Homelessness: The Status of the Status Doctrine*, 54 U.C. DAVIS L. REV. 1725, 1728 (2021).

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

14. *Grants Pass*, 603 U.S. at 546.

Amendment.¹⁵ In the immediate wake of the *Grants Pass* decision, California Governor Gavin Newsom ordered state agencies to begin dismantling homeless encampments and encouraged cities to do the same.¹⁶ As scientific research continues to demonstrate, such actions will have profound impacts on the morbidity and mortality rates of unhoused individuals.¹⁷

The *Grants Pass* case produced a pointed dissent by Justice Sotomayor, who claimed that the Grants Pass ordinances “criminalize being homeless.”¹⁸ Emphasizing the lack of choice facing unhoused residents of Grants Pass, Sotomayor declared that the city’s camping laws—though ostensibly prohibiting conduct—are “just another way to ban the person.”¹⁹ She accused the majority of using “formalistic distinctions” to evade the demands of the Constitution.²⁰

Although Sotomayor’s *Grants Pass* dissent has generally been viewed favorably,²¹ her approach to the Eighth Amendment’s status crimes doctrine implicates three arguably distinct constitutional propositions: First, that the camping ordinances issued by Grants Pass were cruel and unusual because they punished the “status” of homelessness.²² Second, that the Grants Pass ordinances were cruel and unusual because sleeping is involuntary and unavoidable.²³ Third, that the Grants Pass ordinances were cruel and unusual because public camping is non-culpable, and thus any punishment at all would be disproportionate to desert.²⁴

Disaggregating these three propositions reveals real limitations in the ability of the Eighth Amendment to do the work that homeless advocates had argued for. Each proposition, taken to its logical endpoint, is belied by longstanding criminal law practices that would be unsettled by the logic of Sotomayor’s opinion.²⁵ Although these practices are rightly deserving of criticism, they are by now well entrenched into the criminal legal system.

15. *Id.*

16. *See, e.g.,* Trần Nguyễn, *Newsom Orders California State Agencies to Start Clearing Homeless Encampments*, ASSOCIATED PRESS (July 25, 2024, 5:27 PM), <https://apnews.com/article/california-homeless-encampment-newsom-7d4478801de6e9f8a708c7c7c6ef3e5f> [https://perma.cc/RF56-R6XK].

17. *See, e.g.,* Joshua A. Barocas et al., *Population-Level Health Effects of Involuntary Displacement of People Experiencing Unsheltered Homelessness Who Inject Drugs in US Cities*, 329 J. AM. MED. ASS’N 1478, 1479 (2023).

18. *Grants Pass*, 603 U.S. 520 at 574 (Sotomayor, J., dissenting).

19. *Id.* at 577–78.

20. *Id.*

21. *See, e.g.,* Dahlia Lithwick & Mark Joseph Stern, *This Dissent Is Why Sonia Sotomayor Is the People’s Justice*, SLATE (June 29, 2024, 8:30 AM), <https://slate.com/news-and-politics/2024/06/supreme-court-opinions-sonia-sotomayor-homeless-dissent.html> [https://perma.cc/8F7P-W3C8].

22. *Grants Pass*, 603 U.S. 520 at 574 (Sotomayor, J., dissenting).

23. *See id.* at 577–78.

24. *See id.*

25. *See infra* Part II.

The dissent's robust interpretation of the status crimes doctrine, though sympathetic to the realities of individuals experiencing homelessness, thus invites potential implications that reach far beyond the immediate needs of the unhoused.

Justice Gorsuch's majority opinion both implicitly and explicitly sidesteps these implications by invoking judicial deference to the legislature in matters of substantive criminal law.²⁶ While this deference has historical roots,²⁷ it also has consequences for criminal law's political pathology. By now, it is well understood that criminal law is both expansive and expanding, at once too broad and too deep, and desperately in need of restraint.²⁸ While legislators and prosecutors have natural incentives to favor overcriminalization, scholars had hoped that the Court and the Constitution—including a robust Eighth Amendment—might be the bulwark against such practices.²⁹ *Grants Pass* arguably shuts the door on that hope, demonstrating that the current Court has no desire to “constitutionalize” broad swaths of criminal law even if doing so is necessary to protect one of our most vulnerable populations.

A potential path out of this predicament can be found by surfacing the goals of state and local actors who advocate for increased criminalization of homelessness. They as well as anyone know that criminalization is counterproductive and destructive of the humanity of individuals experiencing homelessness.³⁰ Their goal is not—perhaps has never been—to punish voluntary, culpable conduct, but rather to banish, to coerce, and to render invisible those who are unsheltered.³¹ These goals are evident both in the record in the *Grants Pass* case and in the opinions that it produced.³²

Thinking about the goals of banishment, coercion, and relocation highlights the ways in which state and local actors unduly infringe on the ability of individuals experiencing homelessness to make life-defining choices about their own safety, well-being, property, and community.³³ Those kinds of choices have historically been protected, not by the Eighth

26. See *infra* Section III.A.

27. See *Powell v. Texas*, 392 U.S. 514, 536 (1968) (noting that criminal law “doctrines of actus reus, mens rea, insanity, mistake, justification, and duress” have “always been thought to be the province of the States” (emphasis removed)).

28. See generally Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

29. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 587–98 (2001).

30. But see Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 104 (2019) (“[M]any supporters of criminalization are not aware of how such laws actually make homelessness worse.”).

31. *Id.* at 103 (“These laws, fueled by the stigma of visible poverty, function to purge chronically homeless people from public space.”).

32. See *infra* Section II.A & B.

33. See *McJunkin*, *supra* note 6, at 163–74.

Amendment, but rather by our notions of substantive liberty guaranteed both in state constitutions and in the federal constitution's Fifth and Fourteenth Amendments.³⁴ While federal courts may not yet be ready to recognize this liberty for unhoused individuals,³⁵ there is some hope that state courts can find it in state constitutions, as they have at times done with other essential rights.³⁶

This Essay proceeds in three Parts. Part I briefly traces the history of the status crimes doctrine, first in the Supreme Court and then in the Ninth Circuit. This Part also provides an overview of the recent majority, concurring, and dissenting opinions in *City of Grants Pass v. Johnson*. Part II examines the *Grants Pass* opinions in more detail by parsing three interrelated propositions that are implicated by Justice Sotomayor's dissent. This Part catalogues how each of those three propositions are in tension with existing criminal law practices, suggesting a systemic constraint on the Eighth Amendment's ability to do the work asked of it by the dissent without unsettling criminal law more generally. Part III situates this problem within the literature on criminal law's political pathology, contrasting the majority's deference to state legislatures with the academic calls for constitutionalizing substantive criminal law. This Part then sketches a path forward by dispensing with the emphasis on punishment and more directly engaging with the goals of those who seek to reduce visible homelessness. The approaches they take highlight the agency of individuals experiencing homelessness in deciding for themselves how best to live a life under extreme constraints. Taking that agency seriously by litigating for its protection directly—likely under state constitutions—could achieve some of the ends sought by the dissent in *Grants Pass*, but in a cleaner and more doctrinally consistent way.

Make no mistake, *Grants Pass* is a disastrous case for our nation's homeless residents. Cities and states will no doubt be emboldened to pass even more draconian laws against merely existing in public spaces in the hopes of driving unhoused individuals elsewhere. President Donald Trump has recently campaigned on the idea of geographically isolated internment camps for those who cannot afford shelter in their own cities.³⁷ But the case may also spur advocates to mobilize and explore new alternative strategies

34. See *id.* at 174–83.

35. See *id.* at 184–85.

36. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (holding that prohibitions on same-sex marriage violated the requirements of liberty and equality under the state constitution twelve years before the Supreme Court recognized a right to same-sex marriage under the U.S. Constitution).

37. Olympia Sonnier & Ben Kamisar, *Trump Says He'll Ban Homeless Camping, Create "Tent Cities,"* NBC NEWS (Apr. 19, 2023, 1:50 PM), <https://www.nbcnews.com/meet-the-press/meetthepressblog/trump-says-ban-homeless-camping-create-tent-cities-rcna80480> [<https://perma.cc/R2XS-RQT6>].

for protecting the agency and dignity of our unhoused neighbors. Thinking beyond the Eighth Amendment may start us in promising new directions.

I. THE STATUS CRIMES DOCTRINE

What is now sometimes referred to as the status crimes doctrine originated in the midst of the Warren Court's criminal law and procedure revolution of the 1960s.³⁸ Like the seminal cases that surrounded its origin, such as *Mapp v. Ohio*,³⁹ *Miranda v. Arizona*,⁴⁰ and *Katz v. United States*,⁴¹ the status crimes doctrine can be understood as both defense-friendly and countermajoritarian.⁴² Unlike those iconic cases, however, the status crimes doctrine has largely been viewed as anomalous, and it was almost immediately sidelined by lower court decisions refusing to extend it.⁴³ That was until the Ninth Circuit Court of Appeals resurrected the doctrine in the early 2000s as a means of dealing with the nation's growing concern over homelessness.⁴⁴ This Part recounts the origins of the status crimes doctrine, the Ninth Circuit's several attempts to apply it, and, ultimately, the Supreme Court's *Grants Pass* decision once again rendering it an anomalous and fact-bound exception to Eighth Amendment jurisprudence.

A. *Robinson v. California*

In 1962, the U.S. Supreme Court took up a constitutional challenge to a California statute making it a criminal offense to both use and to "be addicted to the use of" narcotics.⁴⁵ The appellant primarily challenged the statute under the due process and equal protection clauses of the Fourteenth Amendment.⁴⁶ The appellee contended that addiction is a *voluntary* condition, therefore the statute is a proper exercise of the state's police

38. See, e.g., Yale Kamisar, *Mapp v. Ohio: The First Shot Fired in the Warren Court's Criminal Procedure "Revolution,"* in *CRIMINAL PROCEDURE STORIES* 45 (Carol S. Steiker ed., 2006). But see Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 *CONN. L. REV.* 1, 4–6 (2010) (arguing that the story of the criminal procedure revolution misunderstands the throughlines of the Warren Court's jurisprudence).

39. 367 U.S. 643 (1961).

40. 384 U.S. 436 (1966).

41. 389 U.S. 347 (1967).

42. But see Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 *U. PA. L. REV.* 1361, 1363–65 (2004) (challenging the common characterization of the criminal procedure revolution as countermajoritarian).

43. Phillip E. Hassman, Annotation, *Drug Addiction or Related Mental State as Defense to Criminal Charge*, 73 *A.L.R.* 3d 16 (1976) ("Although there have been many attempts to induce the courts to broaden the cruel and unusual punishment rationale of *Robinson v. California* . . . most courts have refused to extend the principle to any offense other than addiction pure and simple.").

44. See *infra* Section I.C.

45. *Robinson v. California*, 370 U.S. 660, 660 n.1 (1962).

46. See Appellant's Opening Brief, *Robinson*, 370 U.S. 660 (No. 554), 1962 WL 115380.

power.⁴⁷ However, the Court returned a judgment that the statute imposed a cruel and unusual punishment in violation of the Eighth Amendment.

Writing for a 6–2 majority, Justice Stewart explained that the statute permitted the defendant to be convicted upon evidence that he was a narcotics addict, rather than upon evidence that he had used narcotics.⁴⁸ This, reasoned the court, was punishment for a mere “status,” one which may have been acquired “innocently or involuntarily.”⁴⁹ It was the equivalent of punishment “for the ‘crime’ of having a common cold.”⁵⁰ Under those circumstances, “[e]ven one day in prison would be . . . cruel and unusual.”⁵¹

This was an unexpected foray into the substantive criminal law for a constitutional provision that has primarily focused on methods of punishment.⁵² The majority opinion emphasized the lack of any required act in the statutory definition of the crime.⁵³ It also explained that the law was anomalous in that it defined a continuing offense: “California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.”⁵⁴ But, mostly, the law appeared cruel and unusual “in light of contemporary human knowledge” about the disease of addiction.⁵⁵ In addition to the common cold, the majority compared narcotics addiction to having mental illness, leprosy, or sexually-transmitted diseases.⁵⁶

Justice Douglas and Justice Harlan wrote concurring opinions emphasizing the statute’s folly. Douglas, explaining that addiction was an illness that needed treatment rather than punishment, wrote that “[w]e would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick.”⁵⁷ Harlan attacked the statute on foundational criminal law principles, contending that it authorized “criminal punishment for the bare desire to commit a criminal act.”⁵⁸

47. See Brief of Appellee, *Robinson*, 370 U.S. 660 (No. 554), 1962 WL 115381.

48. *Robinson*, 370 U.S. at 666.

49. *Id.* at 666–67.

50. *Id.* at 667.

51. *Id.*

52. See, e.g., Recent Case, *Imprisonment for the “Crime” of Narcotics Addiction Held Unconstitutional as Cruel and Unusual Punishment*, 111 U. PA. L. REV. 122, 123 (1962).

53. *Robinson*, 370 U.S. at 666 (“This statute . . . is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration.”).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 678 (Douglas, J., concurring).

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

The two dissenters both highlighted that the statute punished a status that was defined by voluntary conduct.⁵⁹ Justice Clark suggested that the majority was overruling the state's considered judgment that "incipient, volitional narcotic addiction poses a threat of serious crime."⁶⁰ Justice White further criticized the majority's "novel" use of the Eighth Amendment, analogizing it to the then-disfavored "substantive due process" jurisprudence of the *Lochner* Court.⁶¹

B. *Powell v. Texas*

Just six years later, the six members of the *Robinson* majority split sharply over how to understand the implications of that decision. In *Powell v. Texas*,⁶² the Court confronted a state statute that criminalized being "in a state of intoxication in any public place."⁶³ Chief Justice Warren, Justice Black, and Justice Harlan, each of whom had helped decide *Robinson*, signed on to a plurality opinion by Justice Marshall asserting that *Robinson* must be construed narrowly.⁶⁴ The key distinction for the plurality was between punishing "mere status" and punishing behavior.⁶⁵ According to Justice Marshall's opinion, "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus."⁶⁶ Since the statute at issue punished the behavior of being intoxicated in public, it did not run afoul of the Eighth Amendment.⁶⁷

Three other members of the *Robinson* majority were inclined to articulate a broader Eighth Amendment principle. Justice Douglas, Justice Brennan, and Justice Stewart signed on to a dissenting opinion by Justice Fortas that proclaimed "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."⁶⁸ Explaining that

59. See *id.* at 680 (Clark, J., dissenting) ("There was no suggestion that the term 'narcotic addict' as here used included a person who acted without volition or who had lost the power of self-control."); *id.* at 687 (White, J. dissenting) ("I agree with my Brother Clark that there was no evidence at all that appellant had lost the power to control his acts.").

60. *Id.* at 684 (Clark, J., dissenting).

61. *Id.* at 689 (White, J., dissenting). See generally *Lochner v. New York*, 198 U.S. 45 (1905).

62. 392 U.S. 514 (1968).

63. *Id.* at 517 (Marshall, J., opinion) (quoting TEX. PENAL CODE ANN. § 477 (West 1952)).

64. According to Marshall, if *Robinson* were to be construed broadly, "it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." *Id.* at 533.

65. See *id.* at 532.

66. *Id.* at 533.

67. *Id.* at 532.

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

the trial court had made factual findings concluding that both the defendant's intoxication and his appearance in public were "a characteristic part of the pattern of his disease" (alcoholism), Fortas reasoned that this case was like *Robinson* because "in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid."⁶⁹ The Marshall plurality had explicitly rejected this interpretation of *Robinson*.⁷⁰

Justice White contributed the essential fifth vote to uphold the constitutionality of the Texas statute. In a concurring opinion, he offered an interpretation of *Robinson* that was in line with the dissenters: "Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk."⁷¹ However, he concurred with the plurality because the relevant statute criminalized being *in public* while intoxicated and there had been no showing that the defendant was compelled by his alcoholism to be in a public space.⁷² Curiously, Justice White had dissented in *Robinson* on the ground that proof of addiction in that case necessarily included proof of voluntary conduct.⁷³

Thus *Powell* left *Robinson* without a controlling interpretation. The six members of the *Robinson* majority had split evenly on whether the Eighth Amendment's prohibition against status crimes was limited to crimes without an actus reus or extended to conduct that one was powerless to avoid. Five members of the Court had intimated that truly involuntary conduct could not be constitutionally punished, but the deciding opinion had done so only as dicta in the course of upholding the Texas statute.⁷⁴

69. *Id.* at 558, 568.

70. *Id.* at 533 (Marshall, J., plurality opinion) ("[*Robinson*] does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'").

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

72. *Id.* at 549–50. Interestingly, Justice White seemed sympathetic to the position that an alcoholic experiencing homelessness could not be punished under the Texas statute because then both the intoxication and the being present in public would be "impossible" to avoid. *See id.* at 551.

73. *Robinson v. California*, 370 U.S. 660, 687–88 (1962) (White, J., dissenting).

74. Under the Supreme Court's *Marks* rule, when "no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Thus, the "holding" of *Powell*, such as it is, is merely that the record contained insufficient evidence that the defendant's conduct is involuntary.

C. *The Ninth Circuit and Homelessness*

Following *Powell*, the status crimes doctrine largely lay dormant.⁷⁵ That changed in 2006, when the Ninth Circuit Court of Appeals decided *Jones v. City of Los Angeles*.⁷⁶ There, unhoused residents of Los Angeles's famous Skid Row brought a civil rights lawsuit challenging their criminal citations under a city ordinance that prohibited sitting, lying, or sleeping in public.⁷⁷ According to the *Jones* court, Los Angeles "could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status."⁷⁸ Noting that there were five votes for this position in *Powell*, the *Jones* majority explained that the Eighth Amendment protects from criminalization any acts or conditions that are unavoidable or involuntary consequences of one's status.⁷⁹ This ruling collapsed the status–voluntariness divide that had split the *Robinson* majority. According to the *Jones* Court, "the conduct at issue here is involuntary and inseparable from status—they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping."⁸⁰ However, the case was ultimately resolved by settlement and the Ninth Circuit vacated its opinion.⁸¹

It took over a decade for the Ninth Circuit to face a similar case, this time a status-crimes challenge to a camping ban in Boise, Idaho.⁸² In *Martin v. City of Boise*, a panel of the Ninth Circuit reiterated the basic rationale of *Jones*. In striking down two city ordinances that banned sleeping or camping in public, the *Martin* Court explained that "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."⁸³ Curiously, the *Martin* decision defined the unhoused residents' conduct as involuntary "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of

75. While occasionally raised, Eighth Amendment challenges under the "status crime" rationale of *Robinson* were largely rejected. *See, e.g.*, *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989); *Joel v. City of Orlando*, 232 F.3d 1353, 1361–62 (11th Cir. 2000); *Joshua v. Adams*, 231 F. App'x 592, 594 (9th Cir. 2007); *United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012).

76. 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

77. *Id.* at 1120, 1123–24.

78. *Id.* at 1132.

79. *Id.* at 1135 ("[F]ive Justices in *Powell* understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.")

80. *Id.* at 1136.

81. *See Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007).

82. *See Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019).

83. *Id.* at 1048.

available beds [in shelters].”⁸⁴ This means that, under *Martin*, it was irrelevant whether a particular individual had access to some form of shelter bed, provided that there was not enough shelter for the entirety of the city’s homeless population.⁸⁵ The Ninth Circuit declined to hear the case en banc,⁸⁶ and the U.S. Supreme Court denied certiorari.⁸⁷

Following *Martin*, cities within the Ninth Circuit’s jurisdiction displayed a variety of responses. Some cities increased offers of shelter beds to homeless residents, backed by the threat of criminal punishment if the offers were refused.⁸⁸ Some cities revised their camping bans to permit overnight sleeping while continuing to criminalize daytime encampments.⁸⁹ Other cities simply took a hands-off approach to homelessness.⁹⁰ But many pushed the limits of the decision by continuing to crack down on homeless residents, either through criminalization or other efforts to “hide” homelessness.⁹¹

In 2023, the Ninth Circuit expanded upon its *Martin* decision in deciding a status-crime challenge to another city’s camping ordinances, this time from Grants Pass, Oregon.⁹² Unlike *Martin*, the *Grants Pass* ordinances did not criminalize the bare act of sleeping in public,⁹³ but rather prohibited “the use of rudimentary bedding supplies, such as a blanket, pillow, or sleeping bag” as bedding.⁹⁴ The Ninth Circuit panel reasoned that *Martin*’s logic applied not only to the act of sleeping, but also to “articles necessary to facilitate sleep.”⁹⁵ The opinion left open the possibility, however, that *Grants Pass* could constitutionally prohibit “the use of stoves or fires, as

84. *Id.* (quoting *Jones*, 444 F.3d at 1136) (alterations in original).

85. *But see id.* at 1048 n.8 (“Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it.”).

86. *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

87. *City of Boise v. Martin*, 140 S. Ct. 674 (2019).

88. Greg Kim, *One Court Case Changed How West Coast Cities Deal With Homeless Encampments*, SEATTLE TIMES (Oct. 15, 2023, 6:00 AM), <https://www.seattletimes.com/seattle-news/homeless/one-court-case-changed-how-west-coast-cities-deal-with-homeless-encampments/> [https://perma.cc/FX79-5GNS].

89. Rachel Cohen, *The Little-Noticed Court Decision that Changed Homelessness in America*, VOX.COM (June 12, 2023, 6:30 AM), <https://www.vox.com/23748522/tent-encampments-martin-boise-homelessness-housing> [https://perma.cc/5WZV-ZRLY].

90. Abe Kwok, *‘The Zone’ is an Epic Fail. All Because Phoenix Misread a Federal Court Ruling*, ARIZ. REPUBLIC (Apr. 3, 2023), <https://www.azcentral.com/story/opinion/op-ed/abekwok/2023/04/03/the-zone-epic-fail-phoenix-misread-homeless-ruling/70070267007/> [https://perma.cc/L42S-PYSE].

91. *See* Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 565 (2021).

92. *Johnson v. City of Grants Pass*, 72 F.4th 868, 874–75 (9th Cir. 2023), *rev’d*, 603 U.S. 520 (2024).

93. To be clear, the city amended its ordinances after the lawsuit was filed to remove the prohibition on sleeping, in the absence of additional bedding materials. *Id.* at 877–78.

94. *Id.* at 889.

95. *Id.* at 891.

well as the erection of any structures.”⁹⁶ It also made clear that the ordinances could be enforced against persons, including the parties to the suit, “who engage in prohibited activity unrelated to their status as homeless persons.”⁹⁷ In January 2024, the U.S. Supreme Court granted certiorari to review the Ninth Circuit’s interpretation of the Eighth Amendment.⁹⁸

D. City of Grants Pass v. Johnson

The Supreme Court issued the *Grants Pass* decision on June 28, 2024.⁹⁹ Writing for a 6–3 majority, Justice Gorsuch held that the Eighth Amendment does not prohibit the city from enforcing a camping ban against homeless residents.¹⁰⁰ Distinguishing *Robinson*, Gorsuch claimed that the Grants Pass ordinances do not “criminalize mere status,” but rather they “forbid actions.”¹⁰¹ Nor did it matter that the forbidden actions might be, “in some sense ‘involuntary,’ for some homeless persons cannot help but do what the law forbids.”¹⁰² Borrowing heavily from the four-Justice plurality opinion in *Powell*, Gorsuch argued that constitutionalizing a general involuntariness defense would leave courts without any limiting principle to guide future cases, and it would violate the principles of federalism.¹⁰³

Beginning with the status crimes doctrine, Gorsuch offered up a narrow interpretation of *Robinson*. Noting that the status of addiction involved neither an actus reus nor a mens rea—the two essential prerequisites of criminal culpability in the Western tradition¹⁰⁴—Gorsuch suggested that California’s law in that case “was an anomaly.”¹⁰⁵ The implication is that *Robinson*’s intervention into the substantive criminal law was equally anomalous,¹⁰⁶ and that the case should have been decided, if at all, under the due process clause of the Fourteenth Amendment.¹⁰⁷ But since the parties

96. *Id.* at 895 (“Consistent with *Martin*, these prohibitions may or may not be permissible.”).

97. *Id.* at 895 n.36.

98. *City of Grants Pass v. Johnson*, 144 S. Ct. 679 (2024).

99. *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024).

100. *See id.* at 560–61.

101. *Id.* at 546.

102. *Id.* at 547.

103. *Id.* at 549–58.

104. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

105. *Grants Pass*, 603 U.S. at 545.

106. *See id.* at 546 (“It was a view unprecedented in the history of the Court before 1962.”); *id.* (“Nor, in the 62 years since *Robinson*, has this Court once invoked it as authority to decline the enforcement of any criminal law, leaving the Eighth Amendment instead to perform its traditional function of addressing the punishments that follow a criminal conviction.”).

107. *See id.* (“By almost every indication, then, *Robinson* was set to be a case about the scope of the Due Process clause . . .”). In a recent op-ed for the *Wall Street Journal*, one of Justice Harlan’s former law clerks confirmed that Harlan, at least, was under the impression that the Court had originally decided to resolve the case on Due Process grounds. Nathan Lewin, Opinion, *How an Accidental Ruling*

did not call for the court to overrule *Robinson*,¹⁰⁸ Gorsuch's majority cabined it as exclusively about criminalization in the absence of *actus reus* and *mens rea*, a claim that cannot apply to the Grants Pass ordinances.¹⁰⁹

Gorsuch then rejected what he viewed as an invitation to "extend" *Robinson* to immunize involuntary conduct.¹¹⁰ Indeed, he claimed that, through *Powell*, "this Court has already rejected that view."¹¹¹ Focusing almost exclusively on Justice Marshall's plurality opinion, Gorsuch argued that *Powell* solidified the distinction between status and conduct by rejecting the claim of an alcoholic that his public intoxication was involuntary.¹¹² According to Gorsuch, the case before the Court "is no different from *Powell*."¹¹³ Gorsuch went further, however, highlighting the policy reasons against interpreting the Eighth Amendment to immunize involuntarily actions. He argued that such a rule would be the equivalent of creating a constitutional insanity defense, untethered from the text of the Eighth Amendment: "an individual like the defendant in *Powell* does not dispute that he has committed an otherwise criminal act with the requisite *mens rea*, yet he seeks to be excused from 'moral accountability' because of his 'condition.'"¹¹⁴ Gorsuch argued that assessments of responsibility and moral culpability are not the province of courts, but rather "are generally best resolved by their people and their elected representatives."¹¹⁵

In addition to joining the majority opinion, Justice Thomas wrote separately to emphasize that *Robinson* was wrongly decided in the first instance.¹¹⁶ According to Thomas, the meaning of the Eighth Amendment is "fixed" by the text and original public meaning, while *Robinson* was premised on modern understandings of disease and addiction.¹¹⁷ He added that the case, in his view, does not even implicate the Eighth Amendment

Led to Homeless Encampments, WALL ST. J. (Aug. 9, 2024, 2:20 PM), <https://www.wsj.com/opinion/how-an-accidental-ruling-led-to-homeless-encampments-law-courts-history-022a7ad6> [https://perma.cc/5U3A-J7YT].

108. *Grants Pass*, 603 U.S. at 574.

109. *Id.* at 547 ("[A] person does not violate ordinances like Grants Pass's simply by being homeless but only by engaging in certain acts (*actus rei*) with certain mental states (*mentes reae*).").

110. *See id.* at 547–50.

111. *Id.* at 548.

112. *Id.* at 548–50.

113. *Id.* at 549.

114. *Id.* at 551.

115. *Id.* at 552.

116. *Id.* at 561 (Thomas, J., concurring).

117. *Id.* at 562. Although the Eighth Amendment is sometimes said to reflect "evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), the Supreme Court has more recently signaled an originalist approach to understanding the Amendment, one that is more permissive of punishment and of broad criminalization. The result is an Eighth Amendment that is largely "defanged," at least with respect to its ability to intervene in the modern problems of criminal justice. *See* Kathryn E. Miller, *No Sense of Decency*, 98 WASH. L. REV. 115, 140 (2023) (arguing that an originalist approach to the punishment clause "would amount to no punishment clause at all").

because the Grants Pass ordinances are ordinarily punished by civil fines and exclusion orders, not criminal punishments.¹¹⁸

Writing for three dissenters, Justice Sotomayor aggressively attacked the majority's claim that the Grants Pass ordinances did not involve the criminalization of status. According to Sotomayor, the ordinances' "purpose, text, and enforcement confirm that they target status, not conduct."¹¹⁹ Sotomayor explained that the Grants Pass City Council implemented "targeted enforcement of illegal camping" precisely as an effort to drive homeless residents out of the city.¹²⁰ And she demonstrated how the text of the ordinances only punished residents who sought to maintain "a temporary place to live," a detail that would only apply to those without a separate home.¹²¹ Thus, Sotomayor claimed that a "straightforward application of *Robinson*" should resolve the case.¹²² Moreover she rejected the majority's reliance on the *Powell* plurality, distinguishing "involuntary" conduct that is "occasioned by" a status from "conduct (sleeping outside) that *defines* a particular status (homelessness)."¹²³

II. DISAGGREGATING STATUS

Although Justice Sotomayor claimed that a "straightforward" application of *Robinson* should decide the case in favor of the city's homeless residents, *Robinson*'s status-based rationale is anything but straightforward. As became evident in *Powell*, half of those who joined the *Robinson* majority found California's statute problematic because it did not require proof of any culpable conduct.¹²⁴ The other half believed *Robinson* rested on a broader principle—that a person cannot be punished for "being in a condition which he had no capacity to change or avoid"¹²⁵—which seemingly read a voluntariness requirement into the Eighth Amendment. And even these interpretations of *Robinson* can be further unpacked. For one thing, *Robinson* addressed not just any status, but an "illness" that "may be contracted innocently or involuntarily."¹²⁶ This implied an absence of

118. *Grants Pass*, 603 U.S. at 562–63 (Thomas, J., concurring). According to the majority, the Eighth Amendment was implicated because violation of an exclusion order can result in "a criminal punishment of up to 30 days in jail and a larger fine." *Id.* at 543 (majority opinion).

119. *Id.* at 575 (Sotomayor, J., dissenting).

120. *Id.* at 575–76.

121. *Id.* at 576–77.

122. *Id.* at 581.

123. *Id.* at 585.

124. *See Powell v. Texas*, 392 U.S. 514, 532–33 (1968) (Marshall, J., plurality opinion).

125. *Id.* at 568 (Fortas, J., dissenting).

126. *Robinson v. California*, 370 U.S. 660, 667 (1962).

culpability that is distinct from the questions of punishing status or involuntary conduct.

The questions of status in *Grants Pass* are similarly intertwined with questions of both voluntariness and culpability. Justice Sotomayor is unquestionably correct that the Grants Pass ordinances *target* a disfavored status.¹²⁷ As Sara Rankin has observed, “Americans are stained by ‘the influence of exile’: deeply ingrained class and status distinctions that can inconspicuously, even unconsciously guide us to create and enforce laws and policies that restrict the visibility of poverty—of poor people—in public space.”¹²⁸ But Justice Gorsuch is also correct that status as such is, in the abstract, irrelevant to criminality: “Under the city’s laws, it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandoned his dorm room to camp out in protest on the lawn of a municipal building.”¹²⁹ The difference between a homeless resident of Grants Pass and a vacationing backpacker is, of course, that one of them arguably violates the law involuntarily. Thus, the salience of status to the question of criminality is also a question of volitional conduct and a perhaps a question of culpability.¹³⁰

This Part seeks clarify three conceptually distinct inquiries that would be implicated by a robust interpretation of the status crimes doctrine: First, is it cruel and unusual to punish “mere” status? Second, is it cruel and unusual to punish conduct that one has no capacity to change or avoid? Third, is it cruel and unusual to punish behavior that is wholly non-culpable? As this Part details, if any of these three inquiries is answered in the affirmative (supporting the Ninth Circuit’s homelessness jurisprudence) it would arguably upend other (often deeply problematic) features of criminal law as currently practiced.

To be clear, this is not an attempt to evade the Constitution through “formalistic distinctions.”¹³¹ Rather, it is a recognition that the Ninth Circuit’s Eighth Amendment jurisprudence in cases like *Martin* and *Grants Pass* emanates from a context—unsheltered homelessness—that implicates multiple challenging questions of criminal law theory, policy, and practice. Taking these questions in turn illustrates the limitations of the Eighth Amendment as a potential tool for improving the lives of individuals experiencing homelessness. Deeming punishment “cruel and unusual”

127. See *Grants Pass*, 603 U.S. at 575–76 (Sotomayor, J., dissenting) (detailing the motivations of the Grants Pass city council with respect to homeless residents).

128. Rankin, *supra* note 30, at 99, 122.

129. *Grants Pass*, 603 U.S. at 546–47.

130. On its face, sleeping in public seems less culpable than, for example, the public drunkenness at issue in *Powell*.

131. See *Grants Pass*, 603 U.S. at 577 (Sotomayor, J., dissenting).

because it targets status, reaches involuntary conduct, or sanctions non-culpable conduct has broad consequences for a criminal legal system that routinely does all three.

A. *Punishing Status*

Robinson held that “even one day in prison” for a status offense “would be cruel and unusual.”¹³² But it did not adequately explain what makes something a “status.” Curiously, the majority opinion primarily invoked analogies to diseases such as mental illness or the common cold, contending that “a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment.”¹³³ Why having a disease is a “status” is left unexplained.

Justice Gorsuch’s majority opinion in *Grants Pass* provides a clear, if narrow, answer: a law punishes “mere status” if the law does not proscribe some actus reus.¹³⁴ This narrowing construction of course fatally undermines the status crimes doctrine. As the dissent correctly notes, under Gorsuch’s framework, *Grants Pass* would be constitutionally prohibited from criminalizing “having a common cold,” but is free to criminalize “sniffing or coughing because of that cold.”¹³⁵ That said, the requirement of actus reus is rooted in a longstanding criminal law tradition.¹³⁶ It is therefore not a surprising interpretation of *Robinson* to claim that it holds that punishment in the absence of conduct is constitutionally suspect. Indeed, this interpretation of *Robinson* and *Powell* has been commonly adopted by lower courts.¹³⁷

If the majority’s definition of status is overly narrow, the dissent’s definition is effectively absent. Some scholars have offered thoughtful attempts to substantively define a “status” and explain why laws targeting status are especially pernicious.¹³⁸ Such elucidation is missing from the

132. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

133. *Id.* at 666.

134. See *Grants Pass*, 603 U.S. at 544–46. Although Justice Gorsuch also implies that a corresponding mens rea may be necessary to save the constitutionality of the ordinances, see *id.* at 544–45, 549–50, the trend in criminal law since the industrial revolution has been to permit some “strict liability” crimes in the interest of social betterment. See *Morrisette v. United States*, 342 U.S. 246, 252–56 (1952). For a lucid critique of this trend, see Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. L. REV. 112 (2023).

135. *Grants Pass*, 603 U.S. at 578 (Sotomayor, J., dissenting).

136. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES* 222 (10th ed. 2016) (describing the actus reus requirement as a “fundamental principle”).

137. See, e.g., *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1166 (Cal. 1995); *Joyce v. City & Cnty. of S.F.*, 846 F. Supp. 843, 857 (N.D. Cal. 1994).

138. See, e.g., John Kip Cornwell, *Status-Based Prosecution: Conflict, Confusion and the Quest for Coherence*, 25 U. PA. J. CONST. L. 107, 137 (2023) (defining status as “an individual’s position within a social structure” that entails specific expectations, rights, and duties).

dissent. According to Justice Sotomayor, the Grants Pass ordinances “criminalize the status of being homeless.”¹³⁹ But she doesn’t explain what makes something a status, or when and why it is impermissible to target it. This is necessary detail if the Eighth Amendment forbids not only statutes that punish status on their face, but those, like the Grants Pass ordinances, that do so in operation. Given that most homeless individuals transition into and out of homelessness relatively rapidly,¹⁴⁰ homelessness is a transitory status at best, if it is a status at all. And it seems simultaneously both more and less like a status than some of the examples from *Robinson* itself.

Sotomayor compounds this confusion when she claims that the Grants Pass ordinances are unconstitutional because they “single out for punishment the activities that *define* the status of being homeless.”¹⁴¹ At the risk of being pedantic, that assertion is misleading, if not outright inaccurate. If point-in-time counts are any indication, the majority of the country’s unhoused individuals occupy some form of shelter that keeps them from sleeping in public.¹⁴² Perhaps the “status” that the Grants Pass ordinances target is *unsheltered* homelessness, but, even then, not all unsheltered individuals in Grants Pass make a campsite in violation of the city’s ordinances.¹⁴³ So the status at issue under the dissent’s theory of the case is just the status of being someone who violates the Grants Pass ordinances.¹⁴⁴

If status can be understood as “defined” by conduct in this way, then laws prohibiting any conduct whatsoever can arguably be construed to punish a corresponding status and therefore to be constitutionally impermissible, at least without a corresponding theory of what makes something an impermissible status to punish. To draw an example from the *Powell* plurality, laws against murder punish those with the status of murderer.¹⁴⁵ We typically think this unproblematic. What makes punishing

139. *Grants Pass*, 603 U.S. at 579 (Sotomayor, J., dissenting).

140. See Adam M. Lippert & Barrett A. Lee, *Stress, Coping, and Mental Health Differences Among Homeless People*, 85 SOCIO. INQUIRY 343, 345 (2015).

141. *Grants Pass*, 603 U.S. at 577 (Sotomayor, J., dissenting) (emphasis added).

142. 2024 AHAR REPORT, *supra* note 1, at 2 (showing that 35.5% of individuals experiencing homelessness were unsheltered in January 2024).

143. See, e.g., *Grants Pass*, 603 U.S. at 579–80 (Sotomayor, J., dissenting) (quoting an unhoused resident of Grants Pass who chose to sleep outside of city limits to avoid the ordinances).

144. I do not say this blithely. As I make clear in Part III, *infra*, I think no one should be put to the choice between criminality and sacrificing safety, security, or community on the other. But I do not believe that this is a problem of status as much as it is a violation of the essential liberty necessary to live a meaningful life under oppressive constraints. See *infra* Section III.B.

145. Cf. *Powell v. Texas*, 392 U.S. 514, 534 (1968) (Marshall, J., plurality opinion) (“If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a ‘compulsion’ to kill, which is an ‘exceedingly strong influence,’ but ‘not completely overpowering.’”). The dissent’s definition of status raises further questions. Should *Lawrence v. Texas* have been decided under the Eighth Amendment on the ground that criminal laws prohibiting

the status of homelessness different, if it is different, appears to be something related to the involuntariness or lack culpability in the associated conduct, rather than anything wrongful about the fact of punishing status as such.

In fact, in criminal law we punish statuses quite regularly, at least in conjunction with some additional actus reus. Felons may not possess firearms,¹⁴⁶ though other citizens may have a constitutional right to do so.¹⁴⁷ Individuals with a sex offense conviction may not be permitted near playgrounds,¹⁴⁸ though the space is ostensibly public and available to everyone. Family members are punished for omissions that would be entirely unproblematic for someone else.¹⁴⁹ Having a particular status can thus make non-culpable conduct culpable or aggravate already culpable conduct.¹⁵⁰ Treating the Grants Pass ordinances as unconstitutional on the ground that they punish a status would open up many existing criminal law practices to constitutional challenge.

Sotomayor makes a singular attempt to distinguish the “status” at issue in *Grants Pass* from the involuntary conduct at issue in *Powell*. She writes, “[t]he *Powell* Court considered a statute that criminalized voluntary conduct (getting drunk) that could be rendered involuntary by a status (alcoholism); here, the Ordinances criminalize conduct (sleeping outside) that defines a particular status (homelessness).”¹⁵¹ I must admit to being perplexed by this purported distinction. Certainly, sleeping outside can be described as “voluntary conduct” that “could be rendered involuntary” by the status of homelessness. And getting drunk can likewise be described as conduct “that defines” the status of alcoholism. If there is a limiting principle to the dissent’s status–conduct distinction, it must be found elsewhere.

homosexual sodomy punish the status of homosexuality? See *Bowers v. Hardwick*, 478 U.S. 186, 202 n.2 (1986) (Blackmun, J., dissenting) (“Consequently, under Justice White’s analysis in *Powell*, the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances.”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

146. 18 U.S.C. § 922(g)(1).

147. See generally *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (holding that the Second Amendment guarantees an individual right to keep and bear arms).

148. See, e.g., MISS. CODE ANN. § 45-33-25(4)(a) (2025).

149. See Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327, 1330 (2008).

150. In her dissent, Justice Sotomayor suggested that, under the majority’s narrow interpretation of *Robinson*, a state would be free to criminalize “being an addict and breathing.” *City of Grants Pass v. Johnson*, 603 U.S. 520, 578 (2024) (Sotomayor, J., dissenting). Again, this example conflates issues of voluntariness (under formulations such as that of the Model Penal Code, breathing would presumably be considered involuntary, see MODEL PENAL CODE § 2.01(d)) and culpability (breathing is presumably harmless). But the structure of Sotomayor’s hypothetical prohibition, combining some conduct with a status, is common in American criminal law.

151. *Grants Pass*, 603 U.S. at 585 (Sotomayor, J., dissenting).

B. Punishing Involuntary Conduct

In *Powell*, five Justices signed on to opinions suggesting that Eighth Amendment should prohibit punishment for conduct that one is powerless to avoid.¹⁵² Justice Sotomayor embraced this rationale in her *Grants Pass* dissent, repeatedly emphasizing that the city's homeless residents had no choice but to sleep in public.¹⁵³ In fact, this point so motivated the dissent that Sotomayor characterized the criminalization of “an essential bodily function” as “just another way to ban the person.”¹⁵⁴ That is, the involuntariness of the conduct at issue informed her conclusion that that the Grants Pass ordinances create an impermissible status crime.

The criminal law implications for holding involuntary conduct unconstitutional, however, are potentially massive. First of all, we should note that the dissent's position relies on a somewhat generous definition of “involuntary” or “unavoidable.” Camping in Grants Pass is not strictly unavoidable. As the dissent recognizes, some city residents sleep outside of the jurisdiction;¹⁵⁵ some residents may choose to sacrifice the use of bedding or other campsite materials;¹⁵⁶ some residents may choose to avail themselves of private shelter despite features that render it undesirable.¹⁵⁷ (We might rightly think that residents should not have to do these things, but that is a question separate from whether the conduct is voluntary).

In criminal law theory, voluntariness tends to be a rather thin requirement. The Model Penal Code, for example, states that an act is insufficiently voluntary to contribute to culpability only if it “is not a product of the effort or determination of the actor.”¹⁵⁸ While this understanding of involuntariness might extend to the act of falling asleep after some sustained period of wake, it likely cannot be extended to the act of preparing a campsite “for the purposes of maintaining a temporary place to live.”¹⁵⁹ Even among scholars who purport to take voluntariness more “seriously,” conduct is treated as voluntary unless a person simply could not

152. See *Powell v. Texas*, 392 U.S. 514, 548–49 (1968) (White, J., concurring); *id.* at 567 (Fortas, J., dissenting).

153. *Grants Pass*, 603 U.S. at 563–64 (Sotomayor, J., dissenting) (“For some people, sleeping outside is their only option.”); *id.* at 563 (“For someone with no available shelter, the only way to comply with the Ordinances is to leave Grants Pass altogether.”); *id.* at 577 (“The Ordinances’ definition of ‘campsite’ creates a situation where homeless people necessarily break the law just by existing.”).

154. *Id.* at 578.

155. *Id.* at 579.

156. *Id.* at 571–72.

157. *Id.* at 569.

158. MODEL PENAL CODE § 2.01(d).

159. *Grants Pass*, 603 U.S. at 570 (Sotomayor, J., dissenting) (quoting GRANTS PASS, OR., MUNICIPAL CODE § 5.61.010(B) (2024)).

“have done otherwise.”¹⁶⁰ Famously, defendants have been guilty of “voluntary” conduct for such involuntary actions as being dragged into a penal institution,¹⁶¹ or forcibly transported into a prohibited jurisdiction.¹⁶²

Even if we take involuntariness to mean something broader, like conduct that is “coerced” or “compelled” by the circumstances,¹⁶³ I am inclined to agree with both Justice Gorsuch in *Grants Pass* and Justice Marshall in *Powell* that any attempt to constitutionally exonerate involuntary conduct would result in the creation of a generally applicable involuntariness defense.¹⁶⁴ Typically, criminal defenses are the province of the state to define and adopt.¹⁶⁵ Moreover, this particular defense has already been rejected in another form. Over the last four decades, numerous states have withdrawn their support for a “volitional” insanity defense—a claim that a person understood what they were doing but could not have done otherwise.¹⁶⁶ That is, even where conduct is involuntary because it was the product of an irresistible impulse produced by a mental defect, states have deemed it sufficiently culpable to warrant punishment.

Lastly, I am hard pressed to see how any account of the Eighth Amendment that prohibits criminalizing sleep as a “biological necessity”¹⁶⁷ would permit the criminalization of public urination and defecation.¹⁶⁸ Involuntariness is not an assessment that permits consideration of countervailing state interests, unlike, for example, due process liberty.¹⁶⁹ Thus, the fact that urination and defecation are arguably harmful in ways that camping is not would be unaccounted for legally.¹⁷⁰ Although Justice Sotomayor is correct that urination and defecation are not implicated by the terms of the Ninth Circuit’s specific injunction, it would be naïve to not

160. See Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1579 (2013).

161. See *People v. Low*, 232 P.3d 635, 644 (Cal. 2010).

162. See *United States v. Ambriz-Ambriz*, 586 F.3d 719, 723 (9th Cir. 2009).

163. For a version of this argument, see Kent Greenawalt, “Uncontrollable” Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927, 938 (1969).

164. See *Powell v. Texas*, 392 U.S. 514, 534–36 (Marshall, J., plurality opinion); *Grants Pass*, 603 U.S. at 551–52.

165. See generally *Kahler v. Kansas*, 589 U.S. 271 (2020) (holding that states are not constitutionally required to permit a particular insanity defense).

166. See KADISH ET AL., *supra* note 136, at 1041–43.

167. See *Grants Pass*, 603 U.S. 520, 563 (Sotomayor, J., dissenting).

168. See *id.* at 564 (“The decision below did, in fact, leave cities free to punish ‘littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence.’”).

169. See, e.g., *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (explaining that due process “forbids the government to infringe certain ‘fundamental’ liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest”).

170. I have previously examined the purported states interest in criminalizing public urination and defecation. See *McJunkin*, *supra* note 6, at 192 & n.493.

anticipate those bodily functions as a future basis for litigation if the dissent's arguments had won the day.

C. Punishing Non-Culpable Conduct

A more promising theory of the Eighth Amendment is that provided by the Criminal Law and Punishment Scholar's amicus brief, cited in Sotomayor's dissent.¹⁷¹ They argue that the Grants Pass ordinances should be struck down under the Eighth Amendment's proportionality jurisprudence because any quantum of punishment is disproportional to entirely non-culpable behavior such as sleeping in public where one has no other alternatives.¹⁷² Sotomayor herself gestures in this direction when she reminds that the Eighth Amendment prohibits "inflicting 'unnecessary suffering' that is 'grossly disproportionate to the severity of the crime.'"¹⁷³ Note that this is conceptually distinct from both the status argument (some statuses, particularly statuses defined by conduct, are culpable)¹⁷⁴ and the involuntariness argument (some involuntary conduct is culpable, assuming involuntariness is defined broadly enough to capture the conduct at issue in *Grants Pass*).¹⁷⁵ The argument here is that the precise conduct at issue in this case is wholly "innocent" and is therefore deserving of no punishment at all.

Although this culpability argument provides a basis to distinguish the conduct associated with homelessness from other conduct that the state may retain an interest in punishing, it faces challenges both from the criminal law tradition and from the Supreme Court's proportionality jurisprudence. Taking the latter first, it is true that the Supreme Court has declared that the Eighth Amendment's punishment clause prohibits disproportionate punishment.¹⁷⁶ It is also true, however, that the Supreme Court has not struck down an individual punishment as disproportionate to culpability since 1983, in a case involving a life-without-parole sentence for uttering a bad check for \$100.¹⁷⁷ The Court's recent proportionality jurisprudence has been limited to so-called "categorical" cases where the punishment imposed

171. Brief of Criminal Law and Punishment Scholars as Amici Curiae in Support of Respondents, *Grants Pass*, 603 U.S. 520 (No. 23-175), 2024 WL 1512984 [hereinafter Criminal Law and Punishment Scholars Brief].

172. *See id.* at 3.

173. *Grants Pass*, 603 U.S. at 574 (Sotomayor, J., dissenting) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 & n.7 (1976)).

174. *See supra* text accompanying notes 145–50.

175. *See supra* text accompanying note 161. *But see* Greenawalt, *supra* note 163, at 953 (contending that retributivists would find chronic alcoholics who cannot control their drinking to be undeserving of punishment).

176. *See Weems v. United States*, 217 U.S. 349, 367 (1910).

177. *See Solem v. Helm*, 463 U.S. 277, 281 (1983).

was either death or life without parole.¹⁷⁸ The last time the Supreme Court struck down a term-of-years sentence was 1910.¹⁷⁹ And—unless we attempt to construe *Robinson* as such a case—the Court has never invalidated a sentence of imprisonment under the Eighth Amendment on the ground that the conduct is wholly innocent.¹⁸⁰

Moreover, the amicus brief asserts that the Eighth Amendment requirement of proportionality “can only be satisfied when criminal punishment is applied to criminal conduct—offenses, like theft, fraud, and murder, that are by their nature culpable.”¹⁸¹ But not all criminality is inherently culpable in this way: *mala prohibita* crimes render something otherwise innocent unlawful in the name of the public interest.¹⁸² Most regulatory offenses are in this category. Camping in public spaces certainly is. And while such offenses may rightly be criticized for contributing to overcriminalization,¹⁸³ or even for unfairly punishing marginalized populations in the name of social “order,”¹⁸⁴ the ability to punish for them *at all* has never been in serious doubt.¹⁸⁵

One might contend that my disaggregation is in fact obscuring the argument here. Unlike other *mala prohibita* crimes, which are in some sense deserving of punishment when committed voluntarily,¹⁸⁶ sleeping in public is wholly innocent precisely when it is committed involuntarily, as in the case of Grants Pass’s unhoused residents. Setting aside how strictly we construe the measure of voluntariness involved,¹⁸⁷ criminal law frequently

178. See *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life without parole for juvenile offenders is unconstitutional); *Graham v. Florida*, 460 U.S. 48 (2010) (holding that mandatory life without parole for non-homicide juvenile offenders is unconstitutional); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that death sentence for juvenile offenders is unconstitutional).

179. See *Weems*, 217 U.S. at 367.

180. The Criminal Law and Punishment Scholars brief attempts to paint *Robinson* this way. See Criminal Law and Punishment Scholars Brief, *supra* note 171, at 8. However, no opinion in *Robinson* ever explicitly references proportionality. Moreover, there is no reason to believe that the defendant’s addiction in *Robinson* should be understood as non-culpable. Addiction may be acquired “innocently or involuntarily,” but it can also be the result of repeated voluntary criminality. See *Powell v. Texas*, 392 U.S. 514, 542 n.3 (1968) (Black, J., concurring).

181. Criminal Law and Punishment Scholars Brief, *supra* note 171, at 6.

182. For a detailed taxonomy of the culpability entailed by *mala prohibita* crimes, see Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1570–98 (1997).

183. See, e.g., Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538–39 (2012) (“With the proliferation of regulatory offenses, infractions that in prior generations might not even have resulted in civil fines or tort liability are now subject to the punishment and stigma of the criminal law.”).

184. See generally Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637 (2021) (arguing that laws against disorderly conduct upholds racist, sexist, and ableist social hierarchies).

185. See Note, *The Distinction Between Mala Prohibita and Mala In Se in Criminal Law*, 30 COLUM. L. REV. 74, 74–76 (1930) (authored by Herbert Wechsler).

186. See Green, *supra* note 182, at 1577–90.

187. See *supra* text accompanying notes 155–57.

punishes *mala prohibita* crimes that, in some sense, could not be avoided.¹⁸⁸ In other words, wholly innocent conduct is not currently beyond the reach of the criminal law. While this is a longstanding source of consternation among dedicated criminal law scholars, it has never previously been thought to violate the Eighth Amendment.¹⁸⁹ The reality of criminal law practice is that culpability beyond engaging in the prohibited actus reus is no longer necessary.

III. BEYOND CRUEL AND UNUSUAL

The foregoing Parts have demonstrated various tensions between an interpretation of the Eighth Amendment that vindicates the *Grants Pass* plaintiffs and some of the more pathological features of the criminal legal system. To hold that the Grants Pass ordinances are unconstitutional because they punish a status, because they punish involuntary conduct, or because they punish non-culpable conduct would be to unsettle entrenched criminal law practices. Those practices are themselves suspect and are likely in need of reconsideration and reform. But *Grants Pass* demonstrates that the current Supreme Court is unwilling to be the source of that reform, at least under the aegis of the Eighth Amendment's punishment clause.

This Section situates *Grants Pass* within the literature on criminal law's political pathology to reveal the more systemic consequences of the Court's failure to intervene. Both legislatures and prosecutors have structural reasons to favor overcriminalization and to remove impediments to conviction.¹⁹⁰ Optimistically, some scholars saw courts as a potential constraint—the one institution with both the competence and the mandate to push back on overcriminalization.¹⁹¹ But Justice Gorsuch's majority opinion betrays that optimism. It shows substantial deference to state legislatures in matters of criminal justice policy, citing legislative supremacy and federalism as reasons to interpret the Constitution narrowly.¹⁹² If courts hold any hope for curing criminal law's pathology, it is likely to be the result of narrower interventions, possibly by state courts, rather than the wholesale constitutionalization of criminal practices that could have emerged from *Grants Pass*.

188. See, e.g., Serota, *supra* note 134, at 123 (describing how public welfare offenses result in punishing “morally innocent” conduct such as “unavoidable accidents”).

189. See, e.g., *United States v. Quality Egg, LLC*, 99 F. Supp. 3d 920, 947 (N.D. Iowa 2015), *aff'd sub nom.* *United States v. DeCoster*, 828 F.3d 626 (8th Cir. 2016) (rejecting argument that a prison sentence for a strict liability crime is a violation of the Eighth Amendment's proportionality principle).

190. Stuntz, *supra* note 29, at 529–40.

191. See *id.* at 587–88.

192. See *infra* Section III.A.

To that end, this Part concludes by briefly sketching a path forward for homeless advocates. Jettisoning the Eighth Amendment's focus on criminal punishment and culpability, this Part instead explores the true motives for criminalizing individuals experiencing homelessness: state and local officials view the threat of criminalization as a tool to influence the decision making of visibly unhoused residents. By surfacing these motives, evident both in the *Grants Pass* record and the majority opinion, advocates can begin to consider other legal doctrines that push back more directly on them.

A. Political Pathology

Two decades ago, Bill Stuntz published *The Pathological Politics of Criminal Law*, one of the most widely read and widely cited works on the fundamental problems that plague the contemporary criminal legal system. Stuntz's diagnosis was straightforward: American criminal law is broad—"it covers far more conduct than any jurisdiction could possibly punish"—and is constantly expanding.¹⁹³ Lawmakers seem immune to normative arguments, typically advanced by criminal law scholars, that narrower criminal liability would be more fair, more just, or otherwise more socially beneficial.¹⁹⁴ The endpoint of this expansion will be "criminal codes that cover everything and decide nothing," a world in which the discretion afforded to police and prosecutors will be the true source of lawmaking.¹⁹⁵

Stuntz attributes this state of affairs to criminal law's "pathological politics," the self-interested alliance between legislators and prosecutors.¹⁹⁶ As Stuntz writes, "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones."¹⁹⁷ This is a structural problem. It occurs because legislators benefit from overcriminalization, insofar as it increases the probability of convictions and blunts judicial pushback through constitutional doctrines or doctrines like the rule of lenity.¹⁹⁸ And legislatures can rely on prosecutors to exercise discretion, minimizing the spillover effects of overcriminalization.¹⁹⁹ Prosecutors, meanwhile, benefit from broad and

193. Stuntz, *supra* note 29, at 507.

194. *See id.* at 507–08.

195. *Id.* at 509.

196. *Id.* at 510.

197. *Id.*

198. *See id.* at 528.

199. *See id.*

overlapping criminal laws by channeling defendants into cost-effective guilty pleas that effectively circumvent any judicial oversight.²⁰⁰

Stuntz suggested that the best remedy to these pathological politics would be “aggressive constitutional regulation of criminal law.”²⁰¹ He envisioned judges invoking “the Eighth Amendment, the Due Process Clause, or both” to impose robust notice requirements, to rid the criminal code of little-used laws, to reject unjust sentencing schemes, or to otherwise push back on legislative overcriminalization.²⁰² Given the various tensions identified earlier in this Essay, *Grants Pass* thus represented a unique opportunity to “constitutionalize a great deal of ordinary criminal law” as Stuntz had hoped for.²⁰³

Against this background, the deference of the *Grants Pass* majority to legislative prerogatives takes on new meaning. In rejecting the Eighth Amendment arguments advanced by the city’s homeless residents, Justice Gorsuch repeatedly invoked the principles of legislative supremacy and federalism to justify keeping courts out of criminal law. He argued that adopting Ninth Circuit’s interpretation of the Eighth Amendment would make the Supreme Court “the ultimate arbiter of standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.”²⁰⁴ Doing so, he claimed, “would interfere with ‘essential considerations of federalism’ that reserve to the States primary responsibility for drafting their own criminal laws.”²⁰⁵

Citing the Court’s recent decision refusing to constitutionalize an insanity defense, Gorsuch repeated that decisions about criminal culpability are “generally best resolved by the people and their elected representatives.”²⁰⁶ He claimed that the Ninth Circuit’s jurisprudence takes these essential questions away from elected representatives and gives them to federal judges who have no “special competence” to decide them.²⁰⁷ “Instead of encouraging ‘productive dialogue’ and ‘experimentation’ through our democratic institutions,” he argues, “courts have frozen in place their own ‘formulas’ by ‘fiat.’”²⁰⁸ Indeed, Gorsuch seems to suggest that the

200. *See id.*

201. *Id.* at 588.

202. *Id.* at 587–98.

203. *Id.* at 512.

204. *City of Grants Pass v. Johnson*, 603 U.S. 520, 551 (2024) (quoting *Powell v. Texas*, 392 U.S. 514, 533 (1968)).

205. *Id.*

206. *Id.*

207. *Id.* at 552–53.

208. *Id.* at 556 (quoting *Powell*, 392 U.S. at 534, 537).

very legislatures who criminalized public camping are the best source of protection against unjust criminalization.²⁰⁹

Viewed through this lens, the *Grants Pass* majority should be understood as expressly declining to step into the role that Stuntz envisioned for federal courts: as a constitutional bulwark against expansive, and expanding, criminalization. But if Stuntz is right about the political incentives of legislators and prosecutors, courts remain the singular institution capable of recognizing the right of unhoused individuals to exist in public spaces. The next two Sections briefly consider what alternative paths—beyond the Eighth Amendment—may remain for homeless advocates.

B. Criminalization's Motives

As the dissent characterizes Gorsuch's majority opinion, it "paints a picture of 'cities across the American West' in 'crisis' that are using criminalization as a last resort."²¹⁰ But what does it mean to use criminalization as a "last resort"? It is well understood that cities cannot punish their way out of homelessness.²¹¹ Responding to the issue with criminal penalties only entrenches those affected into cycles of poverty that pull them further away from escaping the condition.²¹² Thus the benefits of criminalization for state and local actors is not in effecting punishment for culpable wrongdoing, but rather in compelling desired behavior. Cities use criminalization as a way to force homeless individuals into unsuitable shelter and services, or as a threat backing "move along" orders designed to reduce homeless visibility in desirable areas, or in the hopes of making the city so inhospitable that unhoused individuals will leave altogether. For this reason, the Eighth Amendment's punishment clause has always seemed to me ill-suited to thinking about what is wrong with criminalizing homelessness—punishment is fundamentally beside the point.

Allow me to begin with banishment. There is little question that a primary goal of the *Grants Pass* ordinances was to effectuate a constructive banishment of individuals experiencing homelessness. As Justice Sotomayor succinctly stated in her dissent, "[c]ity officials sought to use the Ordinances to drive homeless people out of town."²¹³ The *Grants Pass*

209. See *id.* at 550 (noting that state legislatures may have passed applicable defenses, such as necessity, insanity, diminished capacity, or duress, and that they "are free as well to add additional substantive protections").

210. *Id.* at 565 (Sotomayor, J., dissenting). By contrast, the dissent claims that criminalization is "a frontline response to homelessness." *Id.* at 567.

211. Rankin, *supra* note 91, at 560 ("No city can arrest or sweep its way out of homelessness.").

212. McJunkin, *supra* note 6, at 142–43; see also *Grants Pass*, 603 U.S. at 569 (Sotomayor, J., dissenting) ("For people with nowhere else to go, fines and jail time do not deter behavior, reduce homelessness, or increase public safety.").

213. *Grants Pass*, 603 U.S. at 579 (Sotomayor, J., dissenting).

record detailed this clearly. Prior to 2013, Grants Pass had attempted to banish unhoused residents by buying them one-way bus tickets to other cities.²¹⁴ Grants Pass city council members also “discussed the possibility of ‘driving repeat offenders out of town and leaving them there.’”²¹⁵ Failing that, “[a] city councilor made clear the City’s goal should be ‘to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road.’”²¹⁶ The plan to make it “uncomfortable” was to increase enforcement of the city’s anti-camping ordinances.²¹⁷

Grants Pass is not unusual in this respect. Numerous cities have attempted to exile individuals experiencing homelessness—sometimes physically²¹⁸ and sometimes through increased enforcement of laws against sleeping, camping, panhandling, or loitering.²¹⁹ Indeed, “[f]or hundreds of years, the United States and other countries have used laws and policies—purporting to protect public order—to move undesirable people from sight and control access to public space.”²²⁰ This is well understood.

Now consider coerced shelter use. The *Grants Pass* majority makes evident what is often unspoken: cities use criminalization as leverage to force unhoused residents into using available shelters to remove visible poverty from view. Citing to various amici, Justice Gorsuch appropriately noted that offers of shelter to homeless residents are frequently declined.²²¹ Seattle reported that “roughly 60 percent of its offers of shelter have been rejected in a recent year.”²²² Portland, Oregon, reported a 70 percent rejection rate.²²³ This is consistent with my prior research, which found that “77 percent of homeless individuals would prefer living unsheltered rather than occupying temporary emergency shelters provided by the state.”²²⁴

Gorsuch claims that criminal prohibitions “are not usually deployed as a front-line response,” but rather exist to “encourage” unsheltered individuals to accept alternatives to encampments.²²⁵ In a later passage, he reiterates that the criminal prohibitions in question do not exist to “criminalize homelessness,” but rather, quoting San Francisco’s mayor, “to encourage

214. *See id.* at 575.

215. *Johnson v. City of Grants Pass*, 72 F.4th 868, 876 (9th Cir. 2023), *rev’d*, 603 U.S. 520 (2024).

216. *Id.* (alterations in original).

217. *Id.*

218. *See* Jared Osborne, *Prosecution or Forced Transport: Manhattan Beach’s Unconstitutional Banishment of the Homeless*, 93 S. CAL. L. REV. POSTSCRIPT 70, 71 (2020) (describing one city’s plan to “have police transport individuals to shelters in other municipalities”).

219. *See generally* Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631 (1992).

220. Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 41 (2016).

221. *See* *City of Grants Pass v. Johnson*, 603 U.S. 520, 531 (2024).

222. *Id.*

223. *See id.*

224. *McJunkin*, *supra* note 6, at 164.

225. *Grants Pass*, 603 U.S. at 533.

individuals experiencing homelessness to accept services.”²²⁶ Gorsuch noted that, in the absence of a credible threat of criminal punishment, shelter utilization in Grants Pass fell nearly 40 percent.²²⁷ Thus, he claims that the Ninth Circuit’s Eighth Amendment jurisprudence “has made it more difficult, not less, to help the homeless accept shelter off city streets.”²²⁸

Gorsuch, of course, misses the import of this evidence. Shelter avoidance is often a rational strategy for homeless individuals.²²⁹ The decision to live unsheltered reflects an all-things-considered conclusion that one’s health, safety, welfare, and community would all be better protected outside of the shelter system.²³⁰ Gorsuch’s statistics are persuasive only if one thinks that the goal of homelessness policy should be getting homeless individuals to accept inadequate and undesirable shelter rather than maximizing homeless individuals’ well-being. The evidence cited by Gorsuch is in fact strong evidence that, in the absence of the threat of criminalization, many—perhaps most—homeless individuals believe that their lives are better outside of shelters.

Lastly, there is simple relocation. Perhaps the most common interaction that unhoused individuals have with the criminal legal system is the simple police order to “move along.”²³¹ Barry Friedman has described it succinctly:

The police bounce homeless folks from place to place simply by exercising their authority to tell people to move along. The police are, as leading sociologists in the last century like Egon Bittner have taught us, the “or else” of society: “do this or else I am going to arrest you.” So, people comply.²³²

Those who study homelessness have found that relocating unsheltered individuals in this way is detrimental to their health, safety, and well-being.²³³

226. *Id.* at 533, 535 (internal quotation marks omitted) (quoting Brief for City and County of San Francisco et al. in Support of Petitioner).

227. *Id.* at 556.

228. *Id.*

229. McJunkin, *supra* note 6, at 163–74.

230. *Id.*

231. *Id.* at 135 (“Much of what constitutes the ‘policing’ of individuals experiencing homelessness are simply orders to decamp and relocate, backed up by the threat of arrest.”). The dissent quotes plaintiff Debra Blake, who testified to the following: “I have been repeatedly told by Grants Pass police that I must ‘move along’ and that there is nowhere in Grants Pass that I can legally sit or rest. I have been repeatedly awakened by Grants Pass police while sleeping and told that I need to get up and move.” *Grants Pass*, 603 U.S. at 579 (Sotomayor, J., dissenting).

232. Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597, 1634 (2022).

233. See Adora Svitak, *Why You Should Think Twice About Calling the Police on Homeless People*, MEDIUM (Oct. 22, 2018), <https://thebolditalic.com/why-you-should-think-twice-about-calling-the-police-on-homeless-people-bfec223444f9> [<https://perma.cc/F8BF-SKFL>].

Notably, these relocations are not arbitrary. Individuals experiencing homelessness are typically driven into lower income neighborhoods, where police can expect fewer complaints, and away from centers of commerce.²³⁴ Some cities even impose formal geographical restrictions on where unhoused residents can be, creating unhoused exclusion zones.²³⁵ This relocation is a distinct form of banishment, one that centers on excluding certain neighbors from the sense of community that living somewhere ought to foster.²³⁶ It signals to unhoused individuals that their very presence is a harm sought to be avoided.

C. Taking Unhoused Agency Seriously

What banishment, coercion, and relocation have in common is that they each attempt to use the threat of criminal punishment to influence the decision making of individuals experiencing homelessness about the fundamental questions of where and how to build a life under extreme constraints. Reframing the criminalization of homelessness as about decision making rather than punishment avoids the Eighth Amendment questions about the permissible reach and scope of criminal prohibitions more generally. More importantly, it surfaces the agency of unhoused individuals. Agency theory, popular in feminist philosophy, provides an initial framework for thinking about the importance of decision making under conditions of inequality.

Agency theory posits that “the self is socially constructed in ‘a context of intersecting power inequalities.’”²³⁷ An agentic subject is one who is capable of both self-definition and self-direction despite “substantial constraints.”²³⁸ Individuals experiencing homelessness make decisions about their lives—where to sleep, how to shelter, who to associate with—in an already fraught social context.²³⁹ Exercising agentic subjectivity brings the possibility “to assert power . . . to contest imposed definitions of one’s self, and to forge new definitions.”²⁴⁰ Those who would leverage criminal

234. See Ben A. McJunkin, *Homeless Residency Restrictions*, 125 W. VA. L. REV. 407, 410, 414–15 (2022).

235. See Carrie Leonetti, *The Wild, Wild West: The Right of the Unhoused to Privacy in Their Encampments*, 56 AM. CRIM. L. REV. 399, 404 (2019).

236. John B. Mitchell, *Crimes of Misery and Theories of Punishment*, 15 NEW CRIM. L. REV. 465, 502 (2012) (“Ultimately, the closest analogy to our desire to move the homeless out of our centers of commerce, entertainment, knowledge, and culture is banishment.”).

237. Deborah Tuerkheimer, *Rape on and Off Campus*, 65 EMORY L.J. 1, 40 (2015) (quoting Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 806 (1999)).

238. See *id.* at 41.

239. As is well documented, unsheltered individuals experience considerable external violence, as well as physical, psychological, and emotional trauma. See Rankin, *supra* note 30, at 104–06.

240. Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 342 (2013).

law to “encourage” individuals to render themselves less visible, whether by relocating, hiding themselves in shelters, or, in the language of the Grants Pass city council, “mov[ing] on down the road,”²⁴¹ deny this power of agency.

Moreover, there are constitutional doctrines that protect agency, most notably the substantive due process ensured by the Fifth and Fourteenth Amendments (and state analogues).²⁴² As I have detailed in other work, the choice whether to use a shelter implicates considerations of physical safety, personal property, and community that echo the constitutional protections already recognized for contraceptive use, medical decisions, reproductive rights, sexual autonomy, and bodily integrity.²⁴³ A robust version of substantive due process even explicitly embraces the agentic ideals of self-definition and self-direction.²⁴⁴ While federal courts—currently caught in the grip of a deeply conservative originalism—are unlikely to protect unhoused agency, there is some reason to think that state courts can and will diverge from their federal counterparts.²⁴⁵

Banishment and relocation may likewise raise constitutional problems. Friedman has suggested that “move along” orders by police reflect an absence of due process that presents “a very serious problem within policing.”²⁴⁶ Both relocation and banishment also arguably implicate the right to travel, another fundamental component of constitutional liberty.²⁴⁷ While federal courts have largely adjudicated questions of interstate travel, numerous state courts have indicated that travel between and within local jurisdictions is a fundamental right.²⁴⁸ Many state court constitutions also explicitly prohibit banishment, though details and applications vary.²⁴⁹

241. *City of Grants Pass v. Johnson*, 603 U.S. 520, 576 (2024) (Sotomayor, J., dissenting).

242. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (“[T]he protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”).

243. *McJunkin*, *supra* note 6, at 178–83.

244. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“[T]he heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

245. *See, e.g., Doe v. Hartford Roman Cath. Diocesan Corp.*, 119 A.3d 462, 496 (Conn. 2015) (“[M]ore recent case law has suggested that our state constitution may, in certain instances, afford greater substantive due process rights than the federal constitution.”); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 809 (Cal. 1997) (explaining that the California constitution protects certain fundamental “decisionmaking” to an extent that is broader than federal constitutional protections); *State v. Mills*, 710 P.2d 148, 150 (Or. 1985) (“[W]e may interpret our own state constitution to provide greater protection to our citizens than United States Supreme Court interpretations of the federal constitution provide.”).

246. Friedman, *supra* note 232, at 1634.

247. *See generally Edwards v. California*, 314 U.S. 160 (1941); *United States v. Guest*, 383 U.S. 745 (1966).

248. Osborne, *supra* note 218, at 83 (stating that California, Hawaii, Minnesota, New York, Washington, and Wisconsin have “expressly found such a right”).

249. Kari White, Note, *Where Will They Go? Sex Offender Residency Restrictions as Modern-*

Admittedly, none of these approaches is a silver bullet to decriminalizing homelessness. In addition to vexing legal questions, advocates will need to overcome the traditional stigma that homeless individuals too often bear.²⁵⁰ Moreover, constitutional litigation—especially state-by-state litigation—is both time- and resource-intensive.²⁵¹ In this sense, *Grants Pass* was a missed opportunity to provide some immediate relief to unhoused individuals faced with the constant threat of criminal sanction. But, as I have endeavored to show here, the *Grants Pass* plaintiffs bore the weight, not only of their own arguments on the merits, but also of longstanding criminal practices that favor broad criminalization, even of those undeserving of punishment. We will need to look elsewhere, and agency is an underexamined place to start.

CONCLUSION

The Supreme Court's recent decision in *City of Grants Pass v. Johnson* is severely detrimental to the interests of the nation's unhoused residents. Yet it sits more consistently within the practices of the U.S. criminal legal system than had the Ninth Circuit's approach to the status crimes doctrine, endorsed in dissent by Justice Sotomayor. Punishing those who have nowhere else to sleep is inhumane, but it is arguably consistent with a criminal system that routinely makes inhumanity a feature.²⁵² Unpacking a multilayered understanding of what was problematic about criminalizing the status of homelessness displays the pathology of our criminal legal system while explaining the limits of the Eighth Amendment's punishment's clause as a tool to unseat it. Sidestepping the framing of criminalization of punishment, one path forward emerges by embracing the agency of individuals experiencing homelessness. Protecting agentic decision making provides a new horizon for advocates, and a new set of constitutional doctrines for fighting a much-needed fight.

Day Banishment, 59 CASE W. RESRV. L. REV. 161, 179 (2008); Ben A. McJunkin & J.J. Prescott, *Collusive Prosecution*, 108 IOWA L. REV. 1653, 1701–02 (2023).

250. See Rankin, *supra* note 220, at 21–24 (discussing the contemporary stigmas that homelessness is self-inflicted and indicative of future criminality).

251. See Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 977 (2020).

252. See Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1427 (2022) (“In critical discourse, the U.S. criminal system is punitive, it is carceral, and it is inhumane. The worst features are motivated by a desire for vengeance, a dehumanization of defendants, a drive to individualize blame and punishment for societal problems, and a contempt for the dignity of marginalized populations.”).