

HOMELESSNESS IN THE U.S.: WHY THE SUPREME COURT'S RULING IN CITY OF GRANTS PASS V. JOHNSON ALLOWING THE CRIMINALIZATION OF HOMELESSNESS IS BOTH CRUEL AND COUNTER-PRODUCTIVE

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Homelessness is a serious problem worldwide. Once fairly rare, it now is an urgent problem in the United States, where the homeless population has surged to record levels in 2023, especially in several western states, including California and Oregon. Root causes can be traced primarily to mental health issues, addictions, low incomes and especially the lack of affordable housing. Men are more often homeless than women. People of American Indian, Alaskan Native, or Indigenous descent, as well as people of Black, African American, or African descent, also experience higher rates of homelessness than the overall population. Residents of communities where homelessness has surged have urged politicians to take steps to curb the problem. To reduce encampments or tent cities and to appease their voting constituents, cities have enacted ordinances that allow for both civil and criminal penalties for those sleeping out of doors. These laws have been challenged in the courts, especially in the Pacific Northwest. The homeless found sympathetic judges in the federal Ninth Circuit Court of Appeals, which in several cases held anti-camping ordinances violative of the Cruel and Unusual Punishments Clause of the Eighth Amendment. At the end of the 2024 term, the conservative block of the United States Supreme Court reversed the Ninth Circuit in *City of Grants Pass v. Johnson*, thus allowing these ordinances to stand. The author believes, as did the dissenters in this case, that penalizing the homeless is counter-productive and a better, less expensive, and more compassionate long-term solution is for cities to adopt Housing First policies, such as those in Finland and other European countries.

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1 Introduction

As Shapiro¹ writes, “Home is everything. It’s where we shelter from the world, take our first steps, and learn about life. Home shapes who we are, and then we shape it to reflect who we have become. Home runs deep in our identity as human beings. It is the refuge where we sleep and dream. And, our home largely determines our health. The water we drink, the air we breathe, the security we feel all start at home. For the fortunate, home is where we thrive. For others, home is a roomful of risks or a memory carried on the streets.”

There are many idioms relating to the concept of home. For example, East- West, home is best. This simple phrase connotes the idea that wherever one goes, their home is the place where they can come back and find peace and comfort. Another phrase “There’s no place like home,” also reflects the sentiment that one’s own home is a special and unique place, unmatched by any other location.² Most of us always have had the good fortune, and indeed one that we have probably taken entirely for granted, of having a home to live in. Perhaps the home was large, medium-sized, or even small. Perhaps the home was an apartment. Or a dormitory when we were away at university. Or perhaps we have had temporary shelter in a hotel while away on holiday or for work purposes. But whether our home was or is extravagant or modest, it is our place of refuge.

Think of all the things that those of us having a home take for granted. The home shelters us from the weather: it provides cooling from the heat and sun, warmth during the cold months of winter and keeps us dry from the rain and snow. It is a place to store our food, prepare our meals and eat. It is a place where we can bathe, go to the bathroom and otherwise take necessary steps to maintain proper hygiene. It is a place where we can store our personal belongings so they are protected from the elements and theft: our clothing, electronic devices, books, keys, personal identification, sports gear etc. It’s a place where we can relax and perhaps watch television and listen to music. It’s a place where we can congregate with family members, friends and colleagues. It’s a place where we can study. Where we can recuperate when we are ill. And, it’s a place where we can sleep and get proper rest.

¹ S. Shapiro, *op. cit.*

² This phrase gained popularity through its association with the famous line spoken by Dorothy in the classic film “The Wizard of Oz.”

Two things most of us probably take for granted are our health and our home. One day we are healthy and active without a care in the world. The next day we come down with the flu and are bedbound for a week. Or worse, we receive a devastating diagnosis such as cancer from our doctor. But as we shall see in reading this paper, we also take having a home—a place to live—for granted. And as we shall also see, issues of health, physical and mental, and home are intertwined.

Homelessness is a serious problem worldwide. This paper will tackle the issue of homelessness from various angles. The focus will be the United States. I shall start by discussing the scope of the problem. This section will include a statistical analysis concerning the number of homeless in America and how, alarmingly, this number has increased over time. This section will also discuss where in America the problem is particularly acute, along with a discussion of which members of American society are impacted the most, by gender, race, age, and other demographics.

The paper will then explore the myriad causes of homelessness. It is easy for most of us who will never experience the humiliation of being without shelter to judgmentally conclude that those living on the streets—on a park bench or a piece of cardboard on the stoop of a public building—must have “done something wrong.” We might think, for example, that they just failed to stay in school. Or, they are just lazy and do not want to go to school or work. Or, using the derisive language we have heard from former US President Donald Trump, they are losers. Scientists and researchers have extensively examined the root causes of homelessness. The paper will share their findings.

There always have been homeless people, and I suspect there always will be. So, you might ask, why write this paper now? And what does this have to do with the law? I will be completely forthright upfront. I was trained as a lawyer and spent 35 years practicing law: first in Detroit, Michigan and later in Seattle, Washington. In Michigan, I experienced firsthand the good and bad aspects of capitalism. Some of the largest corporations³ and some of the wealthiest people in America live in Michigan, while it also is the home to some of the poorest and downtrodden cities

³ Major corporations in Michigan include Ford Motor Company, General Motors, Bosch USA, The Dow Chemical Company, Kellogg, to name just a few.

in America.⁴ Michigan has its share of homeless. Seattle, on the other hand, is a very wealthy city, home to corporations such as Starbucks, Boeing, Microsoft, and Amazon, to name but a few. The Pacific Northwest region of America, which includes Washington, Idaho and Oregon, has many homeless people, in part because there are relatively mild weather conditions year round, and those unfortunate souls without a roof over their heads at least will not die from the weather. Many cities in the Pacific Northwest have turned to passing legislation⁵ that has criminalized the status of being homeless. Penalties for breach of these criminal ordinances include fines and even jail time. These legislative enactments, deemed necessary by local communities and other actors to clean up the streets and neighborhoods from blight caused by the homeless, have come under attack by other groups that have tried to intervene in support of the homeless. These competing groups have found themselves embroiled in litigation over the constitutionality of these legislative enactments. As we shall see, the Ninth Circuit Court of Appeals has issued several rulings holding that legislation enacted by certain cities in Oregon is unconstitutional under the Eighth Amendment's Cruel and Unusual Punishments Clause. However, in the recently decided case of *City of Grants Pass v. Johnson*,⁶ in a 6-3 ruling, the Supreme Court reversed the Ninth Circuit and held that the ordinances in question did not violate the Cruel and Unusual Punishments prohibition. The majority decision, written by Justice Gorsuch, was joined by all of Gorsuch's conservative Justices. Justice Sotomayor wrote a scathing dissent, joined by her two liberal colleagues, Justices Kagan and Jackson. The dissenters would have affirmed the Ninth Circuit Court of Appeals. My paper will analyze both the earlier Ninth Circuit rulings bearing on this topic as well as the Supreme Court jurisprudence in question.

The paper will also briefly discuss some of the treaties and international instruments bearing on the question of homelessness and the legal obligations that States have to ensure their citizens have shelter. It also will briefly discuss why the United States, at least those States that do not provide their residents with proper shelter, may be in violation of those treaties and international instruments. It also will discuss strategies employed by other countries and some American States to utilize long-term progressive strategies, in particular so-called Housing First schemes, rather than

⁴ Grosse Pointe, Grosse Pointe Farms and Bloomfield Hills are among the wealthiest while cities such as Flint and River Rouge are among the poorest.

⁵ Legislation at the local level (i.e., cities, towns, villages etc.) are called ordinances.

⁶ *City of Grants Pass v. Johnson*, 603 U.S. ____ (2024)

short-term civil and criminal sanctions, to combat the issue of homelessness. The article will conclude with my personal commentary.

2 The Scope of Homelessness

2.1 Homelessness Worldwide

“The problem of homelessness knows no barriers and countries all over the world struggle to combat this awful problem.”⁷ A 2024 comprehensive study by Homeless No More⁸ states that “[E]stimates suggest that approximately 150 million people are homeless worldwide, with as many as 1.6 billion lacking adequate housing.”⁹ This same study points out that since the global population surpasses seven billion, “The percentage of the world’s population that is homeless, therefore, hovers around 2%, a figure that underscores the urgency of addressing this humanitarian crisis.”¹⁰ According to Filipenco,¹¹ Nigeria has the world’s highest number of homeless people. With a population of 218.5 million, Nigeria’s homeless population is 24.4 million. Accordingly, over 9 percent of Nigerian people are homeless. Nigerians often migrate from rural areas to large cities in search of shelter, money, and opportunity, but many have trouble adjusting to city life for a variety of factors. These include the high cost of living, lack of social support, challenges in securing work, abuse, and hazardous jobs performed for low wages.¹² Filipenco states that Syria has the world’s highest homeless rate, with one-third (6.56 million), or about 29.6 percent, of the country’s 22 million population being homeless.¹³ The largest factor behind the homelessness situation in Syria is its long-standing war, which has left 90 percent of the population in poverty. The Syrian infrastructure has largely collapsed.¹⁴

⁷ World Population Review.

⁸ Understanding Global Homelessness: A Comprehensive Analysis, in Homeless No More, *op. cit.*

⁹ *Ibidem*, citing <<https://www.homelessworldcup.org/homelessness-statistics>>.

¹⁰ *Ibidem*.

¹¹ D. Filipenco, *op. cit.*

¹² *Ibidem*.

¹³ *Ibidem*.

¹⁴ *Ibidem*.

According to Filipenco, numerous factors contribute to homelessness, many of which are interconnected, although a given country's homelessness rate will depend on its unique situation. In general, however, principal factors driving homelessness include: conflicts (whether civil or other wars) which lead people to lose their homes (with many not being able to secure shelter); natural calamities that destroy homes, leaving families without a place to live; the absence of affordable housing, which is often exacerbated when a person becomes unemployed due to layoffs, physical or mental problems; people who simply do not earn enough to be able to cover rent or a house payment.¹⁵

Striking a more positive note, Filipenco points out that at least some countries can boast of very low rates of homeless people. Iceland, Finland, and Japan have the lowest number and rate of homeless people.¹⁶

"Iceland, with only 349 persons per night, has the lowest homeless population on the European continent and one of the lowest in the world. In 2018, the nation announced that tackling homelessness was a priority, with one of the goals being to build homes for homeless people."¹⁷

Finland is also on this notable list. Finland's Housing First policy has dramatically reduced homelessness in the Nordic country. "The latest data shows that 3,950 homeless people were living in Finland at the end of 2021, a decrease of 390 compared to the previous year."¹⁸ Finland's homelessness rate is a remarkable 0.08 percent.¹⁹ I will discuss Finland, and other European countries employing a Housing First strategy to tackle homelessness in Section 5.0.

Japan can boast of the world's lowest rate of homelessness. There is only one homeless person per 34,000 residents, a rate of 0.003 percent.²⁰ This is truly remarkable since Japan has a population of around 125.7 million people. Filipenco states that the Japanese government has carried out an assessment for the last twenty years tracking the number of homeless. The number has steadily decreased from

¹⁵ *Ibidem.*

¹⁶ *Ibidem.*

¹⁷ *Ibidem.*

¹⁸ *Ibidem.*

¹⁹ *Ibidem.*

²⁰ *Ibidem.*

around 26,000 in 2003 to less than 3,500 in 2022. The steady decline can be attributed to initiatives undertaken by local authorities and regional NPOs.

“Japan’s diverse strategy to reduce homelessness involves giving those who lack housing access to resources, permanent shelter, and community assistance.”²¹

2.2 Rates of Homelessness in the United States

2.2.1 Introduction

For all of the successes it can boast of, particularly its economic prowess, the United States nevertheless has a significant homelessness problem. This is a paradox that, upon consideration, is difficult to come to grips with or to explain under any rational basis. How can the leading democracy in the world, home to roughly 800 billionaires in 2024,²² and over 24 million millionaires, the world’s epicenter of innovation, a country that many foreigners aspire to immigrate to, have a homelessness crisis that is worsening? People who only read about America, or perhaps know it from Hollywood movies, are often shocked when they actually visit America and witness the stark contrast between the shockingly rich and equally shockingly poor. Let me give you but two examples.

Several years ago, while living in Seattle, Washington, my family was at the airport awaiting a plane to take us to Europe. As it happened, also in the waiting area was a young family from Scandinavia that had just finished their visit to North America, including British Columbia, Canada, and the west coast of the United States, including California. This family had two primary school- age children. Making casual conversation, I inquired about their impressions of their journey. The father said this. While they enjoyed the many beautiful sights and attractions, they were shocked by the amount of poverty, blight and homelessness they observed. They simply had not realized this was such a problem in the United States. Both parents also told me that their young children were also very surprised.

I visited Las Vegas on many occasions, primarily because my legal work took me there for seminars pertaining to asbestos litigation, which was one of my longstanding areas of defense practice. It is the gambling and entertainment capital

²¹ *Ibidem*.

²² D. De Vise, *op. cit.*

of the United States. Nowhere in America is the dichotomy between wealth and poverty greater than in this city of opulence. Inside the Bellagio Casino or many other casinos, you will find throngs of patrons literally throwing away thousands upon thousands of dollars on every imaginable gaming table, and using their credit cards to pay hundreds for a seat at one of the many concerts and shows. There are vast food buffets and the alcohol flows. Las Vegas is a beehive of activity 24 hours a day, 365 days a year. There are no quiet times in Sin City or the City of Lights, as it is variously known as. Yet, meander just a few blocks off the so-called Strip, and one quickly notices what that family from Scandinavia observed during their visit to America. Down-trodden souls, clinging on to grocery carts that hold their life possessions: a few items of clothing, perhaps a blanket, and some cardboard to sit and sleep on. These persons walk the Vegas streets looking for leftover McDonald's food or perhaps pizza in garbage cans and dumpsters. Some beg tourists for some spare change. Homelessness in America is widespread. It knows no boundaries. It persists from coast to coast, and north to south. And as I will discuss in the following sections, the problem is worsening.

2.2.2 America's State of Homelessness 2024—Key Facts

This section of my paper draws heavily upon a publication from the National Alliance to End Homelessness, entitled *State of Homelessness: 2024 Edition* [hereinafter SOH 2024]. This publication uses data collected by the U.S. Department of Housing and Urban Development (HUD), particularly its 2023 Annual Homeless Assessment Report to Congress (AHAR).²³ It analyzes data on homelessness for 2023 and over time. SOH 2024 first provides an overview of key facts and data points, while the remainder of its report fleshes out these key findings in detail. I will start by restating the key findings and then will discuss what I consider to be some of the more salient underlying data, which I think the reader of this paper might find the most interesting.

A record-high 653,104 people experienced homelessness on a single night in January 2023.²⁴

²³ *State of Homelessness: 2024 Edition*, National Alliance to End Homelessness, op. cit. In the text I will refer to this publication as SOH 2024.

²⁴ The SOH 2024 explains this measurement, known as a 'Point-in-Time Count.' The PIT is a count of sheltered and unsheltered people experiencing homelessness on a single night in January. HUD requires that a group known

This is more than a 12.1 percent increase over the previous year. More people than ever are experiencing homelessness for the first time. From 2019 to 2023, the number of people who entered emergency shelters for the first time increased by more than 23 percent.²⁵ There are record-high numbers of people living unsheltered, especially among individuals. In 2023, a record-high 256,610, or 39.3 percent of all people experiencing homelessness, were unsheltered. More than 50 percent of individuals experiencing homelessness were unsheltered.²⁶ A severe housing cost burden is on the rise. The number of renter households paying more than 50 percent of their income on rent increased dramatically, rising over 12.6 percent between 2015 to 2022. People who identify as Native Hawaiian/Pacific Islander, Black, Hispanic, Asian or ‘Some Other Race’ are more greatly impacted.²⁷ After years of declines due to targeted assistance, the number of veterans and chronically homeless²⁸ individuals experiencing homelessness are both rising again, with a seven percent and twelve percent increase, respectively, since the previous year.²⁹ Finally, while the homeless response system continues to add more temporary and permanent beds each year, it increasingly serves more people, and accordingly needs more resources to combat the nationwide affordable housing crisis.³⁰

2.2.3 Where Do People Experience Homelessness?

Homelessness, although having no borders and being widespread, is an acute problem in seven states: California, New York, Florida, Washington, Texas, Oregon and Massachusetts.³¹ The following chart shows statistics for those seven states.³²

Cumulatively, these seven states account for 410,015 homeless people. They account for 62.8 percent of the total homeless population in the United States. It probably is

as Continuum of Care (CoC), of which there were around 385 in 2023, spread across the country, conduct an annual count of people experiencing homelessness who are staying in CoC-provided temporary shelter and permanent housing on a single night. CoCs also conduct a count of unsheltered people experiencing homelessness. Each count is planned, coordinated, and carried out by local staff and volunteers.

²⁵ State of Homelessness: 2024 Edition, National Alliance to End Homelessness, *op. cit.*

²⁶ *Ibidem.*

²⁷ *Ibidem.*

²⁸ The SOH 2024 defines ‘chronic homelessness’ as the status of being homeless for at least a year—or on at least four separate occasions in the past three years—while experiencing a disabling condition, such as a physical disability, serious mental illness, or substance use disorder.

²⁹ State of Homelessness: 2024 Edition, National Alliance to End Homelessness, *op. cit.*

³⁰ *Ibidem.*

³¹ *Ibidem.*

³² *Ibidem.*

not too surprising that some of the most populous states—California and New York in particular—have large homeless populations. It is more surprising that less populated states, including Oregon, Washington and Massachusetts, also account for many of the nation’s homeless. SOH 2024 concludes that people experiencing homelessness are increasingly concentrated in cities. “In 2007, 51 percent of people experiencing homelessness were concentrated in urban areas. In 2023, 59 percent of people experiencing homelessness lived in urban areas.”³³ Ending or severely reducing homelessness is tied to the lack of affordable housing. The Report concludes that

“Solving the affordable housing crisis in the nation’s major cities, including ensuring that urban areas have enough deeply affordable housing and emergency housing resources, would significantly reduce homelessness.”³⁴

The Report also points out, however, that some smaller states have large numbers of homeless people relative to their populations. For example, from 2022 to 2023, homelessness in New Hampshire and New Mexico increased by more than fifty percent. Additionally, Vermont, Maine, Montana, Colorado, and Alaska all have experienced very high rates of homelessness relative to their small populations. Vermont, for example, has seen a nearly 109 percent increase in homelessness per 10,000 people since 2015. Maine, another sparsely populated state, has seen a nearly 71 percent increase since 2015.³⁵

Table 1: Homelessness in the selected states (2024)

State	Number of homeless	% us homeless population	State pop: % of total US Population
California	181,399	27.8 %	11.6 %
Oregon	20,142	3.1 %	1.3 %
New York	103,200	15.8 %	5.8 %
Florida	30,756	4.7 %	6.8 %
Washington	28,036	4.3 %	2.3 %
Texas	27,377	4.2 %	9.1 %
Massachusetts	19,141	2.9 %	2.1 %

Source: XXXXX

³³ *Ibidem.*

³⁴ *Ibidem.*

³⁵ *Ibidem.*

2.2.4 Who Experiences Homelessness?

Just as from a geographical standpoint, homelessness has no boundaries. Similarly, homelessness afflicts many different people. The SOH 2024 Report states that 71.5 percent of homeless persons are individual adults. 51.2 percent of these individuals experienced unsheltered homelessness.³⁶ 28.5 percent are people living in families with children.³⁷

As is true in other areas of American society, such as the criminal justice system and access to reproductive rights, to name just two areas, people of color are almost always on the short end of the stick, and the same is unfortunately true with respect to homelessness. The SOH 2024 Report summarizes the problem as follows.

“Homelessness is a racial justice issue. Historical and contemporary discrimination from housing, education, employment, and wealth-building have excluded Black, Indigenous, and People of Color (BIPOC) from financial resources and housing opportunities. This has made it more difficult for BIPOC to access safe, stable housing. BIPOC renters experience extremely high rates of severe housing cost burden and are less likely than the overall population to own their homes. The nation’s safety net has also failed to distribute resources in ways that meaningfully address the impacts of systemic and individual discrimination and exclusion. This is reflected in high, and growing, rates of overall homelessness and unsheltered homelessness among BIPOC. Native Hawaiians and Pacific Islanders are the racial/ethnic group that is most likely to experience homelessness. People of American Indian, Alaskan Native, or Indigenous descent, as well as people of Black, African American, or African descent, also experience higher rates of homelessness than the overall population. Since 2015, these rates have increased for most groups of color. They increased most rapidly among the following groups: Asian (91 percent increase); Hispanic or Latino (59 percent increase); American Indian or Alaskan Native (53 percent increase); Native Hawaiian or other Pacific Islanders (21 percent increase).”³⁸

It may come as no surprise that the majority of people that experience homelessness are men (61 percent).³⁹ Homelessness among women, however, is on the rise, with a 12.1 percent increase since 2022 and an 11.4 percent increase since 2015,

³⁶ HUD considers a person “unsheltered” if they are sleeping in a place not ordinarily used as a regular sleeping accommodation. Examples of unsheltered sleeping situations include tents, train stations, structures like sheds or garages, vehicles, sidewalks, or other locations unfit for human habitation.

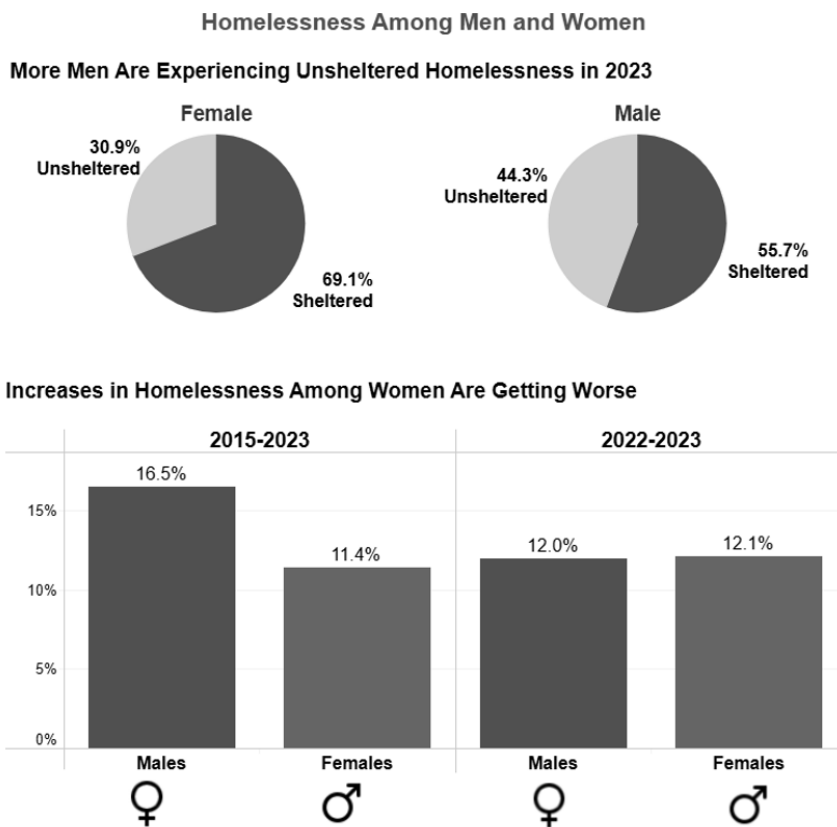
³⁷ State of Homelessness: 2024 Edition, National Alliance to End Homelessness, *op. cit.*

³⁸ *Ibidem.*

³⁹ *Ibidem.*

with the largest increase involving individual women. For every 15 women who experience homelessness, 24 men do. The SOH 2024 Report observes that

“While fewer women experience homelessness than men, this increase is concerning for many reasons. One prominent reason is that women are more likely to experience harassment and assault. Living outside can exacerbate this risk.”⁴⁰



Source: U.S. Department of Housing and Urban Development, 2023 Annual Housing Assessment Report to Congress (AHAR).

Figure 1

HUD data gathering has also shown that the number of disabled people experiencing long-term or recurring homelessness is also increasing. HUD considers people who have experienced homelessness for at least a year—or multiple times

⁴⁰ *Ibidem*.

totaling a year while having a disabling condition such as a physical disability, a mental difference or while experiencing a challenge with substance abuse—as chronically homeless. For years, chronic homelessness declined due to a well-supported and sustained effort to direct housing and supportive services to this population. However, funding for deeply subsidized housing and services has not met this population's needs. Disabled people are often paid subminimum wages and benefits, excluded from economic opportunity, experience housing discrimination, and face a high risk of eviction. This has led to increases in homelessness beginning in 2016.⁴¹ “Nearly two times (154,313) as many people experienced chronic homelessness in 2023 than in 2016, when chronic homelessness reached a record low due to targeted support. 62 percent of these people are unsheltered, compared with 39 percent of the total population. 36 percent (more than a third) of people in shelters experiencing chronic homelessness were older adults in 2021. Older adults are at increased risk of experiencing a disabling condition.”⁴²

The number of older adults (defined as over 55) experiencing homelessness is also growing rapidly. In 2023, 20 percent of all people experiencing homelessness were older than 55, totaling 127,707 older adults who experienced homelessness in the United States.⁴³ Another way to look at this is that 13 out of every 10,000 older adults in America experience homelessness. As is the case with disabled persons and women, discussed in the preceding paragraphs, older people, too, have particular vulnerabilities that make their homelessness particularly difficult. As the SOH 2024 Report points out,

“Older adults have more complex and acute health and housing needs. 34 percent of older adult renters spent 50 percent or more of their income on rent in 2021, higher than any other age group. Renters aged 75 and older were the most likely age group to be severely housing cost burdened.”⁴⁴

The Report recommends these solutions:

“Communities must prevent older adults from entering into homelessness and ensure that they can access permanent housing. At minimum, this means increased

⁴¹ *Ibidem.*

⁴² *Ibidem.*

⁴³ *Ibidem.*

⁴⁴ *Ibidem.*

coordination between homeless service systems, health services, and aging networks; more robust income supports (given that these people are retired and on fixed incomes) including social security; and intentional outreach to ensure that all older adults receive the services that they need.”⁴⁵

Older Adults* Are a Sizable Share of the Population Experiencing Homelessness



Older adults are more likely to spend 50 percent or more of their income on rent
1 in 5 people experiencing homelessness in the United States is 55 or older



Source: U.S. Department of Housing and Urban Development (HUD), 2023 Annual Homeless Assessment Report to Congress, U.S. Census Bureau, 1-Year American Community Survey and American Housing Survey; NAEH analysis

*Older Adults are 55 years or older.

Figure 2

⁴⁵ *Ibidem*.

Survivors of domestic violence are also at high risk for homelessness. The SOH 2024 Report, referencing the Centers for Disease Control and Prevention, shockingly states that 41 percent of women and 26 percent of men will experience violence from an intimate partner during their lifetimes and that this domestic violence is a cause of homelessness, particularly for women and families.⁴⁶ Historically, Veterans in America also have experienced high rates of homelessness. The SOH 2024 Report discusses the Ending Veteran Homelessness Initiative, started in 2009 by the U.S. Department of Veterans Affairs, in collaboration with HUD, to implement specific services to help veterans experiencing homelessness. The Report discusses how this initiative has significantly driven down homelessness involving America's many Veterans.⁴⁷

2.2.5 Conclusions From SOH 2024 Report

The Report concludes that various programs have been put in place and communities have demonstrated that homelessness is a problem that is solvable. The short conclusion and recommendations are worth quoting in full.

“Homelessness is not an intractable problem. While much in this report depicts rising trends in homelessness, local progress and coordinated efforts demonstrate that there are solutions. Local, state and federal policy makers must recognize the urgency of the situation and direct legislative actions and resources to proven solutions to make progress. At a minimum, they can and should: Expand housing production that is affordable for extremely low-income households. Ensure access to emergency housing for everyone who needs it by drastically increasing funding for homelessness assistance grants. Reform existing services like mental health care, physical health care, and substance abuse use treatment to make them extremely affordable for people with the lowest incomes. Everyone should have access to the services they need to thrive. Provide robust income support to ensure that housing is stable and secure for everyone. The United States can end homelessness. Policymakers can invest in these solutions through legislation. Communities can implement them and connect everyone with a safe place to sleep. Investing in housing and services will move the nation to a future where all our neighbors are housed and where everyone can fully contribute to building a productive, safe and sustainable society.” (Emphasis in original text)⁴⁸

⁴⁶ *Ibidem.*

⁴⁷ *Ibidem.*

⁴⁸ *Ibidem.*

2.3 The Causes of Homelessness

Howell, writing for the *Harvard Gazette*, states that there is a general consensus among scholars, healthcare workers, and homeless advocates that poverty and lack of affordable housing are two major causes of homelessness. Homelessness is also rooted in psychiatric issues, many of which date to a person's childhood when they suffered physical or mental abuse at the hands of a parent, uncle, teacher, priest, etc. Of course, homelessness is also often tied to substance-use disorders, which in turn also may have their genesis in underlying abusive relationships, chronic unemployment, etc. Powell explains these constellations of factors lead those who work with the unhoused to refer to what they do as "the long game," "the long walk," or "the five-year-plan," as they seek avenues and strategies to address the multifactorial traumas that people living on the street face.⁴⁹ In other words, each homeless person has their own, unique story. Oftentimes there are variations on a common theme: rape or abuse when young; untreated physical or mental trauma; growing up with a single parent or parent(s) that are themselves drug addicts or alcoholics; psychiatric issues such as schizophrenia, bipolar disorder, post-traumatic stress disorders, etc. But, each person suffering from one or more of these conditions faces their own challenges and their treatment requires an individualistic approach. There are no quick fixes. Often, such persons go years and even decades without adequate treatment. Or the treatment is sporadic. Progress in treating such persons is not linear. One step forward and two back.

Citing Katherine Koh, who earned her medical degree from Harvard Medical School, and who is a practicing psychiatrist at the Boston Health Care for the Homeless Program and Massachusetts General Hospital, Howell writes that

"Though homelessness has roots in poverty and a lack of affordable housing, it also can be traced to early life issues. The journey to the streets often starts in childhood, when neglect and abuse leave their marks, interfering with education, acquisition of work skills, and the ability to maintain healthy relationships. A major unaddressed pathway to homelessness, from my vantage point, is childhood trauma. It can ravage people's lives and minds, until old age. For example, some of my patients in their 70s still talk about the trauma that their parents inflicted on them. The lack of affordable

⁴⁹ *Ibidem*.

housing is a key factor, though there are other drivers of homelessness we must also tackle.”⁵⁰

Horowitz, Hatchett & Staveski,⁵¹ writing for the Pew Charitable Trust in 2023, highlighted how dramatically increasing housing costs have driven up the amount of homelessness.

“A large body of academic research has consistently found that homelessness in an area is driven by housing costs, whether expressed in terms of rents, rent-to-income ratios, price-to-income ratios, or home prices. Further, changes in rents precipitate changes in rates of homelessness: homelessness increases when rents rise by amounts that low-income households cannot afford. Similarly, interventions to address housing costs by providing housing directly or through subsidies have been effective in reducing homelessness. That makes sense if housing costs are the main driver of homelessness, but not if other reasons are to blame. Studies show that other factors have a much smaller impact on homelessness.”⁵²

These authors go on to state that in the United States rents have reached all-time highs with half of renters spending at least thirty percent of their income on rent and a quarter spending at least fifty percent. This was not the case “As recently as the 1970s, when rents as a share of income were far lower, [and] homelessness was rare in the United States.”⁵³ Homelessness is low in some parts of America, such as Mississippi, for one of two main reasons. Either those places have low-cost housing readily available, or they have made concerted efforts to rapidly “reduce the ranks of residents without homes.”⁵⁴

Seattle, Washington, is one of the wealthiest cities in America. It is home to a relatively young, highly educated population. Nestled on beautiful Lake Washington and the Puget Sound, it is a desirable place to live and work. Seattle also has a significant homeless population. Many homeless live in tents under the busy I-5 freeway that runs from Vancouver, British Columbia, Canada, to the north and Portland, Oregon, to the south. Many others live on benches in the historic Pioneer Square part of the downtown core. For some years, when I was practicing law in the

⁵⁰ *Ibidem*.

⁵¹ A. Horowitz, C. Hatchett, A. Staveski, *op. cit.*

⁵² *Ibidem*.

⁵³ *Ibidem*.

⁵⁴ *Ibidem*.

Seattle area, I volunteered for the Knights of Columbus⁵⁵ by periodically serving meals to homeless men temporarily living in a shelter in downtown Seattle, in the shadows of the large, sparkling arenas where the local professional baseball, football and soccer teams played, and also near the large office towers where lawyers such as myself, accountants, bankers and other professionals worked. This volunteer work to me was an eye-opening experience. I never had the chance to formally interview any of these poor souls, though I wanted to. Each one most certainly had a heart-wrenching story about how they ended up in that shelter, sleeping on a cold floor and eating the sandwiches and small servings of hot food me and my fellow Knight volunteers were serving them. There is an old saying, “There but for the grace of God, go I.” While gazing at these downtrodden men, sizing them up, sometimes engaging in small talk that I hoped might be somewhat uplifting, and while serving them as they stood in line with plates thrust toward me, this phrase often came to my mind. I do not know what life circumstances led these men to that shelter. Most of them looked, for lack of a better word, normal. They could have been my neighbor, or an uncle, or a friend. I often wondered whether any were professionals such as myself. Had any studied at and secured degrees from the University of Washington or some other such institution. Surely, some were addicts. Some were alcoholics. Or both. Some might have been employed a month earlier with a good job but were suddenly laid off and ended up on the streets with little in the way of a safety net. These thoughts brought me back to this old saying, “There but for the grace of God, go I.”

3 Does Criminalizing Homelessness Constitute Cruel and Unusual Punishment—A Review of American Jurisprudence

3.1 Introduction

I am always somewhat amused—perhaps that is not the correct word—maybe confused or even aggravated are more descriptive terms—when I listen to British (and other) news reporting, and they refer to homeless sleeping without adequate

⁵⁵ The Knights of Columbus (K of C) is a global Catholic fraternal service order founded by the Blessed Michael J. McGivney in 1882. Membership is limited to practicing Catholic men. The organization is named after the explorer Christopher Columbus. The K of C is dedicated to the principles of charity, unity, fraternity, and patriotism. It supports priests, people with intellectual and physical disabilities and others in need of monetary and physical assistance, including, as discussed in this text, the homeless.

shelter, typically on the streets of a town or city on a park bench, or on a street or sidewalk on a piece of cardboard or blanket—as “sleeping rough.” In my mind, at least, this terminology overly dignifies the problem. This phraseology almost makes it sound as if the homeless person’s decision is one of choice: I think tonight, and even for the foreseeable future, I will forego sleeping somewhere with a roof over my head; where I have a bed; where I have running water; where I have a commode; where I can bathe; where I can cook and eat a meal; where I have heat in the winter and cooling in summer; where I can dress and undress; where I can store my personal belongings; where I can do my laundry, etc. Instead, I think I will just “rough it” tonight and these next nights, and for perhaps the indeterminate future, and try to find some place on the streets where I can survive and suffer the personal indignities of being scorned by the public and by the authorities. Where I can place a paper cup or my hat on the ground and beg for money. Where I can urinate and defecate in public. Where I can scrounge around for food in dumpsters. Where I can place my personal safety at risk. Yes, this has always been on my bucket list of things I want to definitely try before I die.

But, of course, there is a flip side to this problem, and it is one I do not take lightly. It is surely true that residents of a community and visitors coming to a given community where there are homeless do not particularly like witnessing the homeless. It can be unsettling, even an eyesore. And yes, public safety issues are associated with people living on the streets. The shopping carts are full of clothing. Empty beer cans and other trash use. Drug use. An increase in criminal activity. Granville and Hayes, writing for the BBC,⁵⁶ and discussing issues associated with homelessness, state:

“Many US cities have been wrestling with how to combat the growing crisis. The issue has been at the heart of recent election cycles on the West Coast, where officials have poured record amounts of money into creating shelters and building affordable housing.”

Scout Katovich, an attorney who focuses on these issues for the American Civil Liberties Union, told the BBC that,

⁵⁶ S. Granville, C. Hayes, *op. cit.*

“It’s not easy, and it will take time to put into place solutions that work, so there’s a little bit of political theatre going on here. Politicians want to be able to say they’re doing something.”⁵⁷

That “something” is that communities have recently passed laws allowing law enforcement officials to issue fines, or even jail sentences for repeat offences, to unhoused people sleeping or camping in public. Enacting and then enforcing these measures provides political “cover” to politicians. Katovich and other advocates for the homeless argue that arresting or fining the homeless will only worsen the problem. “This tactic simply kicks the can down the road. Sure, you might clean up a street, but the people you arrest will surely be back.”⁵⁸

3.2 *Martin v. City of Boise*—Ninth Circuit Court of Appeals Jurisprudence

In *Martin v. City of Boise*,⁵⁹ the United States Court of Appeals for the Ninth Circuit considered

“whether the Eighth Amendment’s prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to. We conclude that it does.”⁶⁰

Plaintiffs-appellants were six current or former residents of the City of Boise,⁶¹ who were homeless or who had recently been homeless. The plaintiffs alleged that between 2007 and 2009 they had been cited by the Boise police for violating one or both of two city ordinances. The first was Boise City Code § 9-10- 02 (the so-called “Camping Ordinance”), that made it a misdemeanor to use “any of the streets,

⁵⁷ *Ibidem*.

⁵⁸ *Ibidem*.

⁵⁹ *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).

⁶⁰ *Ibidem*, at page 1035.

⁶¹ Boise is the capital and most populous city in the U.S. state of Idaho. Nearly a quarter of a million people live there. In the federal court system, 94 District Courts are organized into 12 circuits, or regions. Each circuit has its own Court of Appeals that reviews cases decided in U.S. District Courts within the circuit. The U.S. Court of Appeals for the Federal Circuit (in Washington D.C.) brings the number of federal appellate courts to 13. The 9th Circuit Court has appellate jurisdiction over the U.S. District Courts in the following western and northwestern states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

sidewalks, parks, or public places as a camping place at any time.”⁶² The Camping Ordinance defined “camping” as “the use of public property as a temporary or permanent place of dwelling, lodging, or residence.”⁶³ The second, Boise City Code § 6-01-05 (the so-called “Disorderly Conduct Ordinance”), banned “[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private [...] without the permission of the owner or person entitled to possession or in control thereof.”⁶⁴

The Court began its discussion by noting that a similar issue had come before a different panel of the 9th Circuit in 2006. In *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007), a panel of the 9th Circuit concluded that “so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]” for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals ‘for involuntarily sitting lying, and sleeping in public.’ *Jones* is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We agree with *Jones*’s reasoning and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.”⁶⁵

The case came to the 9th Circuit (“Court”) on appeal from a ruling by the district court granting summary judgment⁶⁶ to the City on all claims. Discussing the record that was before the trial court, the Court stated that Boise has a “significant and increasing homeless population” and that according to a study

“conducted by the Idaho Housing and Finance Association there were 753 homeless individuals in Ada County—the county of which Boise is the seat—in January 2014, 46 of whom were ‘unsheltered,’ or living in places unsuited to human habitation such as parks or sidewalks.”⁶⁷

⁶² *Martin v. City of Boise*, 902 F.3d at 1035.

⁶³ *Ibidem*.

⁶⁴ *Ibidem*.

⁶⁵ *Ibidem*.

⁶⁶ Fed. R. Civ. P. 56 provides that when there are no genuine issues of material fact, the trial court may grant summary judgment in favor of the moving party. The rule is frequently invoked and is designed to prevent useless trials. Appellate courts reviewing grants of summary judgment do so *de novo*, giving no deference to the trial court.

⁶⁷ *Martin v. City of Boise*, 902 F.3d at 1036.

The Court observed that, in view of methods used to determine the number of homeless, known as a Point-in-Time Count,⁶⁸ these numbers likely were underestimated.⁶⁹ The record revealed that at the time, there were three homeless shelters in Boise offering emergency shelter services, all run by private, nonprofit organizations.⁷⁰ Due to its limited capacity, one of the shelters frequently had to turn away homeless people seeking shelter. In 2014, it was full for men, women, or both on 38 percent of nights. A second shelter was only available for men while the third was only available for women and children.⁷¹ One of the shelters stipulated that there were limits to the number of days the homeless person could stay there. Two of the shelters were operated by a Christian nonprofit organization, and had “programs” for the homeless staying there called the Emergency Services Program and the New Life Discipleship Program. Homeless persons who did not join these overtly religious programs could be denied shelter. These shelters also had other fairly stringent prerequisites for staying at them.⁷²

All six plaintiffs were homeless individuals who had lived in or around Boise since at least 2007. Between 2007 and 2009, each was convicted at least once of violating the Camping Ordinance, the Disorderly Conduct Ordinance, or both.⁷³ With one exception, all plaintiffs were sentenced to time served for all convictions.⁷⁴ In their suit in the District Court, plaintiffs alleged that their citations under both ordinances violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, and sought damages for those alleged violations under federal statutory law. As stated earlier, the District Court granted the City’s motion for summary judgment.⁷⁵

⁶⁸ In Section 2.2.2, I discussed the 2024 State of Homelessness Report. The Department of Housing and Urban Development (HUD) also uses the so-called Point-in-Time Method to measure homelessness. Basically, HUD picks one random night in the winter and then at various points around the country measures the number of homeless people on that one given night. While providing valuable data, obviously measuring in this limited fashion can only provide a snapshot at best. The City of Boise uses a similar measurement tool. *See also*, fn. 1 to *Martin v. City of Boise*, 902 F.3d at 1036 where the Court discusses the Point-in-Time (PIT) Count Method in detail.

⁶⁹ *Martin v. City of Boise*, 902 F.3d at 1036.

⁷⁰ *Ibidem*.

⁷¹ *Ibidem*.

⁷² *Ibidem*.

⁷³ *Martin v. City of Boise*, 902 F.3d at 1037.

⁷⁴ *Ibidem*.

⁷⁵ The District Court ruled on various procedural matters, unrelated to the Eighth Amendment, but for the purpose of this paper I am omitting them, as they add unnecessary detail to this paper. The interested reader is invited to read the entire opinion. *Martin v. City of Boise*, 902 F.3d at 1038–1046.

The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁷⁶ As Stevenson and Stinneford note,

“This amendment prohibits the federal government from imposing unduly harsh penalties on criminal defendants, either as the price for obtaining pre-trial release or as punishment for crime after conviction.”⁷⁷

These authors, both renowned professors, note that

“The Cruel and Unusual Punishments Clause is the most important and controversial part of the Eighth Amendment. In some ways, the Clause is shrouded in mystery. What does it mean for a punishment to be ‘cruel and unusual’? How do we measure a punishment’s cruelty? And if a punishment is cruel, why should we care whether it is ‘unusual’?”⁷⁸

In discussing the history of the Clause, they also note that while it

“clearly prohibits ‘barbaric’ methods of punishment [...] once we get beyond [that], there are many areas of passionate disagreement concerning the meaning and application of the Cruel and Unusual Punishments Clause.”

Areas of disagreement, they explain, include what standard the Court should “use in deciding whether a punishment is unconstitutionally cruel” and whether the “Clause only prohibits barbaric methods of punishment” or whether it also “prohibits punishments that are disproportionate to the offense. For example, would imposing a life sentence for a parking violation violate the Eighth Amendment?”⁷⁹ This “disproportionality question” goes to the heart of the ordinances civilly and criminally punishing homeless persons.

The *Martin* Court explained, to begin its substantive analysis of the principal issues before it, that the Cruel and Unusual Punishments Clause [hereinafter the “Clause”] circumscribes the criminal process in three distinct ways. Citing to *Ingraham v. Wright*, 430 U.S. 651, 667 (1977), the Court stated that “First, it limits the *type* of punishment

⁷⁶ U.S. Const. Amend. VIII.

⁷⁷ B. Stevenson, J. Stinneford, *op. cit.*

⁷⁸ *Ibidem.*

⁷⁹ *Ibidem.*

the government may impose; second, it proscribes punishment ‘grossly disproportionate’ to the severity of the crime; and third, it *places substantive limits on what the government may criminalize*. *Id.* It is the third limitation that is pertinent here.”⁸⁰ The Court acknowledged that cases construing substantive limits on what the government may criminalize are rare, observing that in *Ingraham*, the Supreme Court stated this third limitation is “one to be applied sparingly.”⁸¹ However, the Court then discussed *Robinson v. California*,⁸² which it stated was

“the seminal case in this branch of Eighth Amendment jurisprudence, [and which] held a California statute that ‘ma[de] the ‘status of narcotic addiction a criminal offense’ invalid under the Cruel and Unusual Punishments Clause. 370 U.S. at 666, 82 S.Ct. 1417. The California law at issue in *Robinson* was ‘not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration’; [rather] it punished addiction itself. *Id.* Recognizing narcotics addiction as an illness or disease—‘apparently an illness which may be contracted innocently or involuntarily’—and observing that a ‘law which made a criminal offense of [...] a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment,’ *Robinson* held the challenged statute a violation of the Eighth Amendment. *Id.* at 666-67, 82 S.Ct. 1417.”⁸³ The *Martin* Court further noted that the Supreme Court in *Robinson* stated that, “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”⁸⁴

The *Martin* Court stated that although the Supreme Court in *Robinson* “did not explain at length the principles underpinning its holding,”⁸⁵ it did so in *Powell v. Texas*,⁸⁶ a case decided six years later. *Powell* involved the constitutionality of a Texas statute that made public drunkenness a criminal offense. Justice Marshall, who wrote the plurality decision of the Court, reasoned the Texas law on public drunkenness differed from the California law in *Robinson* because the Texas statute criminalized not a person’s *status* of being an alcoholic, but rather, *conduct*; namely, appearing in public while intoxicated. Justice Marshall wrote,

⁸⁰ *Martin v. City of Boise*, 902 F.3d at 1046. [Emphasis added].

⁸¹ *Martin v. City of Boise*, 902 F.3d at 1046, quoting *Ingraham*, 430 U.S. at 667.

⁸² *Robinson v. California*, 370 U.S. 660 (1962).

⁸³ *Martin v. City of Boise*, 902 F.3d at 1047, quoting *Robinson*, 370 U.S. 660 at 666–667.

⁸⁴ *Martin v. City of Boise*, 902 F.3d at 1046, quoting *Robinson*, 370 U.S. 660 at 667.

⁸⁵ *Martin v. City of Boise*, 902 F.3d at 1047.

⁸⁶ *Powell v. Texas*, 392 U.S. 514 (1968).

“[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate behavior in the privacy of his own home.”⁸⁷

The Court thus upheld the Texas laws in question.

Four Justices dissented from the Court's holding in *Powell*. Justice White concurred in the result alone. His reasoning bears discussion here. Justice White noted that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter.

“For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. [...] For some of these alcoholics, I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.”⁸⁸

The *Martin* Court also pointed out that the four Justices that dissented in *Powell* nevertheless

“adopted a position consistent with that taken by Justice White: that under *Robinson*, ‘criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change,’ and that the defendant, ‘once intoxicated, [...] could not prevent himself from appearing in public places.’ *Id.* at 567, 888 S.Ct. 2145 (Fortas, J., dissenting). Thus, five Justices gleaned from *Robinson* the principle ‘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.’ *Jones*, 444 F.3d at 1135; see also *United States v. Robinson*, 875 F.3d 1281, 1291 (9th Cir. 2017).”⁸⁹

⁸⁷ *Powell v. Texas*, 392 U.S. 514 at 532.

⁸⁸ *Powell v. Texas*, 392 U.S. at 551 (White, J., concurring in the judgment).

⁸⁹ *Martin v. City of Boise*, 902 F.3d at 1047, quoting *Powell v. Texas*, 392 U.S. 514, 567 (Fortas, J., dissenting) and *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007). In *Jones*, another panel of the 9th Circuit, in deciding a case similar to that before the case in *Martin*, concluded that “so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters] for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals ‘for involuntarily sitting, lying, and sleeping in public.’ The panel in *Martin* held that, “*Jones* is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We agree with *Jones*’s reasoning and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes

Accordingly, relying on the Supreme Court's decisions in both *Robinson* and *Powell*, and the Ninth Circuit's 2006 ruling in *Jones*, the *Martin* Court held as follows.

"[These principles] compel the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. As *Jones* reasoned, '[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human.' *Jones*, 444 F.3d at 1136. Moreover, any '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.' *Id.* As a result, just as the state may not criminalize the state of being 'homeless in public places,' the state may not 'criminalize conduct that is an unavoidable consequence of being homeless – namely sitting, lying, or sleeping on the streets,' *Id.* at 1137."⁹⁰

The *Martin* Court was careful to point out that its holding was narrow, as was the holding by the *Jones* panel in 2006. Quoting from *Jones*,

"we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets [...] at any time and at any place.' *Id.* at 1138. We hold only that 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.' *Id.* That is, 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."⁹¹

The *Martin* Court, once again referencing the now-vacated *Jones* decision, placed still further restrictions on its holding.

"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. Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or

criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them" *Martin v. City of Boise*, 902 F.3d at 1035.

⁹⁰ *Martin v. City of Boise*, 902 F.3d at 1048, quoting from *Jones v. City of Los Angeles*, 444 F.3d at 1136-1137, vacated, 505 F.3d 1006 (9th Cir. 2007).

⁹¹ *Martin v. City of Boise*, 902 F.3d at 1048, quoting from *Jones v. City of Los Angeles*, 444 F.3d at 1136-1137, vacated, 505 F.3d 1006 (9th Cir. 2007).

sleeping outside at particular times or in a particular location might well be constitutionally permissible. See *Jones*, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the ‘universal and unavoidable consequences of being human’ in the way the ordinance prescribes. *Id.* at 1136.”⁹²

In 2019, the United States Supreme Court declined to hear an appeal of the *Martin* decision, leaving the precedent intact in the nine Western states under the jurisdiction of the Ninth Circuit.⁹³

3.3 City of Grant’s Pass, Oregon v. Gloria Johnson, et. al.—U.S. Supreme Court, 24 June 2024⁹⁴

3.3.1 Facts and Procedural History—District and Court of Appeals Rulings

Five years after refusing to take up the issue of whether the Eighth Amendment’s Cruel and Unusual Punishments Clause prohibits laws such as those discussed in the previous section that the City of Boise had enacted, the Supreme Court changed course and granted the city of Grants Pass, Oregon’s petition for a writ of certiorari to review its similar laws. Grants Pass, located in southern Oregon, has a population of approximately 38,000, and of that population, somewhere between 50 and 600 persons are unhoused.⁹⁵ Though the exact number of unhoused persons is unclear, what is clear is that the number of such persons exceeds the number of available shelter beds, requiring at least some of them to sleep on the streets or in parks or other public places. Grants Pass adopted three Ordinances that make it unlawful to sleep anywhere in public, even in a car. The Ordinances prohibit “[c]amping” on

⁹² *Ibidem*. The *Martin* Court referenced several other decisions in support of its holding. “We are not alone in reaching this conclusion. As one court observed, ‘resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. [...] As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment – sleeping, eating and other innocent conduct.’ *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1565 (S.D. Fla., 1992); see also *Johnson v. City of Dallas*, 860 F.Supp. 344, 350 (N.D. Tex. 1994) (holding that a ‘sleeping in public ordinance as applied against the homeless is unconstitutional’), *rev’d on other grounds*, 61 F.3d 442 (5th Cir., 1995).” *Martin v. City of Boise*, 902 F.3d at 1048-1049.

⁹³ *Martin v. City of Boise*, 920 F.3d 584, cert. denied, 589 U.S. _____ (2019).

⁹⁴ *City of Grant’s Pass, Oregon v. Gloria Johnson, et. al.*, 603 U.S. _____ (2024).

⁹⁵ *Ibidem*, 603 U.S. at 10.

“any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct.”⁹⁶ A “[c]ampsite” is defined as

“any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained for the purposes of maintaining a temporary place to live.”⁹⁷

The definition of “campsite” includes sleeping in “any vehicle.”⁹⁸ The Ordinances also prohibit camping in public parks, including any vehicle’s “[o]vernight parking”.⁹⁹

“The City enforces these Ordinances with fines starting at \$295 and increasing to \$537.60 if unpaid. Once a person is cited twice for violating park regulations within a 1-year period, city officers can issue an exclusion order barring that person from the park for 30 days. See §6.46.350. A person who camps in a park after receiving that order commits a criminal trespass, which is punishable by a maximum of 30 days in jail and a \$1,250 fine. Ore. Rev. Stat. §164.245 (2023); see §§161.615(3), 161.635(1)(c).”¹⁰⁰

The plaintiffs were two longtime residents of Grants Pass who are homeless and who slept in their cars. They sued on behalf of themselves and all other involuntarily homeless people in the City, seeking an injunction to block the enforcement of the Ordinances. The federal District Court, where the case was filed, relying on the Ninth Circuit’s *Martin* decision, certified a class and granted summary judgment to the plaintiffs (respondents in the Supreme Court).

The District Court found that

“the only way for homeless people to legally sleep on public property within the City is if they lay on the ground with only the clothing on their backs and without their items near them.”¹⁰¹

⁹⁶ *Ibidem*, 603 U.S. at 8, Sotomayor, J., dissenting, quoting Grants Pass, Ore. Municipal Code § 5.61.030 (2024).

⁹⁷ *Ibidem*, 603 U.S. at 8, Sotomayor, J., dissenting, quoting Grants Pass, Ore. Municipal Code § 5.61.010(B).

⁹⁸ *Ibidem*.

⁹⁹ *Ibidem*, quoting Grants Pass, Ore. Municipal Code § 6.46.090(B).

¹⁰⁰ 603 U.S. at 9, Sotomayor, J., dissenting.

¹⁰¹ *Ibidem*.

The District Court issued a “narrow injunction” summarized by Justice Sotomayor in her dissent. The injunction

“concluded that Grants Pass could ‘implement time and place restrictions for when homeless individuals may use their belongings to keep warm and dry and when they must have their belonging[s] packed up.’ *Id.*, at 199a. The City could also ‘ban the use of tents in public parks,’ as long as it did not ‘ban people from using any bedding type materials to keep warm and dry while they sleep.’ *Id.*, at 199a-200a. Further, Grants Pass could continue to ‘enforce laws that actually further public health and safety, such as laws restricting littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence.’ *Id.*, at 200a.”¹⁰²

Grants Pass appealed the lower court’s ruling to the Ninth Circuit Court of Appeals. Before turning to the Ninth’s Circuit’s ultimate ruling, which substantially upheld the District Court, I want to highlight some of the facts discussed by the Ninth Circuit in its opinion.¹⁰³ The Court noted that

“Since at least 2013, City leaders have viewed homeless persons as cause for substantial concern. That year the City Council convened a Community Roundtable (“Roundtable”) ‘to identify solutions to current vagrancy problems.’ Participants discussed the possibility of ‘driving repeat offenders out of town and leaving them there.’ The City’s Public Safety Director noted police officers had bought homeless persons bus tickets out of town, only to have the person returned to the City from the location where they were sent. 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.’ The planned actions resulting from the Roundtable included increased enforcement of City ordinances, including the anti-camping ordinances.”¹⁰⁴

The Court first analyzed issues pertaining to standing and mootness, questions that are crucial to whether the Court had the jurisdiction in the first instance to entertain the appeal. The Court concluded it did.¹⁰⁵ The Court also rejected the City’s argument that the trial court had erred in certifying a class under the Federal Rules of Civil Procedure pertaining to class certifications.¹⁰⁶ The Court then turned to the

¹⁰² 603 U.S. at 10, Sotomayor, J., dissenting. The references 199a and 200a are to the District Court record in the case, which the Supreme Court reviewed.

¹⁰³ *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2022).

¹⁰⁴ *Ibidem*, at page 876.

¹⁰⁵ *Ibidem*, at pages 881-885.

¹⁰⁶ *Ibidem*, at pages 885-889

merits of the case. The City first argued that its system of imposing civil fines cannot be challenged as violating the Cruel and Unusual Clause because that clause provides protection only in criminal proceedings, after an individual has been convicted.¹⁰⁷ Second, the City argued that *Martin* does not protect homeless persons from being cited under the City's anti camping ordinance, which prohibits the use of any bedding or similar protection from the elements. The Court noted that the

“City appears to have conceded it cannot cite homeless persons merely for sleeping in public but the City maintains it is entitled to cite individuals for the use of rudimentary bedding supplies, such as a blanket, pillow, or sleeping bag ‘for bedding purposes’”.¹⁰⁸

The Court rejected both contentions.

Regarding the City's first contention, the Court conceded that,

“Usually, claims under the Cruel and Unusual Clause involve straightforward criminal charges. For example, the situation in *Martin* involved homeless persons allegedly violating criminal ordinances and the opinion identified its analysis as focusing on the ‘criminal’ nature of the charges over ten times.”¹⁰⁹

Grants Pass, on the other hand, “adopted a slightly more circuitous approach” by issuing civil citations, followed by an exclusion order in the event of two violations of the ordinance, followed by a citation for criminal trespass if the person is found in a park following issuance of the exclusion order.¹¹⁰ The Court stated that, “The holding in *Martin* cannot be so easily evaded” just because Grants Pass uses this nuanced protocol.¹¹¹ The Court relied in part on a 2019 case from the Fourth Circuit¹¹² arising from a Virginia law which allowed a state court to first issue a civil order identifying an individual as a “habitual drunkard,” which in turn subjected the individual to “incarceration for the mere possession of or attempt to possess alcohol, or for being drunk in public.”¹¹³ The Court observed that,

¹⁰⁷ *Ibidem*, at pages 888-889.

¹⁰⁸ *Ibidem*, at page 889.

¹⁰⁹ *Ibidem*, at pages 889-890.

¹¹⁰ *Ibidem*.

¹¹¹ *Ibidem*.

¹¹² *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019)(en banc.).

¹¹³ *Johnson v. City of Grants Pass*, 72 F.4th 868, 890, quoting *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 268-269.

“Using reasoning very similar to that in *Martin*, the Fourth Circuit found [Virginia’s] statutory scheme unconstitutional because it provided punishment based on the plaintiffs’ status.¹¹⁴ Of particular relevance here, the Fourth Circuit reasoned the fact that Virginia’s ‘scheme operate[d] in two steps’ did not change the analysis. *Id.* 283. Issuing a civil order first, followed by a criminal charge, was a ‘two-pronged statutory scheme’ potentially ‘less direct’ than straightforwardly criminalizing the status of alcohol addiction. *Id.* But the scheme remained unconstitutional because it ‘effectively criminalize[d] an illness.’ *Id.* The fact that Virginia ‘civilly brands alcoholics as ‘habitual drunkards’ before prosecuting them for involuntary manifestations of their illness does nothing to cure the unconstitutionality of this statutory scheme.’ *Id.*”¹¹⁵

The Court, therefore, rejected the City’s first argument, holding that, “The same reasoning [as in *Manning*] applies here. The anti-camping ordinances prohibit Plaintiffs from engaging in activity they cannot avoid. The civil citations issued for behavior Plaintiffs cannot avoid are then followed by a civil park exclusion order and, eventually, prosecutions for criminal trespass. Imposing a few extra steps before criminalizing the very acts *Martin* explicitly says cannot be criminalized does not cure the anti-camping ordinances’ Eighth Amendment infirmity.”¹¹⁶

The Court also rejected the City’s second contention, namely that it constitutionally revised its anti-camping ordinances [in line with *Martin*] to allow homeless persons to sleep in City parks. The Court referred to the City’s contention as “an illusion” pointing out that,

“The amended ordinance continues to prohibit homeless persons from using ‘bedding, sleeping bag, or other material used for bedding purposes,’ or using stoves, lighting fires or erecting structures of any kind. GPMC 5.61.010. The City claims homeless persons are free to sleep in City parks, but only without items necessary to facilitate sleeping outdoors.”¹¹⁷

The Court then proceeded to explain the City’s contention.

“The discrepancy between sleeping without bedding materials, which is permitted under the [City’s] anti-camping ordinances, and sleeping with bedding, which is not, is

¹¹⁴ The *Manning* case was filed by a group of homeless alcoholics who claimed, among other theories, that Virginia’s “habitual drunkard” scheme violated the Cruel and Unusual Punishments Clause. In the plaintiffs’ view, the scheme resulted in criminal prosecutions based on their “status,” i.e., alcoholism.

¹¹⁵ *Johnson v. City of Grants Pass*, 72 F.4th 868, 890 (9th Cir. 2022).

¹¹⁶ *Ibidem*.

¹¹⁷ *Ibidem*.

intended to distinguish the anti-camping ordinances from *Martin* and the two Supreme Court precedents underlying *Martin*, *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) and *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). Under those cases, a person may not be prosecuted for conduct that is involuntary or the product of a 'status.' See *Martin*, 920 F.3d at 617 (citation omitted). The City accordingly argues that sleeping is involuntary conduct for a homeless person, but that homeless persons can choose to sleep without bedding materials and therefore can be prosecuted for sleeping *with* bedding."¹¹⁸

The Court agreed that the District Court was correct in rejecting the City's second argument. The Court concluded that,

"The only plausible reading of *Martin* is that it applies to the act of 'sleeping' in public, including articles necessary to facilitate sleep. In fact, *Martin* expressed concern regarding a citation given to a woman who had been found sleeping on the ground, wrapped in blankets. 920 F.3d at 618. *Martin* noted that citation as an example of the anti-camping ordinance being 'enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements.' *Id.* *Martin* deemed such enforcement unconstitutional. *Id.* It follows that the City cannot enforce its anti-camping ordinances to the extent they prohibit 'the most rudimentary precautions' a homeless person might take against the elements. The City's position that it is entitled to enforce a complete prohibition on 'bedding, sleeping bag, or other materials used for bedding purposes' is incorrect."¹¹⁹

In sum, following the holding of *Martin*, and the U.S. Supreme Court decisions on which *Martin's* holding was premised namely, *Robinson* and *Powell*, the Court concluded that it had to adhere to the rule stemming from those cases: "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status."¹²⁰ The Court, in reviewing the trial court record, noted that the "undisputed evidence" revealed that both Gloria Johnson, the named plaintiff, along with the other class members, were "involuntarily homeless" as there was no secular space available to them.¹²¹ Since these plaintiffs were not voluntarily homeless, the anti-camping ordinances were unconstitutional as applied to them.

¹¹⁸ *Johnson v. City of Grants Pass*, 72 F.4th 868, 891 (9th Cir. 2022).

¹¹⁹ *Ibidem*.

¹²⁰ *Johnson v. City of Grants Pass*, 72 F.4th 868, 893 (9th Cir. 2022).

¹²¹ *Ibidem*. The beds at Grant's Pass's charity-run shelter did not qualify as "available" in part because that shelter has rules requiring residents to abstain from smoking and to attend religious services.

However, the Court also noted that beyond prohibiting bedding, the ordinance also prohibited the use of stoves or fires, as well as the erection of any structures. The Court observed that the record below did not establish that these prohibitions “deprive homeless persons of sleep or ‘the most rudimentary precautions’ against the elements. Moreover, the record does not explain the City’s interest in these prohibitions. Consistent with *Martin*, these prohibitions may or may not be permissible. On remand, the district court will be required to craft a narrower injunction recognizing Plaintiffs’ limited right to protection against the elements, as well as limitations when a shelter bed is available.”¹²²

The Court concluded its discussion by noting that its decision was “narrow” in the sense that, as in *Martin*, it was holding “simply” that it is “unconstitutional to punish simply sleeping somewhere in public if one has nowhere else to go.” It also noted that “sleeping” in the context of *Martin* includes sleeping with rudimentary forms of protection from the elements, and that its holding “reaches beyond *Martin* slightly” because, whereas *Martin* applies to civil citations only, in the present case, “the civil and criminal punishments are closely intertwined.”¹²³ Finally, the Court concluded with the following additional caveats: “Our decision does not address a regime of purely civil infractions, nor does it prohibit the City from attempting other solutions to the homelessness issue.”¹²⁴

3.3.2 Ruling by U.S. Supreme Court

As has frequently been the case in recent years in matters before the Supreme Court involving some of the greatest, and most contentious social issues of our times including guns, religion, abortion, immigration, government regulation and the like, the Grants Pass case was resolved along ideological lines, with the staunchly conservative block, which now has six members following the Trump presidency (2016–2020) voting to reverse the Ninth Circuit. Justice Gorsuch, a Trump appointee, wrote the majority opinion, which was joined by Justices Roberts, Thomas, Alito, Kavanaugh and Barrett.¹²⁵ The “liberal wing” of the Court would

¹²² *Johnson v. City of Grants Pass*, 72 F.4th 868, 895 (9th Cir. 2022).

¹²³ *Ibidem*.

¹²⁴ *Ibidem*.

¹²⁵ Clarence Thomas was nominated by George H.W. Bush and assumed office in 1991. Chief Justice Roberts was nominated by George W. Bush and assumed office in 2005. Samuel Alito was also nominated by George W. Bush

have upheld the Court of Appeals. Justice Sotomayor wrote a scathing dissent, joined by fellow liberals Kagan and Jackson.¹²⁶ Justice Thomas wrote a concurring opinion, in which he stated that he would have gone even further and overruled the 1962 *Robinson* decision. I will discuss the majority, concurring and dissenting opinions in that order.

3.3.2.1 Majority Opinion

Justice Gorsuch started his analysis by explaining that the Eighth Amendment's Cruel and Unusual Punishments Clause ["Clause"] has historically focused

“on the question of what ‘method or kind of punishment’ a government may impose after a criminal conviction, not on the question whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense. *Powell*, 392 U.S., at 531-532.”¹²⁷

Additionally, according to the Court, the criminal punishments imposed under the Grant Pass ordinances in question do not

“qualify as cruel and unusual” since an initial offense may only trigger a civil fine; repeat offense may trigger an order temporarily barring a person from camping in a public park; and those that violate an order like that may only face a criminal punishment of up to 30 days in jail couple with perhaps a larger fine. Relying on *Bucklew v. Precythe*, 587 U.S. 119, 130 (2019), the Court concluded that none of these sanctions are unusual, “because similar punishments have been and remain among ‘the usual mode[s]’ for punishing offenses throughout the country. [...] In fact, large numbers of cities and States across the country have long employed, and today employ, similar punishments for similar offenses.”¹²⁸

The Court reasoned that the California law at issue in the 1962 *Robinson* decision was “nothing like” the public camping ordinances at the heart of the present case because,

and assumed office in 2006. Brett Kavanaugh and Amy Coney Barrett were both nominated by Donald Trump. Kavanaugh assumed office in 2018 while Barrett assumed office in 2020.

¹²⁶ Sonia Sotomayor was nominated by Barack Obama and assumed office in 2009. Elena Kagan was also appointed by Barack Obama and assumed office in 2010. Ketanji Brown Jackson, the first black woman to serve on the Supreme Court, was nominated by Joe Biden and assumed office in 2022. Supreme Court Justices, as with most other federal judges, have lifetime appointments.

¹²⁷ *City of Grants Pass v. Johnson*, 603 U.S. 16 (2024).

¹²⁸ *City of Grants Pass v. Johnson*, 603 U.S. at 17.

“Rather than criminalize mere status, Grant Pass forbids actions like ‘occupy[ing] a campsite’ on public property ‘for the purpose of maintaining a temporary place to live. 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 abandons his dorm room to camp out in protest on the lawn of a municipal building. In that respect the city’s laws parallel those found in countless jurisdictions across the country. And because laws like these do not criminalize mere status, *Robinson* is not implicated.”¹²⁹

In a footnote, the Court states that the dissent mistakenly suggests that the ordinances at issue, and others like them, apply only to the homeless. In the same footnote, the Court states that perhaps the dissent is really suggesting that some cities, such as Grants Pass, engage in a system of “selective enforcement” of such ordinances against homeless persons, while giving others a pass. If so, the Court states, then a possible remedy might lie, not under the Clause, but rather perhaps under the due process clause and other precedents regarding selective prosecution.¹³⁰

The Court declined to accept plaintiffs’ invitation to extend *Robinson* to prohibit enforcement of laws that proscribe certain acts that are in some sense “involuntary,” because some homeless individuals cannot help but do what the law forbids. The Court reasoned that the Supreme Court had already rejected such an extension in *Powell v. Texas*, the case discussed earlier, where the Court confronted a defendant who had been convicted under a Texas statute making it a crime to get drunk or be found in a state of intoxication in a public place. There, Powell argued that his drunkenness was an “involuntary byproduct” of his status as an alcoholic. The Court noted that in *Powell*, Justice Marshall, writing for the plurality, rejected that contention, writing that *Robinson* did not curtail a State’s authority to secure a conviction when the accused has committed some act society has an interest in preventing. Justice Marshall further reasoned that that remained true even if the defendant’s conduct might, in some sense, be described as involuntary or occasioned by a particular status.¹³¹

¹²⁹ *City of Grants Pass v. Johnson*, 603 U.S. at 20-21 (citations and other references omitted).

¹³⁰ *Ibidem*, at fn. 5.

¹³¹ *City of Grants Pass v. Johnson*, 603 U.S. at 22-23 (citations and other references omitted).

Next, the Court argued that expanding *Robinson's* narrow holding would risk turning the judiciary into the ultimate arbiter of criminal responsibility across diverse areas of law, a role for which the Eighth Amendment provides no guidance.¹³² This, in turn, “would interfere with ‘essential considerations of federalism’ that reserve to the State primary responsibility for drafting their own criminal laws.”¹³³ Furthermore, the Court wrote at length about how expanding *Robinson* would and had led to many practical difficulties as cities have faced numerous challenges in determining who qualifies as “involuntarily” homeless and what constitutes “adequate shelter” under *Martin*. “Posing the questions may be easy; answering them is not. Is it enough that a homeless person has turned down an offer of shelter? Or does it matter why? Cities routinely confront individuals who decline offers of shelter for any number of reasons, ranging from safety concerns to individual preferences. How are cities and their law enforcement officers on the ground to know which of these reasons are sufficiently weighty to qualify a person as ‘involuntarily’ homeless?”¹³⁴ The Court concluded that the judicially created standard from the Ninth Circuit proved unworkable and has interfered with local efforts to address homelessness, ultimately undermining the democratic process and federalism principles.

“Homelessness is complex. Its causes are many. So may be the public policy responses to address it. At bottom, the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes and devising those responses. It does not.”¹³⁵

Clarence Thomas concurred in the Court’s result, but wrote separately to say that in his view *Robinson* had been “wrongly decided,”¹³⁶ and that he would overrule it. Thomas argued that *Robinson's* holding conflicted with the plain text of the Cruel and Unusual Punishments Clause along with its history and that the Court in that case relied too much instead upon contemporary public opinion which, in Thomas’ view “is not an appropriate metric for interpreting [the Clause] or any provision of the Constitution for that matter.”¹³⁷ Thomas’ concurrence comes as no surprise. Throughout his long tenure on the Court, he has been a Justice that, perhaps more

¹³² *City of Grants Pass v. Johnson*, 603 U.S. at 24–25 (citations and other references omitted).

¹³³ *City of Grants Pass v. Johnson*, 603 U.S. at 25 (citations and other references omitted).

¹³⁴ *City of Grants Pass v. Johnson*, 603 U.S. at 26.

¹³⁵ *City of Grants Pass v. Johnson*, 603 U.S. at 34.

¹³⁶ *City of Grants Pass v. Johnson*, 603 U.S. 1 (2024), Thomas, J., concurring.

¹³⁷ *City of Grants Pass v. Johnson*, 603 U.S. 2 (2024), Thomas, J., concurring.

than any other, has been willing to reject the principle of precedence and stare decisis and to overrule previous high court rulings he believes are “demonstrably erroneous.”¹³⁸ Thomas, along with other so-called “textualists,” such as the now deceased Antonin Scalia, hold the view that the text of the Constitution has a “fixed” meaning and that the Court should not take into account the Nation’s “evolving standards of decency” when interpreting it.¹³⁹

3.3.2.2 Dissenting Opinion

Justice Sotomayor starts her dissenting opinion as follows,

“Sleep is a biological necessity, not a crime. For some people, sleeping outside is their only option. The City of Grants Pass jails and fines people for sleeping anywhere in public at any time, including in their cars, if they use as little as a blanket to keep warm or a rolled-up shirt as a pillow. For people with no access to shelter, that punishes them for being homeless. This is unconscionable and unconstitutional. Punishing people for their status is ‘cruel and unusual’ under the Eighth Amendment. See *Robinson v. California*, 370 U.S. 660 (1962).”¹⁴⁰

The dissent framed the issue before the Court as “whether the Constitution permits punishing homeless people with no access to shelter for sleeping in public with as little as a blanket to keep warm.”¹⁴¹ At the outset of the opinion, Justice Sotomayor accused the majority of focusing “almost exclusively on the needs of local governments and leaves the most vulnerable in our society with an impossible choice: Either stay awake or be arrested.”¹⁴² She cautioned that the Court must protect the rights of all Americans, “rich and poor, housed and unhoused [...] even when, and perhaps especially when, doing so is uncomfortable or unpopular.”¹⁴³

¹³⁸ J. Stempel, op. cit. In his article, Stempel points out that in a variety of cases, including gun cases, libel cases, and abortion cases, Thomas has used his textualist or originalist judicial philosophy to argue in favor of abandoning concepts of precedent and stare decisis.

¹³⁹ *City of Grants Pass v. Johnson*, 603 U.S. 2 (2024), Thomas, J., concurring.

¹⁴⁰ *City of Grants Pass v. Johnson*, 603 U.S. 1 (2024), Sotomayor, J., dissenting.

¹⁴¹ *Ibidem*.

¹⁴² *Ibidem*.

¹⁴³ *City of Grants Pass v. Johnson*, 603 U.S. 603, 2 (2024), Sotomayor, J., dissenting.

A good portion of the dissent focuses on the causes of homelessness, some- thing addressed in section 2.3 of this paper.¹⁴⁴ It also highlights, as I also have in 2.2.4 of this paper, that homelessness tends to impact the most vulnerable in society, such as,

“[P]eople already in precarious positions with mental and physical health, trauma, or abuse [who] may have nowhere else to go if forced to leave their homes [along with] [v]eterans, victims of domestic violence, teenagers, and people with disabilities.”¹⁴⁵

Women and American Indians are also particularly vulnerable.¹⁴⁶

The dissent argues that criminalizing homelessness is counterproductive. It results in a “destabilizing cascade of harm” because,

“Rather than helping people to regain housing, obtain employment, or access needed treatment and services, criminalization creates a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back.”¹⁴⁷

It highlights that when a homeless person is arrested their most personal possessions, including “personal documents needed for accessing jobs, housing, and services such as IDs, driver’s licenses, financial documents, birth certificates, and benefit cards” not to mention clothing, tools and computers are separated from them.¹⁴⁸ The dissent presents real life examples of how, “incarceration and warrants from unpaid fines can also result in the loss of employment, benefits, and housing opportunities.”¹⁴⁹

¹⁴⁴ *City of Grants Pass v. Johnson*, 603 U.S. 603, 3-4 (2024), Sotomayor, J., dissenting. “People become homeless for many reasons, including some beyond their control. ‘[S]tag- nant wages and the lack of affordable housing’ can mean some people are one unexpected medical bill away from being able to pay rent. Every ‘\$100 increase in median rental price’ is ‘associated with about a 9 percent increase in the estimated homelessness rate. Individ- uals with disabilities, immigrants, and veterans face policies that increase housing insta- bility. Natural disasters also play a role, including in Oregon, where increasing numbers of people ‘have lost housing because of climate events such as extreme wildfires across the state, floods in the coastal areas, [and] heavy snowstorms. Further, ‘mental and physical health challenges,’ and family and domestic ‘violence and abuse’ can be precipitating causes of homelessness.” [References and citations omitted].

¹⁴⁵ *City of Grants Pass v. Johnson*, 603 U.S. 603, 4 (2024), Sotomayor, J., dissenting.

¹⁴⁶ *Ibidem*.

¹⁴⁷ *City of Grants Pass v. Johnson*, 603 U.S. 603, 5 (2024), Sotomayor, J., dissenting. [References and citations omitted].

¹⁴⁸ *City of Grants Pass v. Johnson*, 603 U.S. 603, 6 (2024), Sotomayor, J., dissenting. [References and citations omitted].

¹⁴⁹ *Ibidem*.

Penalizing homelessness, the dissent argues, does not deter people from living out of doors. Deterrence is one of the objectives of criminal sanctions. However, the dissent points to a study finding that “91 % of homeless people who were surveyed ‘reported remaining outdoors, most often just moving two to three blocks away’ when they received a move-along order.”¹⁵⁰

Turning to its Eighth Amendment analysis of the Grants Pass anti-camping ordinances, the dissent launched into a discussion of *Robinson*, which it stated the Supreme Court has “repeatedly cited [...] for the proposition that the ‘Eighth Amendment [...] imposes a substantive limit on what can be made criminal and punished as such.’”¹⁵¹ In a footnote,¹⁵² the dissent chided the majority for taking, “unnecessary swipes at *Robinson*, but not overruling it,” and “mistakenly treat[ing] it as an outlier,” while also observing that the majority did not “cast doubt on this Court’s firmly rooted principle that inflicting ‘unnecessary suffering’ that is ‘grossly disproportionate to the severity of the crime’ or that serves no ‘penological purpose’ violated the Punishments Clause. *Estelle v. Gamble*, 429 U.S. 97, 103, and n. 7 (1976).”¹⁵³ In the dissent’s view, the majority was wrong in believing that the case before it required an extension of the holding in *Robinson*.¹⁵⁴

At the bottom, the majority and dissent disagreed over whether the Ordinances in question punished mere status [as opposed to conduct]. The majority argued they did not.¹⁵⁵ The dissent vigorously argued they did just that, claiming that, “Every shred of evidence points [that way]” and that “The Ordinances’ purpose, text, and enforcement confirm that they target status, not conduct.”¹⁵⁶ In support of this reasoning, the dissent pointed to the Ordinances’ purpose and the fact, as enforced, they were “intended to criminalize being homeless.” The dissent, as evidence to support this conclusion, pointed to the trial court record, which I previously highlighted in Section 3.3.1, where the Ninth Circuit Court of Appeals in this case referred to the “Roundtable discussions” of the City Council, and its desire to

¹⁵⁰ *Ibidem*.

¹⁵¹ *City of Grants Pass v. Johnson*, 603 U.S. 603, 12 (2024), Sotomayor, J., dissenting. [References and citations omitted].

¹⁵² *Ibidem*, fn. 2

¹⁵³ *City of Grants Pass v. Johnson*, 603 U.S. 603, 12 (2024), Sotomayor, J., dissenting.

¹⁵⁴ *Ibidem*.

¹⁵⁵ *City of Grants Pass v. Johnson*, 603 U.S. at 21.

¹⁵⁶ *City of Grants Pass v. Johnson*, 603 U.S. 603, 13 (2024), Sotomayor, J., dissenting.

essentially “ban” the homeless from its jurisdiction by busing them out of town to some other jurisdiction.¹⁵⁷ “This idea was deterrence, not altruism,” wrote Justice Sotomayor, who followed this up with quotes from Grants Pass council members that had stated in a public hearing, “[m]aybe they aren’t hungry enough or cold enough [...] to make a change in their behavior.” *Id.*, at 122. The council president summed up the goal succinctly, “[T]he point is to make it uncomfortable enough for [homeless people] in our city so they will want to move on down the road.”¹⁵⁸

The dissent also asserts that the text of the Ordinances singles out homeless people. It points to the definition of “campsite” as “any place where bedding, sleeping bag, or other material used for bedding purposes” is placed “for the purpose of maintaining a temporary place to live.”¹⁵⁹ The dissent then takes issue with the majority’s claims that it “makes no difference whether the charged defendant is homeless,” by arguing “the Ordinances do not apply unless bedding is placed to maintain a temporary place to live.”¹⁶⁰ Therefore, quoting from the Brief for Criminal Law and Punishment Scholars as *Amici Curiae* 12, “what separates prohibited conduct from permissible conduct is a person’s intent to ‘live’ in public spaces. Infants napping in strollers, Sunday afternoon picnickers, and nighttime stargazers may all engage in the same conduct of bringing blankets to public spaces [and sleeping], but they are exempt from punishment because they have a separate ‘place to live’ to which they presumably intend to return.”¹⁶¹

The dissent offers a roadmap of sorts to similarly-situated homeless persons who will seek to bring claims against localities that have ordinances similar to those in Grants Pass. The dissent points out that future challenges might be brought on the basis that such ordinances violate the Eighth Amendment’s Excessive Fines

¹⁵⁷ *Ibidem*.

¹⁵⁸ *City of Grants Pass v. Johnson*, 603 U.S. 603, 13–14 (2024), Sotomayor, J., dissenting. [References omitted]. As I read these comments from Grants Pass elected officials, I am acutely reminded of the scheme the Tories hatched in England, and which they poured millions of pounds into, to transport illegal immigrants from England to Rwanda, also to supposedly deter those immigrants crossing the English Channel from France in “small boats” from coming to England in the first place. The new Labour Government scrapped that scheme, although now other European Governments, including Germany, are considering the same scheme.

¹⁵⁹ *City of Grants Pass v. Johnson*, 603 U.S. 603, 14 (2024), Sotomayor, J., dissenting. [Citations to underlying Ordinance provisions omitted].

¹⁶⁰ *Ibidem*.

¹⁶¹ *City of Grants Pass v. Johnson*, 603 U.S. 603, 14–15 (2024), Sotomayor, J., dissenting.

Clause;¹⁶² the Due Process Clauses of the Fifth and Fourteenth Amendments;¹⁶³ assertions that some vagrancy laws are unconstitutionally vague;¹⁶⁴ along with a variety of other perhaps less-well known attacks.¹⁶⁵ The dissent concluded that section of its opinion with these words,

“The Court’s misstep today is confined to its application of *Robinson*. It is quite possible, indeed likely, that these and similar ordinances will face more days in court.”¹⁶⁶

Justice Sotomayor ended her opinion as follows,

“Homelessness in America is a complex and heartbreaking crisis. People experiencing homelessness face immense challenges, as do local and state governments. Especially in the face of these challenges, this Court has an obligation to apply the Constitution faithfully and evenhandedly. The Eighth Amendment prohibits punishing homelessness by criminalizing sleeping outside when an individual has nowhere else to go. It is cruel and unusual to apply any penalty ‘selectively to minorities whose number are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer through it would not countenance general application of the same penalty across the board.’ *Furman v. Georgia*, 408 U.S. 238, 245 (1972) (Douglas, J., concurring).”¹⁶⁷

Finally,

“I remain hopeful that someday in the near future, this Court will play its role in safeguarding constitutional liberties for the most vulnerable among us. Because the Court today abdicates that role, I respectfully dissent.”¹⁶⁸

4 International Law Regarding the Right to Adequate Housing

A comprehensive discussion of this complicated subject is beyond the scope of this paper. However, I do want to touch upon it briefly.

¹⁶² *City of Grants Pass v. Johnson*, 603 U.S. 603, 26-27 (2024), Sotomayor, J., dissenting.

¹⁶³ *City of Grants Pass v. Johnson*, 603 U.S. 603, 27-28 (2024), Sotomayor, J., dissenting.

¹⁶⁴ *Ibidem*.

¹⁶⁵ *City of Grants Pass v. Johnson*, 603 U.S. 603, 28-29 (2024), Sotomayor, J., dissenting.

¹⁶⁶ *City of Grants Pass v. Johnson*, 603 U.S. 603, 29 (2024), Sotomayor, J., dissenting.

¹⁶⁷ *Ibidem*.

¹⁶⁸ *City of Grants Pass v. Johnson*, 603 U.S. 603, 30 (2024), Sotomayor, J., dissenting.

4.1 Special Rapporteur on the Right to Adequate Housing

The Special Rapporteur, speaking about the subject of homelessness and human rights, and in particular the right to adequate housing,¹⁶⁹ states,

“Homelessness is a profound assault on dignity, social inclusion and the right to life. It is a *prima facie* violation of the right to housing and violates a number of other human rights in addition to the right to life, including non-discrimination, health, water and sanitation, security of the person and freedom from cruel, degrading and inhuman treatment.”

Further,

“Homelessness has emerged as a global human rights violation even in States that have adequate resources to address it. It has, however, been largely insulated from human rights accountability and has rarely been addressed as a human rights violation requiring positive measures by States to prevent and eliminate it. Homelessness not only indicates a State failure to guarantee access to safe, affordable and adequate housing for all, it violates as well a number of other human rights:

- For example, being exposed to homelessness impairs strongly the health of those affected undermining their right to the highest attainable standard of health.
- Homelessness causes, every year several thousand premature and preventable deaths, indicating as well a failure of States to protect the right to life adequately. In addition, it must be noted the right to life entails in itself more than mere survival, as it encompasses the core notion that everyone has the right to enjoy her or his life in dignity.
- Homelessness is *stigmatized and often addressed with criminalization, violence, and aggressive policies that violate, rather than safeguard, the rights of the persons involved*.
- Persons experiencing homelessness are also discriminated on the basis of their housing status or due to their lack of official address, affecting their political, economic and social rights, such as their right to participate in elections, their right to work, or their right to access certain social benefits.” [Emphasis added].¹⁷⁰

The Special Rapporteur Report goes on to state that,

¹⁶⁹ Special Rapporteur, *op. cit.*, A/HRC/43/43, para 30.

¹⁷⁰ *Ibidem*.

“Homelessness violates the principle of human dignity enshrined in articles 1 and 22 of the [1948] Universal Declaration of Human Rights and in the [1966] International Covenant on Civil and Political Rights and Economic, Social and Cultural Rights.”¹⁷¹

Further,

“States have recognized in Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights the right of everyone to an adequate standard of living, including to food, clothing and housing and to the continuous improvement of living conditions. Article 12 states that everyone has the right to the highest attainable standard of health. States must furthermore guarantee according to Article 2 (2) that all economic, social and cultural rights ‘are exercised without discrimination of any kind as to [...] national or social origin, property, birth of other status’, the latter includes as well housing status.”¹⁷²

4.2 Do These Apply in the United States?

The National Law Center on Homelessness and Poverty, in exploring this issue, states that presently, the United States has signed but not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is a binding document that recognizes the human right to adequate housing as a government obligation, and does not recognize the human right to housing as defined in international law.¹⁷³ The National Law Center Fact Sheet points out, however, that

“[T]he United States has signed international treaties on racism, civil and political rights, and refugee status, all of which mention the right to housing.”¹⁷⁴

The National Law Center Fact Sheet references an “Economic Bill of Rights” proposed by President Franklin D. Roosevelt in 1944 which, among other things, advocated that every family should have a right to a decent home.¹⁷⁵

This idea was aspirational only and has never had the force of law. In recent times, long-time Vermont Senator and two-time Presidential candidate Bernie Sanders ran on a similar platform first in 2016 and then again in 2020. Sanders garnered much

¹⁷¹ *Ibidem.*

¹⁷² *Ibidem.*

¹⁷³ Right to Housing Fact Sheet in the United States, *op. cit.*

¹⁷⁴ *Ibidem.*

¹⁷⁵ *Ibidem.*

support from Democrats and left-leaning Americans, but he eventually ended his bids for President and threw his support first to Hillary Clinton and then to President Joe Biden in 2020.¹⁷⁶ Conservative politicians paint Sanders and others that hold views similar to his as being “socialist,” “radical left,” “communist,” and, in general, “out of touch.”

In 2014, the National Law Center on Homelessness & Poverty, in conjunction with the National Coalition for the Homeless, and Southern Legal Counsel, as the US Human Rights Network CAT¹⁷⁷ Homeless Working Group, drafted a document entitled “Criminalization of Homelessness in the United States of America, Report [“Report”] to the United Nations Committee Against Torture.”¹⁷⁸ Endorsed by various state chapters of the American Civil Liberties Union and other advocacy groups, the Report concluded that the criminalization of homelessness constitutes cruel, inhuman, and degrading treatment. The Report argues that such criminalization across America constitutes “violations of the Convention Against Torture” and affects “more than 3.5 million people who experience homelessness in the United States of America annually.”¹⁷⁹ The Report argues that “Criminalizing homelessness and its associated activities when people have nowhere else to go constitutes cruel, inhuman, and degrading treatment (CIDT) in violation of Article 16 [of CAT].”¹⁸⁰ Further, the Report notes that,

“On March 27, 2014, the U.N. Human Rights Committee condemned the criminalization of homelessness in the United States as CIDT in violation of Article 7 of the International Covenant on Civil & Political Rights, and called upon the U.S government to abolish criminalization and take corrective action. On August 29, 2014,

¹⁷⁶ For those interested in this topic, I commend a recent book by Sanders entitled *It’s OK to be Angry About Capitalism*. (2024) In his book, Sanders discusses that while the U.S. Constitution and Bill of Rights (collectively, the first ten Amendments to the Constitution) guarantee the right to vote, to express opinions, to assemble, and other important political rights, “they do not guarantee us the right to a decent job, health care, education, food and shelter. They do not guarantee us the right to basic necessities that allow human beings to live decent and secure lives.” After then referencing President Roosevelt’s proposed Economic Bill of Rights, and his proclamation that, “True individual freedom cannot exist without economic security and independence,” Sanders goes on to state, “Roosevelt was right when he made that statement almost eighty years ago, and the principle remains true today. Economic rights are human rights, and true individual freedom cannot exist without those rights.” *Ibidem*, pp. 11–12.

¹⁷⁷ CAT is an acronym for the Convention Against Torture.

¹⁷⁸ *Criminalization of Homelessness in the United States of America, A Report to the U.N. Committee Against Torture. op. cit.*

¹⁷⁹ *Criminalization of Homelessness in the United States of America, A Report to the U.N. Committee Against Torture. op. cit.* p. 1.

¹⁸⁰ *Criminalization of Homelessness in the United States of America, A Report to the U.N. Committee Against Torture. op. cit.* p. 2.

the U.N. Committee on the Elimination of Racial Discrimination echoed this concern and called for abolition of criminalization of homelessness. Numerous Special Rapporteurs and international authorities have similarly condemned criminalization of homelessness as CIDT in both mission reports on the U.S. and in thematic reports on penalization of poverty and stigmatization. These statements reflect a growing consensus.”¹⁸¹

The Report paints a bleak picture of what homeless people face when trying to survive in communities that have ordinances such as those in Boise and Grants Pass, which we have examined through the prism of leading Constitutional law cases.

“Once arrested, unaffordable bail means that homeless persons are nearly always incarcerated until their trials occur – or until they agree to waive their trial rights in exchange for convictions. In a survey of homeless persons, 57% stated that bench warrants had been issued, leading to their arrest. 49% of homeless people report having spent five or more days in a city or county jail. In 87% of cases with bail of \$1000 or less in New York City in 2008, defendants were not able to pay and were incarcerated pending trial. The average length of pretrial detention was 15.7 days. This means homeless persons could spend more than two weeks in detention for crimes as minor as sitting on the sidewalk or littering. More than that, pretrial confinement leads to a higher likelihood of conviction. Confinement, or the threat of confinement, prompts defendants to plead guilty and give up their right to trial. Eight in 10 convicted misdemeanor arrestees receive sentences that do not include jail time – meaning that if they were detained pre-trial, it was unwarranted.”¹⁸²

The Report also underscores the financial costs to society of criminalizing homelessness; costs that could and should be better directed to making more public housing available to these people—a scheme that would go a long way to actually solving the problem.

“Criminalization prolongs homelessness, and creates a correctional-system-to-homelessness cycle with astronomical costs to governments. Criminalization also misdirects state resources away from more effective (and cost-effective) short- and long-term solutions such as shelters and transitional housing, as well as permanent supportive housing and affordable housing programs, all of which are more likely to reduce the number of people living on the streets. Thus, policies in many parts of the

¹⁸¹ *Ibidem*.

¹⁸² Criminalization of Homelessness in the United States of America, A Report to the U.N. Committee Against Torture. *op. cit.* pp. 4–5.

United States increase homelessness and exposure to cruel, inhuman, and degrading conditions rather than working to reduce them.”¹⁸³

Tars,¹⁸⁴ Legal Director for the National Homelessness Law Center, echoes what the Report discussed above chronicled.

“Criminalization policies are ineffective and, in fact, make homelessness harder to exist. Because people experiencing homelessness are not on the street by choice but because they lack choices, criminal and civil punishment serves no constructive purpose. [...] Criminalization is the most expensive and least effective way of addressing homelessness and wastes scarce public resources on policies that do not work. A growing body of research comparing the cost of homelessness, including the cost of criminalization, with the cost of providing housing to homeless people shows that ending homelessness through housing is the most affordable option in the long run.”¹⁸⁵

Tars references a study in Charlotte, North Carolina, which concluded that the city saved \$2.4 million over a year after creating a Housing First facility. The study also found that this strategy led to tenants spending over 1,000 fewer nights in jail; nearly 300 fewer days in hospital; and nearly 650 fewer visits to hospital emergency rooms. In conclusion,

“With state and local budgets stretched to their limit and the threat of additional federal cuts on the horizon, rational, cost-effective policies are needed, not ineffective measures that waste precious taxpayer dollars.”¹⁸⁶

5 Housing First in Finland is Drastically Reducing Homelessness

Finland’s government introduced a “Housing First” policy in 2008, aimed at eradicating long-term homelessness. Whereas the United States has witnessed a sharp rise in homelessness, according to Morales,¹⁸⁷

¹⁸³ *Ibidem*.

¹⁸⁴ E. Tars, *op. cit.*, 6–37.

¹⁸⁵ *Ibidem*.

¹⁸⁶ E. Tars, *op. cit.*, 6–37 and 6–38.

¹⁸⁷ L. Morales, *op. cit.*

“[F]rom 2008 to 2022, the number of individuals experiencing long-term homelessness in Finland decreased by 68 percent.”¹⁸⁸ Morales goes on to state that there were 18,000 homeless persons in 1987, when the government began its effort to address the problem, and that as of 2018, that number dropped to 5,482. Finland’s policy is a human rights-based strategy built upon four principles:

1. Everyone is entitled to a settled place to live, regardless of circumstances, reversing traditional homeless aid approaches. Having stable living conditions makes it easier to look for a job and work on psychological and health problems. Homeless people can get an apartment without any preconditions. Being in a more secure position and having social worker support make it easier for them to find a job and take care of their physical and mental health.
2. The framework respects choice and autonomy, allowing individuals to select treatments and services. Individuals are not required to solve social and health issues beforehand, like completely giving up alcohol and drug use. Moreover, support is tailored to the needs of the person, and this is made possible due to the high standards of public social services.
3. Empowerment of residents and building trust with the staff.
4. Support people’s integration into their community.

Housing First solves long-term homelessness by gradually reducing and abandoning the use of conventional short-term shelters and converting them into affordable rented accommodation units.”¹⁸⁹

The Housing First strategy in Finland has worked through partnerships between the state, cities, municipalities, and local non-governmental organizations. The Finnish government funds the program by funneling money to the municipalities, who in turn can either spend the funds themselves or partner with other organizations that provide social services.

“Between 2008 and 2019, the [Finnish] Government had spent over EUR 270 Million (approximately USD 293 million). Costs are shared between the central government and municipalities. Apartments bought on the private market are funded through the Finnish Lottery.”¹⁹⁰

¹⁸⁸ *Ibidem*.

¹⁸⁹ *Ibidem*.

¹⁹⁰ *Ibidem*.

Morales points to research showing, “that on average 80 percent of homeless people have accessed housing through the programme.”¹⁹¹ Finally,

“The current government has committed to completely eradicating homelessness by 2027 through measures both targeted at the homeless population and preventative programs. In the capital of Helsinki, homelessness is to be eradicated by 2025. This stands in sharp contrast to the rest of Europe [and the United States], where the number of people lacking stable housing has surged dramatically.”^{192 193}

6 Conclusion and Commentary

The traditional objectives of the criminal justice system are to prevent the occurrence of crime, punish criminals, rehabilitate criminals, and provide retribution. The American criminal justice system, both at the federal and state levels, always seems to be fighting some kind of war on crime. For example, the war on drugs. The war on gang violence. The war on illegal immigrants. Funding these “wars” has been expensive for the American taxpayer. They have also resulted in more prisons and more persons being imprisoned. America has the highest prison population in the world.¹⁹⁴ The federal government has so many criminal laws [apparently over 5000] that no one can accurately count them all. Governments have enacted three strikes and you’re out legislation. They have enacted legislation making criminal penalties harsher. The sad truth is that most of these policies have failed and failed miserably. The other unfortunate truth is these policies disproportionately impact the most vulnerable and marginalized in society.¹⁹⁵ As usual, these people almost always end up drawing the short straw.

The homelessness situation in America is worsening. As we have seen from the examples in Charlotte, North Carolina and Finland, this outcome is not inevitable. Rather, it is because of [bad] deliberate choices made by American politicians and others looking for a quick fix. A theme repeated in this article is that the causes of homelessness are complex. There generally are no “quick fixes” in life for complex

¹⁹¹ *Ibidem.*

¹⁹² *Ibidem.*

¹⁹³ Many European countries have robust Housing First policies. For those readers interested in this subject, I commend you to read, *Housing First in Europe, An Overview of Implementation, Strategy and Fidelity*, *op. cit.*

¹⁹⁴ T. Heller, *op. cit.*

¹⁹⁵ *Ibidem.*

problems. On the contrary, they generally require long-term solutions that demand adequate and sustained funding, patience, hard work, diligence, cooperation, creativity, and dedication. Unfortunately, these principles are antithetical to short political election cycles. To try to win votes, and hence elections, and hence to gain power, politicians (way too often anyway) focus not on long-term solutions but rather on policies through which they can claim fast victories. Therefore, it is almost always easier for politicians to run on “law and order,” and “tough on crime” policies than long-term plans such as the Housing First program in Finland. Many people, certainly many people in America, would rather cast their vote for a politician who promises to crack down on homelessness through civil and criminal penalties than the alternative politician who proposes using taxpayer revenue actually to solve the problem. Why? Because many people, certainly many Americans, want to see some instant results. It’s human nature to want instant instead of deferred gratification.

In my view, it is very unfortunate that the Court in *Grants Pass* ruled as it did. Sure, politicians, law enforcement agencies and others hail the ruling. They argue that the Court has restored one of the “tools in their toolbox” to supposedly fight the problem of homelessness. But is that really what the majority in *Grants Pass v. Johnson* did? Let me posit this question. How does punishing a homeless person, who by definition has no or little money, either civilly or criminally, help achieve any of the traditional objectives of the criminal justice system? Will issuing these unfortunate souls fines or jailing them deter them from sleeping out of doors where they have no other place to go? Will doing so in some fashion rehabilitate them? Or, as I suspect, does doing so just make some of us feel better that local governments and policing agencies are “doing something?”

I will make a candid admission here. I am not a constitutional law scholar. I have studied constitutional law. And I made a career out of practicing law. And I have thoroughly read the cases analyzed in this article. One can engage in endless pettifoggery over the meaning of “voluntary” and “involuntary” as the majority did in *Grants Pass*. But, in my view at least, it’s difficult to conclude that punishing a person for being homeless is not cruel and unusual punishment. Should we, as a society, punish a person for their status of being mentally ill? Many of the homeless are mentally ill, or have lifelong psychological problems leading to homelessness, stemming from childhood abuses etc. So, is punishing them the answer? Will

punishing them in any way resolve the problem? Or, is this just a quick fix to make some people feel better that “those people living in tents and blighting our neighborhood” are being given their just desserts by the authorities?

Justice Sotomayor, in her dissent, enumerated other possible legal challenges to the types of ordinances that have been the focus of this paper, such as the due process clause, etc. She wrote there will be more legal challenges in the years to come. She is correct about one thing: there will be more litigation. Lots of it. There will be think tanks on both sides looking for ways to either enact further anti-camping legislation or, on the other side, to attack that legislation using the Sotomayor road map. And these cases will clog the courts, taking up valuable judicial resources. And taxpayers will spend a lot of money on their local governments to have endless meetings over the best ways to criminalize the homeless; and on law enforcement strategies, etc. And what will any of this truly accomplish? It will not solve the problem. And I dare predict that if any of these alternate legal challenges were to end up in front of this Supreme Court again, they would suffer the same fate as the challenge under the Eighth Amendment’s Cruel and Unusual Punishments Clause. In my judgment, the conservative block of this Supreme Court, which will be intact for many years to come, is not likely to view such alternative challenges with any more sympathy than it did the Eighth Amendment challenge. Increasingly, the conservative block, notably the Donald Trump appointees, seemingly following the lead of Clarence Thomas, are more willing to ignore principles of precedent and stare decisis, and to overrule cases that have been considered settled law for years, often decades. Its abortion ruling in 2022 in *Dobbs v. Jackson Women’s Health*,¹⁹⁶ where the conservative block of the Court overruled the fifty-year-old precedent *Roe v. Wade*¹⁹⁷ which had held that the Constitution protects a woman’s right to have an abortion, is but one example. Principles of stare decisis and precedent¹⁹⁸ lend legitimacy to the court and provide stability in the law. In my judgment, the current Court’s willingness to cast away long-standing precedents on the grounds it feels all of these cases were just “wrongly decided” is damaging to the Court’s legitimacy and undermining the rule of law.

¹⁹⁶ *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022).

¹⁹⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹⁸ *Stare decisis* is a Latin term meaning “let the decision stand” or “to stand by things decided.” Simply put, this doctrine holds that courts and judges should honor precedent—the decisions, rulings, and opinions from prior cases. Respect for precedents gives the law consistency and makes interpretations of the law more predictable and less seemingly random.

If I have learned anything in my life, kicking the proverbial can down the road is usually a poor, self-defeating strategy. Instead, why not be proactive? Why not instead employ a strategy that has been proven to work? Perhaps it is time for America to take a hard look at Finland. Or even closer to home: Charlotte, North Carolina. Finland will have largely eradicated the homeless problem there in the relatively short span of twenty years. Isn't a longer-term plan with a positive outcome better than the endless war on homelessness? It is also more compassionate.

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Naslov v slovenskem jeziku

Brezdomstvo v Združenih državah Amerike: Zakaj je sodba Vrhovnega sodišča ZDA v zadevi City of Grants proti Johnsonu, ki dopušča kriminalizacijo brezdomstva, tako kruta in protiproduktivna

Povzetek v slovenskem jeziku

Brezdomstvo ne pozna meja in države po vsem svetu uporabljajo različne pristope pri njegovem reševanju. Število brezdomcev v ZDA je v letu 2023 doseglo rekordne ravni, zlasti v več zahodnih zveznih državah, med drugim v Kaliforniji in Oregonu. Brezdomstvo v ZDA je tudi vprašanje rase pravičnosti, saj nesorazmerno prizadene različne manjšinske skupine in ljudi, ki so v kapitalistični družbi z razmeroma šibkimi socialnimi varnostnimi mrežami že tako ali tako potisnjeni na rob. Brezdomstvo pogosteje prizadene moške, čeprav se število žensk nedvomno povečuje. Še ena ranljiva skupina so starejši ljudje. Stroški stanovanj v ZDA so astronomsko narasli.

Presenetljivo je, da veliko Američanov živi bodisi pod pragom revščine ali komaj nad njim. Revščina in pomanjkanje cenovno dostopnih stanovanj sta dva glavna vzroka za brezdomstvo. Toda brezdomstvo ima tudi številne druge vzroke, med drugim psihiatrične težave, zlorabo prepovedanih substanc, alkoholizem, nasilna razmerja, brezposelnost, kronične zdravstvene težave in telesne omejitve. Ker različne oblasti skupnosti brezdomnim prebivalcem niso zagotovile ustreznih zavetišč, so se ljudje zatekli v parke in postavili tako imenovana šotorska mesta. To je med drugim povzročilo tudi pomisleke glede javne varnosti z vidika pojavnosti kaznivih dejanj, na primer tatvin v trgovinah, odprtega uživanja drog in alkohola ipd.

Z namenom politične rešitve tega problema in zaradi pomiritve dela prebivalstva, ki si v svojih skupnostih ne želi brezdomcev, so lokalne oblasti sprejele odloke, ki policiji omogočajo, da brezdomne kaznuje z denarnimi ali prosto strogimi kaznimi. Zagovorniki brezdomnih so sprožili sodne postopke proti tem odlokom in trdijo, da se jim krši osmi amandma k ameriški ustavi, ki prepoveduje okrutno in nenavadno kaznovanje. Argumenti temeljijo predvsem na sodbi Vrhovnega sodišča ZDA iz leta 1962 v zadevi Robinson proti Kaliforniji. V njej je sodišče razveljavilo kalifornijski zakon, ki je že golo dejstvo, da je nekdo odvisen od mamil, obravnaval kot kaznivo dejanje, namesto da bi kaznoval uporabo, prodajo ali posedovanje mamil. Sodišče je namreč menilo, da kaznovanje nekoga le zaradi njegovega statusa pomeni okrutno in nenavadno kaznovanje. V nizu nedavnih primerov je Zvezno prizivno sodišče za deveto okrožje, ki se je pretežno oprlo prav na sodno prakso iz zadeve Robinson, razveljavilo tako imenovane protitaboriščne odloke v zveznih državah Oregon in Idaho, ker naj bi kršili klavzulo o prepovedi okrutnega in nenavadnega kaznovanja.

Potem ko je Vrhovno sodišče ZDA leta 2019 zavrnilo obravnavo odločb Zveznega prizivnega sodišča, je Vrhovno sodišče ZDA, ki je danes v precej bolj konservativni sestavi, vnovič obravnavalo to pereče vprašanje v zadevi *City of Grants Pass, Oregon* proti Johnsonu. Junija 2024 je s šestimi glasovi proti trem sodna večina razveljavila odločitev Zveznega prizivnega sodišča za deveto okrožje in navedla številne argumente v podporo ugotovitvi, da se kalifornijski zakon iz zadeve *Robinson* razlikuje od odlokov, ki jih je sprejel *Grants Pass*, ter da ti odloki ne kršijo osmega amandmaja o prepovedi okrutnega in nenavadnega kaznovanja. Sodniška manjšina je so v svojem odklonilnem ločenem mnenju zapisala, da je spanje človekova biološka nuja in ne kaznivo dejanje. Za ljudi brez dostopa do zavetja po njihovem mnenju ti odloki pomenijo kaznovanje zgolj zaradi statusa brezdomca. Trdijo, da to krši prepoved okrutnega in nenavadnega kaznovanja po osmem amandmaju. Primer so izenačili s kaznovanjem osebe zgolj zaradi odvisnosti, kar je po njihovem mnenju primerljivo s kaznovanjem osebe zgolj zato, ker je brezdomna. Ti sodniki bi na podlagi zadeve *Robinson* iz leta 1962 odloke mesta *Grants Pass* razveljavili.

Različne mednarodne pogodbe in sporazumi priznavajo pravico do ustrezne- ga bivališča kot človekovo pravico. Posebni poročevalci Združenih narodov o pravici do ustreznega bivališča (angl. the Special Rapporteur on the Right to Adequate Housing) je pripravil številna temeljita poročila o tej temi. Čeprav Združene države niso ratificirale Mednarodnega pakta o ekonomskih, socialnih in kulturnih pravicah, ki priznava pravico do ustreznega bivališča kot obveznost oblasti, različne organizacije za pomoč brezdomnim v ZDA, kot je National Law Center on Homelessness and Poverty, trdijo, da kriminalizacija brezdomstva pomeni okrutno, nečloveško in ponižujoče ravnanje ter krši Konvencijo Združenih narodov proti mučenju. Prav tako to vpliva na več kot 3,5 milijona Američanov, ki se vsako leto v ZDA spopadajo z brezdomstvom.

Veliko evropskih držav, vključno s Finsko, je drastično zmanjšalo število brezdomcev z uporabo pristopa »najprej stanovanje« (angl. Housing First), ki priznava, da ima vsakdo pravico do stalnega bivališča, ne glede na druge okoliščine v posameznikovem življenju. Pristop »najprej stanovanje« uspešno uporablja tudi v nekaterih delih ZDA, na primer v mestu Charlotte v Severni Karolini. Brezdomstvo v ZDA je neupravičeno in ni nerešljiva težava. Kriminalizacija brezdomcev je kontraproduktivna. Ne služi nobenemu od splošno priznanih ciljev kazenskega pravosodja. Naložiti še eno denarno kazen osebi, ki nima kam iti in nima denarja, da bi kazen plačala, ali pa jo poslati v zapor za nekaj dni ali tednov, ne bo rešilo problema. Ti isti nesrečniki se bodo v nekaj dneh vrnili na iste ulice ali na ulice v kakem drugem mestu. Za mesta, kot je *Grants Pass*, bi bilo dolgoročno bolje, če bi se odrekla kazenskim rešitvam in namesto tega pri reševanju krize brezdomstva sprejela načelo »najprej stanova- nje«. Tako bi tudi dolgoročno prihranili denar. Ta pristop bi bil sočuten.

