THE CRIMINALIZATION OF HOMELESSNESS
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READINGS, Parts I & II

Part I

Part II

ROBINSON *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 554. Argued April 17, 1962.—Decided June 25, 1962.

A California statute makes it a misdemeanor punishable by imprisonment for any person to "be addicted to the use of narcotics," and, in sustaining petitioner's conviction thereunder, the California courts construed the statute as making the "status" of narcotic addiction a criminal offense for which the offender may be prosecuted "at any time before he reforms," even though he has never used or possessed any narcotics within the State and has not been guilty of any antisocial behavior there. *Held:* As so construed and applied, the statute inflicts a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Pp. 660–668.

Reversed.

Samuel Carter McMorris argued the cause and filed briefs for appellant.

William E. Doran argued the cause for appellee. With him on the brief were *Roger Arnebergh* and *Philip E. Grey.*

MR. JUSTICE STEWART delivered the opinion of the Court.

A California statute makes it a criminal offense for a person to "be addicted to the use of narcotics." [1] This

[1] The statute is § 11721 of the California Health and Safety Code. It provides:

"No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced

appeal draws into question the constitutionality of that provision of the state law, as construed by the California courts in the present case.

The appellant was convicted after a jury trial in the Municipal Court of Los Angeles. The evidence against him was given by two Los Angeles police officers. Officer Brown testified that he had had occasion to examine the appellant's arms one evening on a street in Los Angeles some four months before the trial.[2] The officer testified that at that time he had observed "scar tissue and discoloration on the inside" of the appellant's right arm, and "what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow" on the appellant's left arm. The officer also testified that the appellant under questioning had admitted to the occasional use of narcotics.

Officer Lindquist testified that he had examined the appellant the following morning in the Central Jail in Los Angeles. The officer stated that at that time he had observed discolorations and scabs on the appellant's arms,

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to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail."

[2] At the trial the appellant, claiming that he had been the victim of an unconstitutional search and seizure, unsuccessfully objected to the admission of Officer Brown's testimony. That claim is also pressed here, but since we do not reach it there is no need to detail the circumstances which led to Officer Brown's examination of the appellant's person. Suffice it to say, that at the time the police first accosted the appellant, he was not engaging in illegal or irregular conduct of any kind, and the police had no reason to believe he had done so in the past.

and he identified photographs which had been taken of the appellant's arms shortly after his arrest the night before. Based upon more than ten years of experience as a member of the Narcotic Division of the Los Angeles Police Department, the witness gave his opinion that "these marks and the discoloration were the result of the injection of hypodermic needles into the tissue into the vein that was not sterile." He stated that the scabs were several days old at the time of his examination, and that the appellant was neither under the influence of narcotics nor suffering withdrawal symptoms at the time he saw him. This witness also testified that the appellant had admitted using narcotics in the past.

The appellant testified in his own behalf, denying the alleged conversations with the police officers and denying that he had ever used narcotics or been addicted to their use. He explained the marks on his arms as resulting from an allergic condition contracted during his military service. His testimony was corroborated by two witnesses.

The trial judge instructed the jury that the statute made it a misdemeanor for a person "either to use narcotics, or to be addicted to the use of narcotics . . . .[3] That portion of the statute referring to the 'use' of narcotics is based upon the 'act' of using. That portion of the statute referring to 'addicted to the use' of narcotics is based upon a condition or status. They are not identical. . . . To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is

[3] The judge did not instruct the jury as to the meaning of the term "under the influence of" narcotics, having previously ruled that there was no evidence of a violation of that provision of the statute. See note 1, *supra*.

chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present."

The judge further instructed the jury that the appellant could be convicted under a general verdict if the jury agreed *either* that he was of the "status" *or* had committed the "act" denounced by the statute.[4] "All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics . . . ." [5]

Under these instructions the jury returned a verdict finding the appellant "guilty of the offense charged."

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[4] "Where a statute such as that which defines the crime charged in this case denounces an act and a status or condition, either of which separately as well as collectively, constitute the criminal offense charged, an accusatory pleading which accuses the defendant of having committed the act and of being of the status or condition so denounced by the statute, is deemed supported if the proof shows that the defendant is guilty of any one or more of the offenses thus specified. However, it is important for you to keep in mind that, in order to convict a defendant in such a case, it is necessary that all of you agree as to the same particular act or status or condition found to have been committed or found to exist. It is not necessary that the particular act or status or condition so agreed upon be stated in the verdict."

[5] The instructions continued "and it is then up to the defendant to prove that the use, or of being addicted to the use of narcotics was administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics or at least to raise a reasonable doubt concerning the matter." No evidence, of course, had been offered in support of this affirmative defense, since the appellant had denied that he had used narcotics or been addicted to their use.

An appeal was taken to the Appellate Department of the Los Angeles County Superior Court, "the highest court of a State in which a decision could be had" in this case. 28 U. S. C. § 1257. See *Smith* v. *California,* 361 U. S. 147, 149; *Edwards* v. *California,* 314 U. S. 160, 171. Although expressing some doubt as to the constitutionality of "the crime of being a narcotic addict," the reviewing court in an unreported opinion affirmed the judgment of conviction, citing two of its own previous unreported decisions which had upheld the constitutionality of the statute.[6] We noted probable jurisdiction of this appeal, 368 U. S. 918, because it squarely presents the issue whether the statute as construed by the California courts in this case is repugnant to the Fourteenth Amendment of the Constitution.

The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. More than forty years ago, in *Whipple* v. *Martinson,* 256 U. S. 41, this Court explicitly recognized the validity of that power: "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question." 256 U. S., at 45.

Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the viola-

[6] The appellant tried unsuccessfully to secure habeas corpus relief in the District Court of Appeal and the California Supreme Court.

tion of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics.[7] Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. Cf. *Jacobson* v. *Massachusetts,* 197 U. S. 11. Or a State might choose to attack the evils of narcotics traffic on broader fronts also—through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide. Upon that premise we turn to the California law in issue here.

It would be possible to construe the statute under which the appellant was convicted as one which is operative only upon proof of the actual use of narcotics within the State's jurisdiction. But the California courts have not so construed this law. Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's "status" or "chronic condition" was that of being "addicted to the use of narcotics." And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding.

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[7] California appears to have established just such a program in §§ 5350–5361 of its Welfare and Institutions Code. The record contains no explanation of why the civil procedures authorized by this legislation were not utilized in the present case.

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The instructions of the trial court, implicitly approved on appeal, amounted to "a ruling on a question of state law that is as binding on us as though the precise words had been written" into the statute. *Terminiello* v. *Chicago,* 337 U. S. 1, 4. "We can only take the statute as the state courts read it." *Id.,* at 6. Indeed, in their brief in this Court counsel for the State have emphasized that it is "the proof of addiction by circumstantial evidence . . . by the tell-tale track of needle marks and scabs over the veins of his arms, that remains the gist of the section."

This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. See *Francis* v. *Resweber,* 329 U. S. 459.

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness.[8] Indeed, it is apparently an illness which may be contracted innocently or involuntarily.[9] We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

We are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government. There are, as we have said, countless fronts on

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[8] In its brief the appellee stated: "Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic." Thirty-seven years ago this Court recognized that persons addicted to narcotics "are diseased and proper subjects for [medical] treatment." *Linder* v. *United States*, 268 U. S. 5, 18.

[9] Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth. See Schneck, Narcotic Withdrawal Symptoms in the Newborn Infant Resulting from Maternal Addiction, 52 Journal of Pediatrics 584 (1958); Roman and Middelkamp, Narcotic Addiction in a Newborn Infant, 53 Journal of Pediatrics 231 (1958); Kunstadter, Klein, Lundeen, Witz, and Morrison, Narcotic Withdrawal Symptoms in Newborn Infants, 168 Journal of the American Medical Association 1008 (1958); Slobody and Cobrinik, Neonatal Narcotic Addiction, 14 Quarterly Review of Pediatrics 169 (1959); Vincow and Hackel, Neonatal Narcotic Addiction, 22 General Practitioner 90 (1960); Dikshit, Narcotic Withdrawal Syndrome in Newborns, 28 Indian Journal of Pediatrics 11 (1961).

which those evils may be legitimately attacked. We deal in this case only with an individual provision of a particularized local law as it has so far been interpreted by the California courts.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion, I wish to make more explicit the reasons why I think it is "cruel and unusual" punishment in the sense of the Eighth Amendment to treat as a criminal a person who is a drug addict.

In Sixteenth Century England one prescription for insanity was to beat the subject "until he had regained his reason." Deutsch, The Mentally Ill in America (1937), p. 13. In America "the violently insane went to the whipping post and into prison dungeons or, as sometimes happened, were burned at the stake or hanged"; and "the pauper insane often roamed the countryside as wild men and from time to time were pilloried, whipped, and jailed." Action for Mental Health (1961), p. 26.

As stated by Dr. Isaac Ray many years ago:

> "Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing." Treatise on the Medical Jurisprudence of Insanity (5th ed. 1871), p. 56.

Today we have our differences over the legal definition of insanity. But however insanity is defined, it is in end effect treated as a disease. While afflicted people

may be confined either for treatment or for the protection of society, they are not branded as criminals.

Yet terror and punishment linger on as means of dealing with some diseases. As recently stated:

> ". . . the idea of basing treatment for disease on purgatorial acts and ordeals is an ancient one in medicine. It may trace back to the Old Testament belief that disease of any kind, whether mental or physical, represented punishment for sin; and thus relief could take the form of a final heroic act of atonement. This superstition appears to have given support to fallacious medical rationales for such procedures as purging, bleeding, induced vomiting, and blistering, as well as an entire chamber of horrors constituting the early treatment of mental illness. The latter included a wide assortment of shock techniques, such as the 'water cures' (dousing, ducking, and near-drowning), spinning in a chair, centrifugal swinging, and an early form of electric shock. All, it would appear, were planned as means of driving from the body some evil spirit or toxic vapor." Action for Mental Health (1961), pp. 27–28.

That approach continues as respects drug addicts. Drug addiction is more prevalent in this country than in any other nation of the western world.[1] S. Rep. No. 1440, 84th Cong., 2d Sess., p. 2. It is sometimes referred to as "a contagious disease." *Id.*, at p. 3. But those living in a world of black and white put the addict in the cate-

[1] Drug Addiction: Crime or Disease? (1961), p. XIV. ". . . even if one accepts the lowest estimates of the number of addicts in this country there would still be more here than in all the countries of Europe combined. Chicago and New York City, with a combined population of about 11 million or one-fifth that of Britain, are ordinarily estimated to have about 30,000 addicts, which is from thirty to fifty times as many as there are said to be in Britain."

gory of those who could, if they would, forsake their evil ways.

The first step toward addiction may be as innocent as a boy's puff on a cigarette in an alleyway. It may come from medical prescriptions. Addiction may even be present at birth. Earl Ubell recently wrote:

> "In Bellevue Hospital's nurseries, Dr. Saul Krugman, head of pediatrics, has been discovering babies minutes old who are heroin addicts.
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> "More than 100 such infants have turned up in the last two years, and they show all the signs of drug withdrawal: irritability, jitters, loss of appetite, vomiting, diarrhea, sometimes convulsions and death.
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> " 'Of course, they get the drug while in the womb from their mothers who are addicts,' Dr. Krugman said yesterday when the situation came to light. 'We control the symptoms with Thorazine, a tranquilizing drug.
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> " 'You should see some of these children. They have a high-pitched cry. They appear hungry but they won't eat when offered food. They move around so much in the crib that their noses and toes become red and excoriated.'
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> "Dr. Lewis Thomas, professor of medicine at New York University-Bellevue, brought up the problem of the babies Monday night at a symposium on narcotics addiction sponsored by the New York County Medical Society. He saw in the way the babies respond to treatment a clue to the low rate of cure of addiction.
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> " 'Unlike the adult addict who gets over his symptoms of withdrawal in a matter of days, in most cases,' Dr. Thomas explained later, 'the infant has to be treated for weeks and months. The baby continues to show physical signs of the action of the drugs.

> " 'Perhaps in adults the drugs continue to have physical effects for a much longer time after withdrawal than we have been accustomed to recognize. That would mean that these people have a physical need for the drug for a long period, and this may be the clue to recidivism much more than the social or psychological pressures we've been talking about.' " N. Y. Herald Tribune, Apr. 25, 1962, p. 25, cols. 3–4.

The addict is under compulsions not capable of management without outside help. As stated by the Council on Mental Health:

> "Physical dependence is defined as the development of an altered physiological state which is brought about by the repeated administration of the drug and which necessitates continued administration of the drug to prevent the appearance of the characteristic illness which is termed an abstinence syndrome. When an addict says that he has a habit, he means that he is physically dependent on a drug. When he says that one drug is habit-forming and another is not, he means that the first drug is one on which physical dependence can be developed and that the second is a drug on which physical dependence cannot be developed. Physical dependence is a real physiological disturbance. It is associated with the development of hyperexcitability in reflexes mediated through multineurone arcs. It can be induced in animals, it has been shown to occur in the paralyzed hind limbs of addicted chronic spinal dogs, and also has been produced in dogs whose cerebral cortex has been removed." Report on Narcotic Addiction, 165 A. M. A. J. 1707, 1713.

Some say the addict has a disease. See Hesse, Narcotics and Drug Addiction (1946), p. 40 *et seq.*

Others say addiction is not a disease but "a symptom of a mental or psychiatric disorder." H. R. Rep. No. 2388, 84th Cong., 2d Sess., p. 8. And see Present Status of Narcotic Addiction, 138 A. M. A. J. 1019, 1026; Narcotic Addiction, Report to Attorney General Brown by Citizens Advisory Committee to the Attorney General on Crime Prevention (1954), p. 12; Finestone, Narcotics and Criminality, 22 Law & Contemp. Prob. 69, 83–85 (1957).

The extreme symptoms of addiction have been described as follows:

> "To be a confirmed drug addict is to be one of the walking dead . . . . The teeth have rotted out; the appetite is lost and the stomach and intestines don't function properly. The gall bladder becomes inflamed; eyes and skin turn a billious yellow. In some cases membranes of the nose turn a flaming red; the partition separating the nostrils is eaten away—breathing is difficult. Oxygen in the blood decreases; bronchitis and tuberculosis develop. Good traits of character disappear and bad ones emerge. Sex organs become affected. Veins collapse and livid purplish scars remain. Boils and abscesses plague the skin; gnawing pain racks the body. Nerves snap; vicious twitching develops. Imaginary and fantastic fears blight the mind and sometimes complete insanity results. Often times, too, death comes—much too early in life . . . . Such is the torment of being a drug addict; such is the plague of being one of the walking dead." N. Y. L. J., June 8, 1960, p. 4, col. 2.

Some States punish addiction, though most do not. See S. Doc. No. 120, 84th Cong., 2d Sess., pp. 41, 42. Nor does the Uniform Narcotic Drug Act, first approved in 1932 and now in effect in most of the States. Great Britain, beginning in 1920 placed "addiction and the

treatment of addicts squarely and exclusively into the hands of the medical profession." Lindesmith, The British System of Narcotics Control, 22 Law & Contemp. Prob. 138 (1957). In England the doctor "has almost complete professional autonomy in reaching decisions about the treatment of addicts." Schur, British Narcotics Policies, 51 J. Crim. L. & Criminology 619, 621 (1961). Under British law "addicts are patients, not criminals." *Ibid.* Addicts have not disappeared in England but they have decreased in number (*id.*, at 622) and there is now little "addict-crime" there. *Id.*, at 623.

The fact that England treats the addict as a sick person, while a few of our States, including California, treat him as a criminal, does not, of course, establish the unconstitutionality of California's penal law. But we do know that there is "a hard core" of "chronic and incurable drug addicts who, in reality, have lost their power of self-control." S. Rep. No. 2033, 84th Cong., 2d Sess., p. 8. There has been a controversy over the type of treatment—whether enforced hospitalization or ambulatory care is better. H. R. Rep. No. 2388, 84th Cong., 2d Sess., pp. 66–68. But there is little disagreement with the statement of Charles Winick: "The hold of drugs on persons addicted to them is so great that it would be almost appropriate to reverse the old adage and say that opium derivatives represent the religion of the people who use them." Narcotics Addiction and its Treatment, 22 Law & Contemp. Prob. 9 (1957). The abstinence symptoms and their treatment are well known. *Id.*, at 10–11. Cure is difficult because of the complex of forces that make for addiction. *Id.*, at 18–23. "After the withdrawal period, vocational activities, recreation, and some kind of psychotherapy have a major role in the treatment program, which ideally lasts from four to six months." *Id.*, at 23–24. Dr. Marie Nyswander tells us that normally a drug addict

must be hospitalized in order to be cured. The Drug Addict as a Patient (1956), p. 138.

The impact that an addict has on a community causes alarm and often leads to punitive measures. Those measures are justified when they relate to acts of transgression. But I do not see how under our system *being an addict* can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.[2] As Charles Winick has said:

> "There can be no single program for the elimination of an illness as complex as drug addiction, which

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[2] "The sick addict must be quarantined until cured, and then carefully watched until fully rehabilitated to a life of normalcy." Narcotics, N. Y. Leg. Doc. No. 27 (1952), p. 116. And see the report of Judge Morris Ploscowe printed as Appendix A, Drug Addiction: Crime or Disease? (1961), pp. 18, 19–20, 21.

"These predilections for stringent law enforcement and severer penalties as answers to the problems of drug addiction reflect the philosophy and the teachings of the Bureau of Narcotics. For years the Bureau has supported the doctrine that if penalties for narcotic drug violations were severe enough and if they could be enforced strictly enough, drug addiction and the drug traffic would largely disappear from the American scene. This approach to problems of narcotics has resulted in spectacular modifications of our narcotic drug laws on both the state and federal level. . . .

. . . . . .

"Stringent law enforcement has its place in any system of controlling narcotic drugs. However, it is by no means the complete answer to American problems of drug addiction. In the first place it is doubtful whether drug addicts can be deterred from using drugs by threats of jail or prison sentences. The belief that fear of punishment is a vital factor in deterring an addict from using drugs rests upon a superficial view of the drug addiction process and the nature of drug addiction. . . .

". . . The very severity of law enforcement tends to increase the price of drugs on the illicit market and the profits to be made therefrom. The lure of profits and the risks of the traffic simply challenge the

> carries so much emotional freight in the community. Cooperative interdisciplinary research and action, more local community participation, training the various healing professions in the techniques of dealing with addicts, regional treatment facilities, demonstration centers, and a thorough and vigorous post-treatment rehabilitation program would certainly appear to be among the minimum requirements for any attempt to come to terms with this problem. The addict should be viewed as a sick person, with a chronic disease which requires almost emergency action." 22 Law & Contemp. Prob. 9, 33 (1957).

The Council on Mental Health reports that criminal sentences for addicts interferes "with the possible treatment and rehabilitation of addicts and therefore should be abolished." 165 A. M. A. J. 1968, 1972.

The command of the Eighth Amendment, banning "cruel and unusual punishments," stems from the Bill of Rights of 1688. See *Francis* v. *Resweber,* 329 U. S. 459, 463. And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. *Ibid.*

The historic punishments that were cruel and unusual included "burning at the stake, crucifixion, breaking on the wheel" (*In re Kemmler,* 136 U. S. 436, 446), quartering, the rack and thumbscrew (see *Chambers* v. *Florida,* 309 U. S. 227, 237), and in some circumstances even solitary confinement (see *Medley,* 134 U. S. 160, 167–168).

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ingenuity of the underworld peddlers to find new channels of distribution and new customers, so that profits can be maintained despite the risks involved. So long as a non-addict peddler is willing to take the risk of serving as a wholesaler of drugs, he can always find addict pushers or peddlers to handle the retail aspects of the business in return for a supply of the drugs for themselves. Thus, it is the belief of the author of this report that no matter how severe law enforcement may be, the drug traffic cannot be eliminated under present prohibitory repressive statutes."

The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present.[3] A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishments." See *O'Neil* v. *Vermont*, 144 U. S. 323, 331. So may the cruelty of the method of punishment, as, for example, disemboweling a person alive. See *Wilkerson* v. *Utah*, 99 U. S. 130, 135. But the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.

The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the "cry of horror" against man's inhumanity to his fellow man. See *O'Neil* v. *Vermont*, *supra*, at 340 (dissenting opinion); *Francis* v. *Resweber*, *supra*, at 473 (dissenting opinion).

By the time of Coke, enlightenment was coming as respects the insane. Coke said that the execution of a madman "should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others." 6 Coke's Third Inst. (4th ed. 1797), p. 6. Blackstone endorsed this view of Coke. 4 Commentaries (Lewis ed. 1897), p. 25.

We should show the same discernment respecting drug addiction. The addict is a sick person. He may, of course, be confined for treatment or for the protection of society.[4] Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime. The purpose of § 11721 is not to cure, but to penalize.

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[3] See 3 Catholic U. L. Rev. 117 (1953); 31 Marq. L. Rev. 108 (1947); 22 St. John's L. Rev. 270 (1948); 2 Stan. L. Rev. 174 (1949); 33 Va. L. Rev. 348 (1947); 21 Tul. L. Rev. 480 (1947); 1960 Wash. U. L. Q., p. 160.

[4] As to the insane, see *Lynch* v. *Overholser*, 369 U. S. 705; note, 1 L. R. A. (N. S.), p. 540 *et seq.*

Were the purpose to cure, there would be no need for a mandatory jail term of not less than 90 days. Contrary to my Brother CLARK, I think the means must stand constitutional scrutiny, as well as the end to be achieved. A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well. Indeed, in § 5350 of the Welfare and Institutions Code, California has expressly provided for civil proceedings for the commitment of habitual addicts. Section 11721 is, in reality, a direct attempt to punish those the State cannot commit civilly.[5] This prosecution has no relationship to the curing

[5] The difference between § 5350 and § 11721 is that the former aims at treatment of the addiction, whereas § 11721 does not. The latter cannot be construed to provide treatment, unless jail sentences, without more, are suddenly to become medicinal. A comparison of the lengths of confinement under the two sections is irrelevant, for it is the purpose of the confinement that must be measured against the constitutional prohibition of cruel and unusual punishments.

Health and Safety Code § 11391, to be sure, indicates that perhaps some form of treatment may be given an addict convicted under § 11721. Section 11391, so far as here relevant, provides:

"No person shall treat an addict for addiction except in one of the following:

"(a) An institution approved by the Board of Medical Examiners, and where the patient is at all times kept under restraint and control.

"(b) A *city or county jail.*

"(c) A state prison.

"(d) A state narcotic hospital.

"(e) A state hospital.

"(f) A county hospital.

"This section does not apply during emergency treatment or where the patient's addiction is complicated by the presence of incurable disease, serious accident, or injury, or the infirmities of old age." (Emphasis supplied.)

Section 11391 does not state that any treatment is required for either part or the whole of the mandatory 90-day prison term imposed by § 11721. Should the necessity for treatment end before the 90-day

of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.

MR. JUSTICE HARLAN, concurring.

I am not prepared to hold that on the present state of medical knowledge it is completely irrational and hence unconstitutional for a State to conclude that narcotics addiction is something other than an illness nor that it amounts to cruel and unusual punishment for the State to subject narcotics addicts to its criminal law. Insofar as addiction may be identified with the use or possession of narcotics within the State (or, I would suppose, without the State), in violation of local statutes prohibiting such acts, it may surely be reached by the State's criminal law. But in this case the trial court's instructions permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics.* Since addiction alone cannot

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term is concluded, or should no treatment be given, the addict clearly would be undergoing punishment for an illness. Therefore, reference to § 11391 will not solve or alleviate the problem of cruel and unusual punishment presented by this case.

*The jury was instructed that "it is not incumbent upon the People to prove the unlawfulness of defendant's use of narcotics. All that the People must show is *either* that the defendant did use a narcotic in Los Angeles County, *or* that while in the City of Los Angeles he was addicted to the use of narcotics." (Emphasis added.) Although the jury was told that it should acquit if the appellant proved that his "being addicted to the use of narcotics was administered [*sic*] by or under the direction of a person licensed by the State of California to prescribe and administer narcotics," this part of the instruction did not cover other possible lawful uses which could have produced the appellant's addiction.

reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

If the California statute reaches this type of conduct, and for present purposes we must accept the trial court's construction as binding, *Terminiello* v. *Chicago,* 337 U. S. 1, 4, it is an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law. Accordingly, I agree that the application of the California statute was unconstitutional in this case and join the judgment of reversal.

MR. JUSTICE CLARK, dissenting.

The Court finds § 11721 of California's Health and Safety Code, making it an offense to "be addicted to the use of narcotics," violative of due process as "a cruel and unusual punishment." I cannot agree.

The statute must first be placed in perspective. California has a comprehensive and enlightened program for the control of narcotism based on the overriding policy of prevention and cure. It is the product of an extensive investigation made in the mid-Fifties by a committee of distinguished scientists, doctors, law enforcement officers and laymen appointed by the then Attorney General, now Governor, of California. The committee filed a detailed study entitled "Report on Narcotic Addiction" which was given considerable attention. No recommendation was made therein for the repeal of § 11721, and the State Legislature in its discretion continued the policy of that section.

Apart from prohibiting specific acts such as the purchase, possession and sale of narcotics, California has taken certain legislative steps in regard to the status of being a narcotic addict—a condition commonly recognized as a threat to the State and to the individual. The

Code deals with this problem in realistic stages. At its incipiency narcotic addiction is handled under § 11721 of the Health and Safety Code which is at issue here. It provides that a person found to be addicted to the use of narcotics shall serve a term in the county jail of not less than 90 days nor more than one year, with the minimum 90-day confinement applying in all cases without exception. Provision is made for parole with periodic tests to detect readdiction.

The trial court defined "addicted to narcotics" as used in § 11721 in the following charge to the jury:

> "The word 'addicted' means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. Does he use them habitually. To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."

There was no suggestion that the term "narcotic addict" as here used included a person who acted without volition or who had lost the power of self-control. Although the section is penal in appearance—perhaps a carry-over from a less sophisticated approach—its present provisions are quite similar to those for civil commitment and treatment of addicts who have lost the power of self-control, and its present purpose is reflected in a statement which closely follows § 11721: "The rehabilitation of narcotic addicts and the prevention of continued addiction to narcotics is a matter of statewide concern." California Health and Safety Code § 11728.

Where narcotic addiction has progressed beyond the incipient, volitional stage, California provides for commitment of three months to two years in a state hospital.

California Welfare and Institutions Code § 5355. For the purposes of this provision, a narcotic addict is defined as

> "any person who habitually takes or otherwise uses *to the extent of having lost the power of self-control* any opium, morphine, cocaine, or other narcotic drug as defined in Article 1 of Chapter 1 of Division 10 of the Health and Safety Code." California Welfare and Institutions Code § 5350. (Emphasis supplied.)

This proceeding is clearly civil in nature with a purpose of rehabilitation and cure. Significantly, if it is found that a person committed under § 5355 will not receive substantial benefit from further hospital treatment and is not dangerous to society, he may be discharged—but only after a minimum confinement of three months. § 5355.1.

Thus, the "criminal" provision applies to the incipient narcotic addict who retains self-control, requiring confinement of three months to one year and parole with frequent tests to detect renewed use of drugs. Its overriding purpose is to cure the less seriously addicted person by preventing further use. On the other hand, the "civil" commitment provision deals with addicts who have lost the power of self-control, requiring hospitalization up to two years. Each deals with a different type of addict but with a common purpose. This is most apparent when the sections overlap: if after civil commitment of an addict it is found that hospital treatment will not be helpful, the addict is confined for a minimum period of three months in the same manner as is the volitional addict under the "criminal" provision.

In the instant case the proceedings against the petitioner were brought under the volitional-addict section. There was testimony that he had been using drugs only four months with three to four relatively mild doses a

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week. At arrest and trial he appeared normal. His testimony was clear and concise, being simply that he had never used drugs. The scabs and pocks on his arms and body were caused, he said, by "overseas shots" administered during army service preparatory to foreign assignment. He was very articulate in his testimony but the jury did not believe him, apparently because he had told the clinical expert while being examined after arrest that he had been using drugs, as I have stated above. The officer who arrested him also testified to like statements and to scabs—some 10 or 15 days old—showing narcotic injections. There was no evidence in the record of withdrawal symptoms. Obviously he could not have been committed under § 5355 as one who had completely "lost the power of self-control." The jury was instructed that narcotic "addiction" as used in § 11721 meant strongly disposed to a taste or practice or habit of its use, indicated by the use of narcotics often or daily. A general verdict was returned against petitioner, and he was ordered confined for 90 days to be followed by a two-year parole during which he was required to take periodic Nalline tests.

The majority strikes down the conviction primarily on the grounds that petitioner was denied due process by the imposition of criminal penalties for nothing more than being in a status. This viewpoint is premised upon the theme that § 11721 is a "criminal" provision authorizing a punishment, for the majority admits that "a State might establish a program of compulsory treatment for those addicted to narcotics" which "might require periods of involuntary confinement." I submit that California has done exactly that. The majority's error is in instructing the California Legislature that hospitalization is the *only treatment* for narcotics addiction—that anything less is a punishment denying due process. California has found otherwise after a study which I suggest was more extensive than that conducted by the Court.

Even in California's program for hospital commitment of nonvolitional narcotic addicts—which the majority approves—it is recognized that some addicts will not respond to or do not need hospital treatment. As to these persons its provisions are identical to those of § 11721—confinement for a period of not less than 90 days. Section 11721 provides this confinement as treatment for the volitional addicts to whom its provisions apply, in addition to parole with frequent tests to detect and prevent further use of drugs. The fact that § 11721 might be labeled "criminal" seems irrelevant,* not only to the majority's own "treatment" test but to the "concept of ordered liberty" to which the States must attain under the Fourteenth Amendment. The test is the overall purpose and effect of a State's act, and I submit that California's program relative to narcotic addicts—including both the "criminal" and "civil" provisions—is inherently one of treatment and lies well within the power of a State.

However, the case in support of the judgment below need not rest solely on this reading of California law. For even if the overall statutory scheme is ignored and a purpose and effect of punishment is attached to § 11721, that provision still does not violate the Fourteenth Amendment. The majority acknowledges, as it must, that a State can punish persons who purchase, possess or use narcotics. Although none of these acts are harmful to society *in themselves,* the State constitutionally may attempt to deter and prevent them through punishment because of the grave threat of future harmful conduct which they pose. Narcotics addiction—including the incipient, volitional addiction to which this provision speaks—is no different. California courts have taken judicial notice that "the inordinate use of a narcotic drug tends

*Any reliance upon the "stigma" of a misdemeanor conviction in this context is misplaced, as it would hardly be different from the stigma of a civil commitment for narcotics addiction.

to create an irresistible craving and forms a habit for its continued use until one becomes an addict, and he respects no convention or obligation and will lie, steal, or use any other base means to gratify his passion for the drug, being lost to all considerations of duty or social position." *People* v. *Jaurequi,* 142 Cal. App. 2d 555, 561, 298 P. 2d 896, 900 (1956). Can this Court deny the legislative and judicial judgment of California that incipient, volitional narcotic addiction poses a threat of serious crime similar to the threat inherent in the purchase or possession of narcotics? And if such a threat is inherent in addiction, can this Court say that California is powerless to deter it by punishment?

It is no answer to suggest that we are dealing with an involuntary status and thus penal sanctions will be ineffective and unfair. The section at issue applies only to persons who use narcotics often or even daily but not to the point of losing self-control. When dealing with involuntary addicts California moves only through § 5355 of its Welfare Institutions Code which clearly is not penal. Even if it could be argued that § 11721 may not be limited to volitional addicts, the petitioner in the instant case undeniably retained the power of self-control and thus to him the statute would be constitutional. Moreover, "status" offenses have long been known and recognized in the criminal law. 4 Blackstone, Commentaries (Jones ed. 1916), 170. A ready example is drunkenness, which plainly is as involuntary after addiction to alcohol as is the taking of drugs.

Nor is the conjecture relevant that petitioner may have acquired his habit under lawful circumstances. There was no suggestion by him to this effect at trial, and surely the State need not rebut all possible lawful sources of addiction as part of its prima facie case.

The argument that the statute constitutes a cruel and unusual punishment is governed by the discussion above.

Properly construed, the statute provides a treatment rather than a punishment. But even if interpreted as penal, the sanction of incarceration for 3 to 12 months is not unreasonable when applied to a person who has voluntarily placed himself in a condition posing a serious threat to the State. Under either theory, its provisions for 3 to 12 months' confinement can hardly be deemed unreasonable when compared to the provisions for 3 to 24 months' confinement under § 5355 which the majority approves.

I would affirm the judgment.

MR. JUSTICE WHITE, dissenting.

If appellant's conviction rested upon sheer status, condition or illness or if he was convicted for being an addict who had lost his power of self-control, I would have other thoughts about this case. But this record presents neither situation. And I believe the Court has departed from its wise rule of not deciding constitutional questions except where necessary and from its equally sound practice of construing state statutes, where possible, in a manner saving their constitutionality.[1]

[1] It has repeatedly been held in this Court that its practice will not be "to decide any constitutional question in advance of the necessity for its decision . . . or . . . except with reference to the particular facts to which it is to be applied," *Alabama State Federation* v. *McAdory*, 325 U. S. 450, 461, and that state statutes will always be construed, if possible, to save their constitutionality despite the plausibility of different but unconstitutional interpretation of the language. Thus, the Court recently reaffirmed the principle in *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, 370: "When that claim is litigated it will be subject to review, but it is not for us now to anticipate its outcome. '"Constitutional questions are not to be dealt with abstractly". . . . They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. . . . Nor will we assume in advance that a State will so

I am not at all ready to place the use of narcotics beyond the reach of the States' criminal laws. I do not consider appellant's conviction to be a punishment for having an illness or for simply being in some status or condition, but rather a conviction for the regular, repeated or habitual use of narcotics immediately prior to his arrest and in violation of the California law. As defined by the trial court,[2] addiction *is* the regular use of narcotics and can be proved only by evidence of such use. To find addiction in this case the jury had to believe that appellant had frequently used narcotics in the recent past.[3] California is entitled to have its statute and the record so read, particularly where the State's only purpose in allowing prosecutions for addiction was to supersede its own venue requirements applicable to prosecutions for the use of narcotics and in effect to allow convictions for use

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construe its law as to bring it into conflict with the federal Constitution or an act of Congress.' *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740, at 746."

[2] The court instructed the jury that, "The word 'addicted' means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. . . . To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."

[3] This is not a case where a defendant is convicted "even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there." The evidence was that appellant lived and worked in Los Angeles. He admitted before trial that he had used narcotics for three or four months, three or four times a week, usually at his place with his friends. He stated to the police that he had last used narcotics at 54th and Central in the City of Los Angeles on January 27, 8 days before his arrest. According to the State's expert, no needle mark or scab found on appellant's arms was newer than 3 days old and the most recent mark might have been as old as 10 days, which was consistent with appellant's own pretrial admissions. The State's evidence was that appellant had used narcotics at least 7 times in the 15 days immediately preceding his arrest.

where there is no precise evidence of the county where the use took place.[4]

Nor do I find any indications in this record that California would apply § 11721 to the case of the helpless addict. I agree with my Brother CLARK that there was no evidence at all that appellant had lost the power to control his acts. There was no evidence of any use within 3 days prior to appellant's arrest. The most recent marks might have been 3 days old or they might have been 10

[4] The typical case under the narcotics statute, as the State made clear in its brief and argument, is the one where the defendant makes no admissions, as he did in this case, and the only evidence of use or addiction is presented by an expert who, on the basis of needle marks and scabs or other physical evidence revealed by the body of the defendant, testifies that the defendant has regularly taken narcotics in the recent past. See, *e. g., People* v. *Williams,* 164 Cal. App. 2d 858, 331 P. 2d 251; *People* v. *Garcia,* 122 Cal. App. 2d 962, 266 P. 2d 233; *People* v. *Ackles,* 147 Cal. App. 2d 40, 304 P. 2d 1032. Under the local venue requirements, a conviction for simple use of narcotics may be had only in the county where the use took place, *People* v. *Garcia, supra,* and in the usual case evidence of the precise location of the use is lacking. Where the charge is addiction, venue under § 11721 of the Health and Safety Code may be laid in any county where the defendant is found. *People* v. *Ackles, supra,* 147 Cal. App. 2d, at 42–43, 304 P. 2d, at 1033, distinguishing *People* v. *Thompson,* 144 Cal. App. 2d 854, 301 P. 2d 313. Under California law a defendant has no constitutional right to be tried in any particular county, but under statutory law, with certain exceptions, "an accused person is answerable only in the jurisdiction where the crime, or some part or effect thereof, was committed or occurred." *People* v. *Megladdery,* 40 Cal. App. 2d 748, 762, 106 P. 2d 84, 92. A charge of narcotics addiction is one of the exceptions and there are others. See, *e. g.,* §§ 781, 784, 785, 786, 788, Cal. Penal Code. Venue is to be determined from the evidence and is for the jury, but it need not be proved beyond a reasonable doubt. *People* v. *Megladdery, supra,* 40 Cal. App. 2d, at 764, 106 P. 2d, at 93. See *People* v. *Bastio,* 55 Cal. App. 2d 615, 131 P. 2d 614; *People* v. *Garcia, supra.* In reviewing convictions in narcotics cases, appellate courts view the evidence of venue "in the light most favorable to the judgment." *People* v. *Garcia, supra.*

days old. The appellant admitted before trial that he had last used narcotics 8 days before his arrest. At the trial he denied having taken narcotics at all. The uncontroverted evidence was that appellant was not under the influence of narcotics at the time of his arrest nor did he have withdrawal symptoms. He was an incipient addict, a redeemable user, and the State chose to send him to jail for 90 days rather than to attempt to confine him by civil proceedings under another statute which requires a finding that the addict has lost the power of self-control. In my opinion, on this record, it was within the power of the State of California to confine him by criminal proceedings for the use of narcotics or for regular use amounting to habitual use.[5]

The Court clearly does not rest its decision upon the narrow ground that the jury was not expressly instructed not to convict if it believed appellant's use of narcotics was beyond his control. The Court recognizes no degrees of addiction. The Fourteenth Amendment is today held to bar any prosecution for addiction regardless of the degree or frequency of use, and the Court's opinion bristles with indications of further consequences. If it is "cruel and unusual punishment" to convict appellant for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use on the same evidence of use which proved he was an addict. It is significant that in purporting to reaffirm the power of the States to deal with the narcotics traffic, the Court does not include among the obvious powers of the State the power to punish for the use of narcotics. I cannot think that the omission was inadvertent.

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[5] Health and Safety Code § 11391 expressly permits and contemplates the medical treatment of narcotics addicts confined to jail.

The Court has not merely tidied up California's law by removing some irritating vestige of an outmoded approach to the control of narcotics. At the very least, it has effectively removed California's power to deal effectively with the recurring case under the statute where there is ample evidence of use but no evidence of the precise location of use. Beyond this it has cast serious doubt upon the power of any State to forbid the use of narcotics under threat of criminal punishment. I cannot believe that the Court would forbid the application of the criminal laws to the use of narcotics under any circumstances. But the States, as well as the Federal Government, are now on notice. They will have to await a final answer in another case.

Finally, I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

I respectfully dissent.

POWELL *v.* TEXAS.

APPEAL FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY, TEXAS.

No. 405. Argued March 7, 1968.—Decided June 17, 1968.

Appellant was arrested and charged with being found in a state of intoxication in a public place, in violation of Art. 477 of the Texas Penal Code. He was tried in the Corporation Court of Austin, and found guilty. He appealed to the County Court of Travis County, and after a trial *de novo*, he was again found guilty. That court made the following "findings of fact": (1) chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive use of alcohol, (2) a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism, and (3) appellant is a chronic alcoholic who is afflicted by the disease of chronic alcoholism; but ruled as a matter of law that chronic alcoholism was not a defense to the charge. The principal testimony was that of a psychiatrist, who testified that appellant, a man with a long history of arrests for drunkenness, was a "chronic alcoholic" and was subject to a "compulsion" which was "not completely overpowering," but which was "an exceedingly strong influence." *Held:* The judgment is affirmed. Pp. 517–554.

MR. JUSTICE MARSHALL, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN, concluded that:

1. The lower court's "findings of fact" were not such in any recognizable, traditional sense, but were merely premises of a syllogism designed to bring this case within the scope of *Robinson* v. *California*, 370 U. S. 660 (1962). P. 521.

2. The record here is utterly inadequate to permit the informed adjudication needed to support an important and wide-ranging new constitutional principle. Pp. 521–522.

3. There is no agreement among medical experts as to what it means to say that "alcoholism" is a "disease," or upon the "manifestations of alcoholism," or on the nature of a "compulsion." Pp. 522–526.

4. Faced with the reality that there is no known generally effective method of treatment or adequate facilities or manpower

for a full-scale attack on the enormous problem of alcoholics, it cannot be asserted that the use of the criminal process to deal with the public aspects of problem drinking can never be defended as rational. Pp. 526–530.

5. Appellant's conviction on the record in this case does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. Pp. 531–537.

(a) Appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion, and thus, as distinguished from *Robinson* v. *California, supra,* was not being punished for a mere status. P. 532.

(b) It cannot be concluded, on this record and the current state of medical knowledge, that appellant suffers from such an irresistible compulsion to drink and to get drunk in public that he cannot control his performance of these acts and thus cannot be deterred from public intoxication. In any event, this Court has never articulated a general constitutional doctrine of *mens rea,* as the development of the doctrine and its adjustment to changing conditions has been thought to be the province of the States. Pp. 535–536.

MR. JUSTICE BLACK, joined by MR. JUSTICE HARLAN, concluded:

1. Public drunkenness, which has been a crime throughout our history, is an offense in every State, and this Court certainly cannot strike down a State's criminal law because of the heavy burden of enforcing it. P. 538.

2. Criminal punishment provides some form of treatment, protects alcoholics from causing harm or being harmed by removing them from the streets, and serves some deterrent functions; and States should not be barred from using the criminal process in attempting to cope with the problem. Pp. 538–540.

3. Medical decisions based on clinical problems of diagnosis and treatment bear no necessary correspondence to the legal decision whether the overall objectives of criminal law can be furthered by imposing punishment; and States should not be constitutionally required to inquire as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was the result of a "compulsion." Pp. 540–541.

4. Crimes which require the State to prove that the defendant actually committed some proscribed act do not come within the scope of *Robinson* v. *California, supra,* which is properly limited to pure status crimes. Pp. 541–544.

5. Appellant's argument that it is cruel and unusual to punish a person who is not morally blameworthy goes beyond the Eighth Amendment's limits on the use of criminal sanctions and would create confusion and uncertainty in areas of criminal law where our understanding is not complete. Pp. 544–546.

6. Appellant's proposed constitutional rule is not only revolutionary but it departs from the premise that experience in making local laws by local people is the safest guide for our Nation to follow. Pp. 547–548.

MR. JUSTICE WHITE concluded:

While *Robinson* v. *California, supra,* would support the view that a chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or being drunk, appellant's conviction was for the different crime of being drunk in a public place; and though appellant showed that he was to some degree compelled to drink and that he was drunk at the time of his arrest, he made no showing that he was unable to stay off the streets at that time. Pp. 548–554.

Don L. Davis argued the cause for appellant, *pro hac vice.* With him on the briefs was *Tom H. Davis.*

David Robinson, Jr., argued the cause for appellee. With him on the briefs were *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.*

Peter Barton Hutt argued the cause for the American Civil Liberties Union et al., as *amici curiae,* urging reversal. With him on the brief was *Richard A. Merrill.*

Briefs of *amici curiae,* urging reversal, were filed by *Paul O'Dwyer* for the National Council on Alcoholism, and by the Philadelphia Diagnostic and Relocation Services Corp.

MR. JUSTICE MARSHALL announced the judgment of the Court and delivered an opinion in which THE CHIEF

JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN join.

In late December 1966, appellant was arrested and charged with being found in a state of intoxication in a public place, in violation of Texas Penal Code, Art. 477 (1952), which reads as follows:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was tried in the Corporation Court of Austin, Texas, found guilty, and fined $20. He appealed to the County Court at Law No. 1 of Travis County, Texas, where a trial *de novo* was held. His counsel urged that appellant was "afflicted with the disease of chronic alcoholism," that "his appearance in public [while drunk was] . . . not of his own volition," and therefore that to punish him criminally for that conduct would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge in the county court, sitting without a jury, made certain findings of fact, *infra*, at 521, but ruled as a matter of law that chronic alcoholism was not a defense to the charge. He found appellant guilty, and fined him $50. There being no further right to appeal within the Texas judicial system,[1] appellant appealed to this Court; we noted probable jurisdiction. 389 U. S. 810 (1967).

I.

The principal testimony was that of Dr. David Wade, a Fellow of the American Medical Association, duly certificated in psychiatry. His testimony consumed a total of 17 pages in the trial transcript. Five of those pages were taken up with a recitation of Dr. Wade's qualifica-

[1] Tex. Code Crim. Proc., Art. 4.03 (1966).

tions. In the next 12 pages Dr. Wade was examined by appellant's counsel, cross-examined by the State, and re-examined by the defense, and those 12 pages contain virtually all the material developed at trial which is relevant to the constitutional issue we face here. Dr. Wade sketched the outlines of the "disease" concept of alcoholism; noted that there is no generally accepted definition of "alcoholism"; alluded to the ongoing debate within the medical profession over whether alcohol is actually physically "addicting" or merely psychologically "habituating"; and concluded that in either case a "chronic alcoholic" is an "involuntary drinker," who is "powerless not to drink," and who "loses his self-control over his drinking." He testified that he had examined appellant, and that appellant is a "chronic alcoholic," who "by the time he has reached [the state of intoxication] . . . is not able to control his behavior, and [who] . . . has reached this point because he has an uncontrollable compulsion to drink." Dr. Wade also responded in the negative to the question whether appellant has "the willpower to resist the constant excessive consumption of alcohol." He added that in his opinion jailing appellant without medical attention would operate neither to rehabilitate him nor to lessen his desire for alcohol.

On cross-examination, Dr. Wade admitted that when appellant was sober he knew the difference between right and wrong, and he responded affirmatively to the question whether appellant's act of taking the first drink in any given instance when he was sober was a "voluntary exercise of his will." Qualifying his answer, Dr. Wade stated that "these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence, and this compulsion coupled with the firm belief in their mind that they are going to be able to handle it from now on causes their judgment to be somewhat clouded."

Appellant testified concerning the history of his drinking problem. He reviewed his many arrests for drunkenness; testified that he was unable to stop drinking; stated that when he was intoxicated he had no control over his actions and could not remember them later, but that he did not become violent; and admitted that he did not remember his arrest on the occasion for which he was being tried. On cross-examination, appellant admitted that he had had one drink on the morning of the trial and had been able to discontinue drinking. In relevant part, the cross-examination went as follows:

"Q. You took that one at eight o'clock because you wanted to drink?

"A. Yes, sir.

"Q. And you knew that if you drank it, you could keep on drinking and get drunk?

"A. Well, I was supposed to be here on trial, and I didn't take but that one drink.

"Q. You knew you had to be here this afternoon, but this morning you took one drink and then you knew that you couldn't afford to drink any more and come to court; is that right?

"A. Yes, sir, that's right.

"Q. So you exercised your will power and kept from drinking anything today except that one drink?

"A. Yes, sir, that's right.

"Q. Because you knew what you would do if you kept drinking, that you would finally pass out or be picked up?

"A. Yes, sir.

"Q. And you didn't want that to happen to you today?

"A. No, sir.

"Q. Not today?

"A. No, sir.

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"Q. So you only had one drink today?

"A. Yes, sir."

On redirect examination, appellant's lawyer elicited the following:

"Q. Leroy, isn't the real reason why you just had one drink today because you just had enough money to buy one drink?

"A. Well, that was just give to me.

"Q. In other words, you didn't have any money with which you could buy any drinks yourself?

"A. No, sir, that was give to me.

"Q. And that's really what controlled the amount you drank this morning, isn't it?

"A. Yes, sir.

"Q. Leroy, when you start drinking, do you have any control over how many drinks you can take?

"A. No, sir."

Evidence in the case then closed. The State made no effort to obtain expert psychiatric testimony of its own, or even to explore with appellant's witness the question of appellant's power to control the frequency, timing, and location of his drinking bouts, or the substantial disagreement within the medical profession concerning the nature of the disease, the efficacy of treatment and the prerequisites for effective treatment. It did nothing to examine or illuminate what Dr. Wade might have meant by his reference to a "compulsion" which was "not completely overpowering," but which was "an exceedingly strong influence," or to inquire into the question of the proper role of such a "compulsion" in constitutional adjudication. Instead, the State contented itself with a brief argument that appellant had no defense to the charge because he "is legally sane and knows the difference between right and wrong."

Following this abbreviated exposition of the problem before it, the trial court indicated its intention to disallow appellant's claimed defense of "chronic alcoholism." Thereupon defense counsel submitted, and the trial court entered, the following "findings of fact":

> "'(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

Whatever else may be said of them, those are not "findings of fact" in any recognizable, traditional sense in which that term has been used in a court of law; they are the premises of a syllogism transparently designed to bring this case within the scope of this Court's opinion in *Robinson* v. *California,* 370 U. S. 660 (1962). Nonetheless, the dissent would have us adopt these "findings" without critical examination; it would use them as the basis for a constitutional holding that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease." *Post,* at 569.

The difficulty with that position, as we shall show, is that it goes much too far on the basis of too little knowledge. In the first place, the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. We know very little about the circumstances surrounding the drinking bout which re-

sulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases. The State put on only one witness, the arresting officer. The defense put on three—a policeman who testified to appellant's long history of arrests for public drunkenness, the psychiatrist, and appellant himself.

Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in this field states that the major difficulty in articulating a "disease concept of alcoholism" is that "alcoholism has too many definitions and disease has practically none." [2] This same author concludes that *"a disease is what the medical profession recognizes as such."* [3] In other words, there is widespread agreement today that "alcoholism" is a "disease," for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops. Debate rages within the medical profession as to whether "alcoholism" is a separate "disease" in any meaningful biochemical, physiological or psychological sense, or whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders.[4]

Nor is there any substantial consensus as to the "manifestations of alcoholism." E. M. Jellinek, one of the outstanding authorities on the subject, identifies five

[2] E. Jellinek, The Disease Concept of Alcoholism 11 (1960).

[3] *Id.*, at 12 (emphasis in original).

[4] See, *e. g.*, Joint Information Serv. of the Am. Psychiatric Assn. & the Nat. Assn. for Mental Health, The Treatment of Alcoholism—A Study of Programs and Problems 6–8 (1967) (hereafter cited as Treatment of Alcoholism).

different types of alcoholics which predominate in the United States, and these types display a broad range of different and occasionally inconsistent symptoms.[5] Moreover, wholly distinct types, relatively rare in this country, predominate in nations with different cultural attitudes regarding the consumption of alcohol.[6] Even if we limit our consideration to the range of alcoholic symptoms more typically found in this country, there is substantial disagreement as to the manifestations of the "disease" called "alcoholism." Jellinek, for example, considers that only two of his five alcoholic types can truly be said to be suffering from "alcoholism" as a "disease," because only these two types attain what he believes to be the requisite degree of physiological dependence on alcohol.[7] He applies the label "gamma alcoholism" to "that species of alcoholism in which (1) acquired increased tissue tolerance to alcohol, (2) adaptive cell metabolism . . . , (3) withdrawal symptoms and 'craving,' i. e., physical dependence, and (4) loss of control are involved." [8] A "delta" alcoholic, on the other hand, "shows the first three characteristics of gamma alcoholism as well as a less marked form of the fourth characteristic—that is, instead of loss of control

[5] Jellinek, *supra*, n. 2, at 35–41.

[6] For example, in nations where large quantities of wine are customarily consumed with meals, apparently there are many people who are completely unaware that they have a "drinking problem"—they rarely if ever show signs of intoxication, they display no marked symptoms of behavioral disorder, and are entirely capable of limiting their alcoholic intake to a reasonable amount—and yet who display severe withdrawal symptoms, sometimes including delirium tremens, when deprived of their daily portion of wine. M. Block, Alcoholism—Its Facets and Phases 27 (1965); Jellinek, *supra*, n. 2, at 17. See generally *id.*, at 13–32.

[7] Jellinek, *supra*, n. 2, at 40.

[8] Jellinek, *supra*, n. 2, at 37.

there is inability to abstain." [9] Other authorities approach the problems of classification in an entirely different manner and, taking account of the large role which psycho-social factors seem to play in "problem drinking," define the "disease" in terms of the earliest identifiable manifestations of any sort of abnormality in drinking patterns.[10]

Dr. Wade appears to have testified about appellant's "chronic alcoholism" in terms similar to Jellinek's "gamma" and "delta" types, for these types are largely defined, in their later stages, in terms of a strong compulsion to drink, physiological dependence and an inability to abstain from drinking. No attempt was made in the court below, of course, to determine whether Leroy Powell could in fact properly be diagnosed as a "gamma" or "delta" alcoholic in Jellinek's terms. The focus at the trial, and in the dissent here, has been exclusively upon the factors of loss of control and inability to abstain. Assuming that it makes sense to compartmentalize in this manner the diagnosis of such a formless "disease," tremendous gaps in our knowledge remain, which the record in this case does nothing to fill.

The trial court's "finding" that Powell "is afflicted with the disease of chronic alcoholism," which "destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol" covers a multitude of sins. Dr. Wade's testimony that appellant suffered from a compulsion which was an "exceedingly strong influence," but which was "not completely overpowering" is at least more carefully stated, if no less mystifying. Jellinek insists that conceptual clarity can only be achieved by distinguishing carefully between "loss of control" once an individual has commenced to drink and "inability to abstain"

[9] *Id.*, at 38.

[10] See Block, *supra*, n. 6, at 19–49.

from drinking in the first place.[11] Presumably a person would have to display both characteristics in order to make out a constitutional defense, should one be recognized. Yet the "findings" of the trial court utterly fail to make this crucial distinction, and there is serious question whether the record can be read to support a finding of either loss of control or inability to abstain.

Dr. Wade did testify that once appellant began drinking he appeared to have no control over the amount of alcohol he finally ingested. Appellant's own testimony concerning his drinking on the day of the trial would certainly appear, however, to cast doubt upon the conclusion that he was without control over his consumption of alcohol when he had sufficiently important reasons to exercise such control. However that may be, there are more serious factual and conceptual difficulties with reading this record to show that appellant was unable to abstain from drinking. Dr. Wade testified that when appellant was sober, the act of taking the first drink was a "voluntary exercise of his will," but that this exercise of will was undertaken under the "exceedingly strong influence" of a "compulsion" which was "not completely overpowering." Such concepts, when juxtaposed in this fashion, have little meaning.

Moreover, Jellinek asserts that it cannot accurately be said that a person is truly unable to abstain from drinking unless he is suffering the physical symptoms of withdrawal.[12] There is no testimony in this record that Leroy Powell underwent withdrawal symptoms either before he began the drinking spree which resulted in the conviction under review here, or at any other time. In attempting to deal with the alcoholic's desire for drink in the absence of withdrawal symptoms, Jellinek is re-

[11] Jellinek, *supra*, n. 2, at 41–42.

[12] *Id.*, at 43.

duced to unintelligible distinctions between a "compulsion" (a "psychopathological phenomenon" which can apparently serve in some instances as the functional equivalent of a "craving" or symptom of withdrawal) and an "impulse" (something which differs from a loss of control, a craving or a compulsion, and to which Jellinek attributes the start of a new drinking bout for a "gamma" alcoholic).[13] Other scholars are equally unhelpful in articulating the nature of a "compulsion." [14]

It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter statement. This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.[15]

II.

Despite the comparatively primitive state of our knowledge on the subject, it cannot be denied that the destructive use of alcoholic beverages is one of our prin-

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[13] *Id.*, at 41–44.

Dr. Wade did not clarify matters when he testified at trial that a chronic alcoholic suffers from "the same type of compulsion" as a "compulsive eater."

[14] See, *e. g.*, Block, *supra*, n. 6, at 40, 55, 308; Treatment of Alcoholism 6–8; Note, Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 112–114 (1966).

[15] See *Washington* v. *United States*, —— U. S. App. D. C. ——, ——–——, 390 F. 2d 444, 446–456 (1967).

cipal social and public health problems.[16] The lowest current informed estimate places the number of "alcoholics" in America (definitional problems aside) at 4,000,000,[17] and most authorities are inclined to put the figure considerably higher.[18] The problem is compounded by the fact that a very large percentage of the alcoholics in this country are "invisible"—they possess the means to keep their drinking problems secret, and the traditionally uncharitable attitude of our society toward alcoholics causes many of them to refrain from seeking treatment from any source.[19] Nor can it be gainsaid that the legislative response to this enormous problem has in general been inadequate.

There is as yet no known generally effective method for treating the vast number of alcoholics in our society. Some individual alcoholics have responded to particular forms of therapy with remissions of their symptomatic dependence upon the drug. But just as there is no agreement among doctors and social workers with respect to the causes of alcoholism, there is no consensus as to why particular treatments have been effective in particular cases and there is no generally agreed-upon approach to the problem of treatment on a large scale.[20] Most psychiatrists are apparently of the opinion that alcoholism is far more difficult to treat than other forms of behavioral disorders, and some believe it is impossible

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[16] See generally Block, *supra,* n. 6, at 19–30, 43–49.

[17] See Treatment of Alcoholism 11.

[18] Block, *supra,* n. 6, at 43–44; Blum & Braunstein, Mind-altering Drugs and Dangerous Behavior: Alcohol, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 29, 30 (1967); Note, 2 Col. J. Law & Soc. Prob. 109 (1966).

[19] See Block, *supra,* n. 6, at 74–81; Note, 2 Col. J. Law & Soc. Prob. 109 (1966).

[20] See Treatment of Alcoholism 13–17.

to cure by means of psychotherapy; indeed, the medical profession as a whole, and psychiatrists in particular, have been severely criticised for the prevailing reluctance to undertake the treatment of drinking problems.[21] Thus it is entirely possible that, even were the manpower and facilities available for a full-scale attack upon chronic alcoholism, we would find ourselves unable to help the vast bulk of our "visible"—let alone our "invisible"—alcoholic population.

However, facilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country.[22] It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides. Presumably no State or city will tolerate

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[21] *Id.*, at 18–26.

[22] Encouraging pilot projects do exist. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 50–64, 82–108 (1967). But the President's Commission concluded that the "strongest barrier" to the abandonment of the current use of the criminal process to deal with public intoxication "is that there presently are no clear alternatives for taking into custody and treating those who are now arrested as drunks." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 235 (1967). Moreover, even if massive expenditures for physical plants were forthcoming, there is a woeful shortage of trained personnel to man them. One study has concluded that:

"[T]here is little likelihood that the number of workers in these fields could be sufficiently increased to treat even a large minority of problem drinkers. In California, for instance, according to the best estimate available, providing all problem drinkers with weekly contact with a psychiatrist and once-a-month contact with a social worker would require the full time work of *every* psychiatrist and *every* trained social worker in the United States." Cooperative Commission on Study of Alcoholism, Alcohol Problems 120 (1967) (emphasis in original).

such a state of affairs. Yet the medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were made available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading "hospital"—over one wing of the jailhouse.[23]

One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole. "Therapeutic civil commitment" lacks this feature; one is typically committed until one is "cured." Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic "freedom." [24]

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[23] For the inadequate response in the District of Columbia following *Easter* v. *District of Columbia,* 124 U. S. App. D. C. 33, 361 F. 2d 50 (1966), which held on constitutional and statutory grounds that a chronic alcoholic could not be punished for public drunkenness, see President's Commission on Crime in the District of Columbia, Report 486–490 (1966).

[24] Counsel for *amici curiae* ACLU et al., who has been extremely active in the recent spate of litigation dealing with public intoxication statutes and the chronic inebriate, recently told an annual meeting of the National Council on Alcoholism:

"We have not fought for two years to extract DeWitt Easter, Joe Driver, and their colleagues from jail, only to have them involuntarily committed for an even longer period of time, with no assurance of appropriate rehabilitative help and treatment. . . . The euphemistic name 'civil commitment' can easily hide nothing more than permanent incarceration. . . . I would caution those who might rush headlong to adopt civil commitment procedures and

Faced with this unpleasant reality, we are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational. The picture of the penniless drunk propelled aimlessly and endlessly through the law's "revolving door" of arrest, incarceration, release and re-arrest is not a pretty one. But before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately, no such promise has yet been forthcoming. If, in addition to the absence of a coherent approach to the problem of treatment, we consider the almost complete absence of facilities and manpower for the implementation of a rehabilitation program, it is difficult to say in the present context that the criminal process is utterly lacking in social value. This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects, and it can hardly be said with assurance that incarceration serves such purposes any better for the general run of criminals than it does for public drunks.

Ignorance likewise impedes our assessment of the deterrent effect of criminal sanctions for public drunkenness. The fact that a high percentage of American alcoholics conceal their drinking problems, not merely by avoiding public displays of intoxication but also by shunning all forms of treatment, is indicative that some powerful deterrent operates to inhibit the public revela-

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remind them that just as difficult legal problems exist there as with the ordinary jail sentence."

Quoted in Robitscher, Psychiatry and Changing Concepts of Criminal Responsibility, 31 Fed. Prob. 44, 49 (No. 3, Sept. 1967). Cf. Note, The Nascent Right to Treatment, 53 Va. L. Rev. 1134 (1967).

tion of the existence of alcoholism. Quite probably this deterrent effect can be largely attributed to the harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism. Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo, just as we presume it serves to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct.

Obviously, chronic alcoholics have not been deterred from drinking to excess by the existence of criminal sanctions against public drunkenness. But all those who violate penal laws of any kind are by definition undeterred. The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts. Certainly no effort was made at the trial of this case, beyond a monosyllabic answer to a perfunctory one-line question, to determine the effectiveness of penal sanctions in deterring Leroy Powell in particular or chronic alcoholics in general from drinking at all or from getting drunk in particular places or at particular times.

III.

Appellant claims that his conviction on the facts of this case would violate the Cruel and Unusual Punishment Clause of the Eighth Amendment as applied to the States through the Fourteenth Amendment. The primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of

punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed. See, *e. g., Trop* v. *Dulles,* 356 U. S. 86 (1958); *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947); *Weems* v. *United States,* 217 U. S. 349 (1910).[25]

Appellant, however, seeks to come within the application of the Cruel and Unusual Punishment Clause announced in *Robinson* v. *California,* 370 U. S. 660 (1962), which involved a state statute making it a crime to "be addicted to the use of narcotics." This Court held there that "a state law which imprisons a person thus afflicted [with narcotic addiction] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment . . . . " *Id.,* at 667.

On its face the present case does not fall within that holding, since appellant 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 appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being "mentally ill, or a leper . . . ." *Id.,* at 666.

[25] See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635 (1966).

Robinson so viewed brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.

It is suggested in dissent that *Robinson* stands for the "simple" but "subtle" principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Post*, at 567. In that view, appellant's "condition" of public intoxication was "occasioned by a compulsion symptomatic of the disease" of chronic alcoholism, and thus, apparently, his behavior lacked the critical element of *mens rea*. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*. The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion."

Likewise, as the dissent acknowledges, there is a substantial definitional distinction between a "status," as in *Robinson*, and a "condition," which is said to be involved in this case. Whatever may be the merits of an attempt to distinguish between behavior and a condition, it is perfectly clear that the crucial element in this case, so far as the dissent is concerned, is whether or not appellant can legally be held responsible for his

appearance in public in a state of intoxication. The only relevance of *Robinson* to this issue is that because the Court interpreted the statute there involved as making a "status" criminal, it was able to suggest that the statute would cover even a situation in which addiction had been acquired involuntarily. 370 U. S., at 667, n. 9. That this factor was not determinative in the case is shown by the fact that there was no indication of how Robinson himself had become an addict.

Ultimately, then, the most troubling aspects of this case, were *Robinson* to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility. In dissent it is urged that the decision could be limited to conduct which is "a characteristic and involuntary part of the pattern of the disease as it afflicts" the particular individual, and that "[i]t is not foreseeable" that it would be applied "in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery." *Post*, at 559, n. 2. That is limitation by fiat. In the first place, nothing in the logic of the dissent would limit its application to chronic alcoholics. If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a "compulsion" to kill, which is an "exceedingly strong influence," but "not completely overpowering." [26] Even if we limit our consideration to chronic alcoholics, it would seem impossible to confine the principle within the arbitrary bounds which the dissent seems to envision.

It is not difficult to imagine a case involving psychiatric testimony to the effect that an individual suffers

[26] Cf. *Commonwealth* v. *Phelan*, 427 Pa. 265, 234 A. 2d 540 (1967), cert. denied, 391 U. S. 920 (1968).

from some aggressive neurosis which he is able to control when sober; that very little alcohol suffices to remove the inhibitions which normally contain these aggressions, with the result that the individual engages in assaultive behavior without becoming actually intoxicated; and that the individual suffers from a very strong desire to drink, which is an "exceedingly strong influence" but "not completely overpowering." Without being untrue to the rationale of this case, should the principles advanced in dissent be accepted here, the Court could not avoid holding such an individual constitutionally unaccountable for his assaultive behavior.

Traditional common-law concepts of personal accountability and essential considerations of federalism lead us to disagree with appellant. We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication. And in any event this Court has never articulated a general constitutional doctrine of *mens rea*.[27]

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral

[27] The Court did hold in *Lambert* v. *California*, 355 U. S. 225 (1957), that a person could not be punished for a "crime" of omission, if that person did not know, and the State had taken no reasonable steps to inform him, of his duty to act and of the criminal penalty for failure to do so. It is not suggested either that *Lambert* established a constitutional doctrine of *mens rea*, see generally Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, or that appellant in this case was not fully aware of the prohibited nature of his conduct and of the consequences of taking his first drink.

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accountability of an individual for his antisocial deeds.[28] The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect," *Durham* v. *United States,* 94 U. S. App. D. C. 228, 241, 214 F. 2d 862, 875 (1954), would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, *e. g.,* the right-wrong test of *M'Naghten's Case.*[29] The experimentation of one jurisdiction in that field alone indicates the magnitude of the problem. See, *e. g., Carter* v. *United States,* 102 U. S. App. D. C. 227, 252 F. 2d 608 (1957); *Blocker* v. *United States,* 107 U. S. App. D. C. 63, 274 F. 2d 572 (1959); *Blocker* v. *United States,* 110 U. S. App. D. C. 41, 288 F. 2d 853 (1961) (*en banc*); *McDonald* v. *United States,* 114 U. S. App. D. C. 120, 312 F. 2d 847 (1962) (*en banc*); *Washington* v. *United States,* — U. S. App. D. C. —, 390 F. 2d 444 (1967). But formulating a constitutional rule would reduce, if not eliminate, that fruitful

[28] See generally Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932).

[29] 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Affirmed.

MR. JUSTICE BLACK, whom MR. JUSTICE HARLAN joins, concurring.

While I agree that the grounds set forth in MR. JUSTICE MARSHALL'S opinion are sufficient to require affirmance of the judgment here, I wish to amplify my reasons for concurring.

Those who favor the change now urged upon us rely on their own notions of the wisdom of this Texas law to erect a constitutional barrier, the desirability of which is far from clear. To adopt this position would significantly limit the States in their efforts to deal with a widespread and important social problem and would do so by announcing a revolutionary doctrine of constitutional law that would also tightly restrict state power to deal with a wide variety of other harmful conduct.

I.

Those who favor holding that public drunkenness cannot be made a crime rely to a large extent on their own notions of the wisdom of such a change in the law. A great deal of medical and sociological data is cited to us in support of this change. Stress is put upon the fact that medical authorities consider alcoholism a disease and have urged a variety of medical approaches to treating it. It is pointed out that a high percentage of all arrests in America are for the crime of public drunkenness and that the enforcement of these laws constitutes a tremendous burden on the police. Then it is argued that

there is no basis whatever for claiming that to jail chronic alcoholics can be a deterrent or a means of treatment; on the contrary, jail has, in the expert judgment of these scientists, a destructive effect. All in all, these arguments read more like a highly technical medical critique than an argument for deciding a question of constitutional law one way or another.

Of course, the desirability of this Texas statute should be irrelevant in a court charged with the duty of interpretation rather than legislation, and that should be the end of the matter. But since proponents of this grave constitutional change insist on offering their pronouncements on these questions of medical diagnosis and social policy, I am compelled to add that, should we follow their arguments, the Court would be venturing far beyond the realm of problems for which we are in a position to know what we are talking about.

Public drunkenness has been a crime throughout our history, and even before our history it was explicitly proscribed by a 1606 English statute, 4 Jac. 1, c. 5. It is today made an offense in every State in the Union. The number of police to be assigned to enforcing these laws and the amount of time they should spend in the effort would seem to me a question for each local community. Never, even by the wildest stretch of this Court's judicial review power, could it be thought that a State's criminal law could be struck down because the amount of time spent in enforcing it constituted, in some expert's opinion, a tremendous burden.

Jailing of chronic alcoholics is definitely defended as therapeutic, and the claims of therapeutic value are not insubstantial. As appellee notes, the alcoholics are removed from the streets, where in their intoxicated state they may be in physical danger, and are given food, clothing, and shelter until they "sober up" and thus at least regain their ability to keep from being run over by

automobiles in the street. Of course, this treatment may not be "therapeutic" in the sense of curing the underlying causes of their behavior, but it seems probable that the effect of jail on any criminal is seldom "therapeutic" in this sense, and in any case the medical authorities relied on so heavily by appellant themselves stress that no generally effective method of curing alcoholics has yet been discovered.

Apart from the value of jail as a form of treatment, jail serves other traditional functions of the criminal law. For one thing, it gets the alcoholics off the street, where they may cause harm in a number of ways to a number of people, and isolation of the dangerous has always been considered an important function of the criminal law. In addition, punishment of chronic alcoholics can serve several deterrent functions—it can give potential alcoholics an additional incentive to control their drinking, and it may, even in the case of the chronic alcoholic, strengthen his incentive to control the frequency and location of his drinking experiences.

These values served by criminal punishment assume even greater significance in light of the available alternatives for dealing with the problem of alcoholism. Civil commitment facilities may not be any better than the jails they would replace. In addition, compulsory commitment can hardly be considered a less severe penalty from the alcoholic's point of view. The commitment period will presumably be at least as long, and it might in fact be longer since commitment often lasts until the "sick" person is cured. And compulsory commitment would of course carry with it a social stigma little different in practice from that associated with drunkenness when it is labeled a "crime."

Even the medical authorities stress the need for continued experimentation with a variety of approaches. I cannot say that the States should be totally barred from

one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem. From what I have been able to learn about the subject, it seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that *any* use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

II.

I agree with MR. JUSTICE MARSHALL that the findings of fact in this case are inadequate to justify the sweeping constitutional rule urged upon us. I could not, however, consider any findings that could be made with respect to "voluntariness" or "compulsion" controlling on the question whether a specific instance of human behavior should be immune from punishment as a constitutional matter. When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force that is nevertheless "his" except in some special sense.[1] The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible. Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was "compelled" by some elusive "irresponsible" aspect of his personality. As I have already indicated, punishment of such a defendant can clearly be justified

[1] If an intoxicated person is actually carried into the street by someone else, "he" does not do the act at all, and of course he is entitled to acquittal. *E. g., Martin* v. *State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

in terms of deterrence, isolation, and treatment. On the other hand, medical decisions concerning the use of a term such as "disease" or "volition," based as they are on the clinical problems of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment. For these reasons, much as I think that criminal sanctions should in many situations be applied only to those whose conduct is morally blameworthy, see *Morissette* v. *United States*, 342 U. S. 246 (1952), I cannot think the States should be held constitutionally required to make the inquiry as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a "compulsion." [2]

III.

The rule of constitutional law urged by appellant is not required by *Robinson* v. *California*, 370 U. S. 660 (1962). In that case we held that a person could not be punished for the mere status of being a narcotics

[2] The need for a cautious and tentative approach has been thoroughly recognized by one of the most active workers for reform in this area, Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit. In a recent decision limiting the scope of psychiatric testimony in insanity defense cases, Judge Bazelon states:

"[I]t may be that psychiatry and the other social and behavioral sciences cannot provide sufficient data relevant to a determination of criminal responsibility no matter what our rules of evidence are. If so, we may be forced to eliminate the insanity defense altogether, or refashion it in a way which is not tied so tightly to the medical model. . . . But at least we will be able to make that decision on the basis of an informed experience. For now the writer is content to join the court in this first step." *Washington* v. *United States* — U. S. App. D. C. —, —, n. 33, 390 F. 2d 444, 457, n. 33 (1967) (expressing the views of Chief Judge Bazelon).

addict. We explicitly limited our holding to the situation where no conduct of any kind is involved, stating:

> "We hold that a state law which imprisons a person thus afflicted as a criminal, *even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there,* inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment." 370 U. S., at 667. (Emphasis added.)

The argument is made that appellant comes within the terms of our holding in *Robinson* because being drunk in public is a mere status or "condition." Despite this many-faceted use of the concept of "condition," this argument would require converting *Robinson* into a case protecting actual behavior, a step we explicitly refused to take in that decision.

A different question, I admit, is whether our attempt in *Robinson* to limit our holding to pure status crimes, involving no conduct whatever, was a sound one. I believe it was. Although some of our objections to the statute in *Robinson* are equally applicable to statutes that punish conduct "symptomatic" of a disease, any attempt to explain *Robinson* as based solely on the lack of voluntariness encounters a number of logical difficulties.[3] Other problems raised by status crimes are in no way involved when the State attempts to punish for conduct, and these other problems were, in my view, the controlling aspects of our decision.

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[3] Although we noted in *Robinson,* 370 U. S., at 667, that narcotics addiction apparently is an illness that can be contracted innocently or involuntarily, we barred punishment for addiction even when it could be proved that the defendant had voluntarily become addicted. And we compared addiction to the status of having a common cold, a condition that most people can either avoid or quickly cure when it is important enough for them to do so.

Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes.[4] In fact, one eminent authority has found only one isolated instance, in all of Anglo-American jurisprudence, in which criminal responsibility was imposed in the absence of any act at all.[5]

The reasons for this refusal to permit conviction without proof of an act are difficult to spell out, but they are nonetheless perceived and universally expressed in our criminal law. Evidence of propensity can be considered relatively unreliable and more difficult for a defendant to rebut; the requirement of a specific act thus provides some protection against false charges. See 4 Blackstone, Commentaries 21. Perhaps more fundamental is the difficulty of distinguishing, in the absence of any conduct, between desires of the day-dream variety and fixed intentions that may pose a real threat to society; extending the criminal law to cover both types of desire would be unthinkable, since "[t]here can hardly be anyone who has never thought evil. When a desire is inhib-

[4] As Glanville Williams puts it, "[t]hat crime requires an act is *invariably* true if the proposition be read as meaning that a private thought is not sufficient to found responsibility." Williams, Criminal Law—the General Part 1 (1961). (Emphasis added.) For the requirement of some act as an element of conspiracy and attempt, see *id.*, at 631, 663, 668; R. Perkins, Criminal Law 482, 531–532 (1957).

[5] Williams, *supra*, n. 4, at 11.

ited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal." [6]

In contrast, crimes that require the State to prove that the defendant actually committed some proscribed act involve none of these special problems. In addition, the question whether an act is "involuntary" is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons, wish to regard as irrelevant. In light of all these considerations, our limitation of our *Robinson* holding to pure status crimes seems to me entirely proper.

IV.

The rule of constitutional law urged upon us by appellant would have a revolutionary impact on the criminal law, and any possible limits proposed for the rule would be wholly illusory. If the original boundaries of *Robinson* are to be discarded, any new limits too would soon fall by the wayside and the Court would be forced to hold the States powerless to punish any conduct that could be shown to result from a "compulsion," in the complex, psychological meaning of that term. The result, to choose just one illustration, would be to require recognition of "irresistible impulse" as a complete defense to any crime; this is probably contrary to present law in most American jurisdictions.[7]

The real reach of any such decision, however, would be broader still, for the basic premise underlying the argument is that it is cruel and unusual to punish a person who is not morally blameworthy. I state the proposition in this sympathetic way because I feel there is much to be said for avoiding the use of criminal sanctions in many

[6] *Id.*, at 2.

[7] Perkins, *supra*, n. 4, at 762.

such situations. See *Morissette* v. *United States, supra.* But the question here is one of constitutional law. The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime. *E. g., United States* v. *Dotterweich,* 320 U. S. 277 (1943). The criminal law is a social tool that is employed in seeking a wide variety of goals, and I cannot say the Eighth Amendment's limits on the use of criminal sanctions extend as far as this viewpoint would inevitably carry them.

But even if we were to limit any holding in this field to "compulsions" that are "symptomatic" of a "disease," in the words of the findings of the trial court, the sweep of that holding would still be startling. Such a ruling would make it clear beyond any doubt that a narcotics addict could not be punished for "being" in possession of drugs or, for that matter, for "being" guilty of using them. A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease. More generally speaking, a form of the insanity defense would be made a constitutional requirement throughout the Nation, should the Court now hold it cruel and unusual to punish a person afflicted with any mental disease whenever his conduct was part of the pattern of his disease and occasioned by a compulsion symptomatic of the disease. Such a holding would appear to overrule *Leland* v. *Oregon,* 343 U. S. 790 (1952), where the majority opinion and the dissenting opinion in which I joined both stressed the indefensibility of imposing on the States any particular test of criminal responsibility. *Id.,* at 800–801; *id.,* at 803 (Frankfurter, J., dissenting).

The impact of the holding urged upon us would, of course, be greatest in those States which have until now

refused to accept any qualifications to the "right from wrong" test of insanity; apparently at least 30 States fall into this category.[8] But even in States which have recognized insanity defenses similar to the proposed new constitutional rule, or where comparable defenses could be presented in terms of the requirement of a guilty mind (*mens rea*), the proposed new constitutional rule would be devastating, for constitutional questions would be raised by every state effort to regulate the admissibility of evidence relating to "disease" and "compulsion," and by every state attempt to explain these concepts in instructions to the jury. The test urged would make it necessary to determine, not only what constitutes a "disease," but also what is the "pattern" of the disease, what "conditions" are "part" of the pattern, what parts of this pattern result from a "compulsion," and finally which of these compulsions are "symptomatic" of the disease. The resulting confusion and uncertainty could easily surpass that experienced by the District of Columbia Circuit in attempting to give content to its similar, though somewhat less complicated, test of insanity.[9] The range of problems created would seem totally beyond our capacity to settle at all, much less to settle wisely, and even the attempt to define these terms and thus to impose constitutional and doctrinal rigidity seems absurd in an area where our understanding is even today so incomplete.

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[8] See Model Penal Code § 4.01, at 160 (Tent. Draft No. 4, 1955).

[9] *Durham* v. *United States*, 94 U. S. App. D. C. 228, 214 F. 2d 862 (1954). Some of the enormous difficulties encountered by the District of Columbia Circuit in attempting to apply its *Durham* rule are related in H. R. Rep. No. 563, 87th Cong., 1st Sess. (1961). The difficulties and shortcomings of the *Durham* rule have been fully acknowledged by the District of Columbia Circuit itself, and in particular by the author of the *Durham* opinion. See *Washington* v. *United States*, *supra*.

V.

Perceptive students of history at an early date learned that one country controlling another could do a more successful job if it permitted the latter to keep in force the laws and rules of conduct which it had adopted for itself. When our Nation was created by the Constitution of 1789, many people feared that the 13 straggling, struggling States along the Atlantic composed too great an area ever to be controlled from one central point. As the years went on, however, the Nation crept cautiously westward until it reached the Pacific Ocean and finally the Nation planted its flag on the far-distant Islands of Hawaii and on the frozen peaks of Alaska. During all this period the Nation remembered that it could be more tranquil and orderly if it functioned on the principle that the local communities should control their own peculiarly local affairs under their own local rules.

This Court is urged to forget that lesson today. We are asked to tell the most-distant Islands of Hawaii that they cannot apply their local rules so as to protect a drunken man on their beaches and the local communities of Alaska that they are without power to follow their own course in deciding what is the best way to take care of a drunken man on their frozen soil. This Court, instead of recognizing that the experience of human beings is the best way to make laws, is asked to set itself up as a board of Platonic Guardians to establish rigid, binding rules upon every small community in this large Nation for the control of the unfortunate people who fall victim to drunkenness. It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary—

it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow. I suspect this is a most propitious time to remember the words of the late Judge Learned Hand, who so wisely said:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. Hand, The Bill of Rights 73 (1958).

I would confess the limits of my own ability to answer the age-old questions of the criminal law's ethical foundations and practical effectiveness. I would hold that *Robinson* v. *California* establishes a firm and impenetrable barrier to the punishment of persons who, whatever their bare desires and propensities, have committed no proscribed wrongful act. But I would refuse to plunge from the concrete and almost universally recognized premises of *Robinson* into the murky problems raised by the insistence that chronic alcoholics cannot be punished for public drunkenness, problems that no person, whether layman or expert, can claim to understand, and with consequences that no one can safely predict. I join in affirmance of this conviction.

MR. JUSTICE WHITE, concurring in the result.

If it cannot be a crime to have an irresistible compulsion to use narcotics, *Robinson* v. *California*, 370 U. S. 660, rehearing denied, 371 U. S. 905 (1962), I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an

addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, and so could not constitutionally be convicted for drinking, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk. The statute involved here, which aims at keeping drunks off the street for their own welfare and that of others, is not challenged on the ground that it interferes unconstitutionally with the right to frequent public places. No question is raised about applying this statute to the nonchronic drunk, who has no compulsion to drink, who need not drink to excess, and who could have arranged to do his drinking in private or, if he began drinking in public, could have removed himself at an appropriate point on the path toward complete inebriation.

The trial court said that Powell was a chronic alcoholic with a compulsion not only to drink to excess but also to frequent public places when intoxicated. Nothing in the record before the trial court supports the latter conclusion, which is contrary to common sense and to common knowledge.[1] The sober chronic alcoholic has no

[1] The trial court gave no reasons for its conclusion that Powell appeared in public due to "a compulsion symptomatic of the disease of chronic alcoholism." No facts in the record support that conclusion. The trial transcript strongly suggests that the trial judge merely adopted proposed findings put before him by Powell's counsel. The fact that those findings were of no legal relevance in the trial judge's view of the case is very significant for appraising the extent to which they represented a well-considered and well-supported judgment. For all these reasons I do not feel impelled to accept this finding, and certainly would not rest a constitutional adjudication upon it.

compulsion to be on the public streets; many chronic alcoholics drink at home and are never seen drunk in public. Before and after taking the first drink, and until he becomes so drunk that he loses the power to know where he is or to direct his movements, the chronic alcoholic with a home or financial resources is as capable as the nonchronic drinker of doing his drinking in private, of removing himself from public places and, since he knows or ought to know that he will become intoxicated, of making plans to avoid his being found drunk in public. For these reasons, I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who could be punished for driving a car but not for his disease.[2]

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[2] Analysis of this difficult case is not advanced by preoccupation with the label "condition." In *Robinson* the Court dealt with "a statute which makes the 'status' of narcotic addiction a criminal offense . . . ." 370 U. S., at 666. By precluding criminal conviction for such a "status" the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. Although the same may be said for the "condition" of being a chronic alcoholic, it cannot be said for the mere transitory state of "being drunk in public." "Being" drunk in public is not far removed in time from the acts of "getting" drunk and "going" into public, and it is not necessarily a state of any great duration. And, an isolated instance of "being" drunk in public is of relatively slight importance in the life of an individual as compared with the condition of being a chronic alcoholic. If it were necessary to distinguish between "acts" and "conditions" for purposes of the Eighth Amendment, I would adhere to the concept of "condition" implicit

The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*.[3] Although many chronics have homes, many others do not. 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. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. 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.

It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that

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in the opinion in *Robinson;* I would not trivialize that concept by drawing a nonexistent line between the man who appears in public drunk and that same man five minutes later who is then "being" drunk in public. The proper subject of inquiry is whether volitional acts brought about the "condition" and whether those acts are sufficiently proximate to the "condition" for it to be permissible to impose penal sanctions on the "condition."

[3] The opinion of MR. JUSTICE MARSHALL makes clear the limitations of our present knowledge of alcoholism and the disagreements among doctors in their description and analysis of the disease. It is also true that on the record before us there is some question whether Powell possessed that degree of compulsion which alone would satisfy one of the prerequisites I deem essential to assertion of an Eighth Amendment defense. It is nowhere disputed, however, that there are chronic alcoholics whose need to consume alcohol in large quantities is so persistent and so insistent that they are truly compelled to drink. I find it unnecessary to attempt on this record to determine whether or not Powell is such an alcoholic, for in my view his attempt to claim the Eighth Amendment fails for other reasons.

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he loses the power to control his movements and for that reason appears in public. The Eighth Amendment might also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue.

These prerequisites to the possible invocation of the Eighth Amendment are not satisfied on the record before us.[4] Whether or not Powell established that he could

[4] A holding that a person establishing the requisite facts could not, because of the Eighth Amendment, be criminally punished for appearing in public while drunk would be a novel construction of that Amendment, but it would hardly have radical consequences. In the first place, when as here the crime charged was being drunk in a public place, only the compulsive chronic alcoholic would have a defense to both elements of the crime—for his drunkenness because his disease compelled him to drink and for being in a public place because the force of circumstances or excessive intoxication sufficiently deprived him of his mental and physical powers. The drinker who was not compelled to drink, on the other hand, although he might be as poorly circumstanced, equally intoxicated, and equally without his physical powers and cognitive faculties, could have avoided drinking in the first place, could have avoided drinking to excess, and need not have lost the power to manage his movements. Perhaps the heavily intoxicated, compulsive alcoholic who could not have arranged to avoid being in public places may not, consistent with the Eighth Amendment, be convicted for being drunk in a public place. However, it does not necessarily follow that it would be unconstitutional to convict him for committing crimes involving much greater risk to society.

Outside the area of alcoholism such a holding would not have a wide impact. Concerning drugs, such a construction of the Eighth Amendment would bar conviction only where the drug is addictive and then only for acts which are a necessary part of addiction, such as simple use. Beyond that it would preclude punishment only when the addiction to or the use of drugs caused sufficient loss of physical and mental faculties. This doctrine would not bar con-

not have resisted becoming drunk on December 19, 1966, nothing in the record indicates that he could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street. Indeed, the evidence in the record strongly suggests that Powell could have drunk at home and made plans while sober to prevent ending up in a public place. Powell had a home and wife, and if there were reasons why he had to drink in public or be drunk there, they do not appear in the record.

Also, the only evidence bearing on Powell's condition at the time of his arrest was the testimony of the arresting officer that appellant staggered, smelled of alcohol, and was "very drunk." Powell testified that he had no clear recollection of the situation at the time of his arrest. His testimony about his usual condition when drunk is no substitute for evidence about his condition at the time of his arrest. Neither in the medical testimony nor elsewhere is there any indication that Powell had reached such a state of intoxication that he had lost the ability to comprehend what he was doing or where he was. For all we know from this record, Powell at the time knew precisely where he was, retained the power to stay off or leave the streets, and simply preferred to be there rather than elsewhere.

It is unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place. For the purposes of this case, it is necessary to say only that Powell showed nothing more than that he was to some degree compelled

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viction of a heroin addict for being under the influence of heroin in a public place (although other constitutional concepts might be relevant to such a conviction), or for committing other criminal acts.

to drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question.[5]

Because Powell did not show that his conviction offended the Constitution, I concur in the judgment affirming the Travis County court.

MR. JUSTICE FORTAS, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART join, dissenting.

Appellant was charged with being found in a state of intoxication in a public place. This is a violation of Article 477 of the Texas Penal Code, which reads as follows:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was tried in the Corporation Court of Austin, Texas. He was found guilty and fined $20. He appealed to the County Court at Law No. 1 of Travis County, Texas, where a trial *de novo* was held. Appellant was defended by counsel who urged that appellant was "afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol; his appear-

[5] I do not question the power of the State to remove a helplessly intoxicated person from a public street, although against his will, and to hold him until he has regained his powers. The person's own safety and the public interest require this much. A statute such as the one challenged in this case is constitutional insofar as it authorizes a police officer to arrest any seriously intoxicated person when he is encountered in a public place. Whether such a person may be charged and convicted for violating the statute will depend upon whether he is entitled to the protection of the Eighth Amendment.

ance in public in that condition is not of his own volition, but a compulsion symptomatic of the disease of chronic alcoholism." Counsel contended that to penalize appellant for public intoxication would be to inflict upon him cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

At the trial in the county court, the arresting officer testified that he had observed appellant in the 2000 block of Hamilton Street in Austin; that appellant staggered when he walked; that his speech was slurred; and that he smelled strongly of alcohol. He was not loud or boisterous; he did not resist arrest; he was cooperative with the officer.

The defense established that appellant had been convicted of public intoxication approximately 100 times since 1949, primarily in Travis County, Texas. The circumstances were always the same: the "subject smelled strongly of alcoholic beverages, staggered when walking, speech incoherent." At the end of the proceedings, he would be fined: "down in Bastrop County, it's $25.00 down there, and it's $20.00 up here [in Travis County]." Appellant was usually unable to pay the fines imposed for these offenses, and therefore usually has been obliged to work the fines off in jail. The statutory rate for working off such fines in Texas is one day in jail for each $5 of fine unpaid. Texas Code Crim. Proc., Art. 43.09.

Appellant took the stand. He testified that he works at a tavern shining shoes. He makes about $12 a week which he uses to buy wine. He has a family, but he does not contribute to its support. He drinks wine every day. He gets drunk about once a week. When he gets drunk, he usually goes to sleep, "mostly" in public places such as the sidewalk. He does not disturb the peace or interfere with others.

The defense called as a witness Dr. David Wade, a Fellow of the American Medical Association and a former President of the Texas Medical Association. Dr. Wade is a qualified doctor of medicine, duly certificated in psychiatry. He has been engaged in the practice of psychiatry for more than 20 years. During all of that time he has been especially interested in the problem of alcoholism. He has treated alcoholics; lectured and written on the subject; and has observed the work of various institutions in treating alcoholism. Dr. Wade testified that he had observed and interviewed the appellant. He said that appellant has a history of excessive drinking dating back to his early years; that appellant drinks only wine and beer; that "he rarely passes a week without going on an alcoholic binge"; that "his consumption of alcohol is limited only by his finances, and when he is broke, he makes an effort to secure alcohol by getting his friends to buy alcohol for him"; that he buys a "fifty cent bottle" of wine, always with the thought that this is all he will drink; but that he ends by drinking all he can buy until he "is . . . passed out in some joint or out on the sidewalk." According to Dr. Wade, appellant "has never engaged in any activity that is destructive to society or to anyone except himself." He has never received medical or psychiatric treatment for his drinking problem. He has never been referred to Alcoholics Anonymous, a voluntary association for helping alcoholics, nor has he ever been sent to the State Hospital.

Dr. Wade's conclusion was that "Leroy Powell is an alcoholic and that his alcoholism is in a chronic stage." Although the doctor responded affirmatively to a question as to whether the appellant's taking the first drink on any given occasion is "a voluntary exercise of will," his testimony was that "we must take into account" the fact that chronic alcoholics have a "compulsion" to drink which "while not completely overpowering, is a

very strong influence, an exceedingly strong influence," and that this compulsion is coupled with the "firm belief in their mind that they are going to be able to handle it from now on." It was also Dr. Wade's opinion that appellant "has an uncontrollable compulsion to drink" and that he "does not have the willpower [to resist the constant excessive consumption of alcohol or to avoid appearing in public when intoxicated] nor has he been given medical treatment to enable him to develop this willpower."

The trial judge in the county court, sitting without a jury, made the following findings of fact:

> "(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism." [1]

[1] I do not understand the relevance of our knowing "very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem." (Opinion of MARSHALL, J., *ante*, at 521–522). We do not "traditionally" sit as a trial court, much less as a finder of fact. I submit that we must accept the findings of the trial court as they were made and not as the members of this Court would have made them had they sat as triers of fact. I would add, lest I create a misunderstanding, that I do not suggest in this opinion that Leroy Powell had a constitutional right, based upon the evidence adduced at his trial, to the findings of fact that were made by the county court; only that once such findings were in fact made, it became the duty of the trial court to apply the relevant legal principles and to declare that appellant's conviction would be constitutionally invalid. See *infra*, at 567–570.

I confess, too, that I do not understand the relevance of our knowing very little "about alcoholism itself," given what we do

The court then rejected appellant's constitutional defense, entering the following conclusion of law:

> "(1) The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code."

The court found appellant guilty as charged and increased his fine to $50. Appellant did not have the right to appeal further within the Texas judicial system. Tex. Code Crim. Proc., Art. 4.03. He filed a jurisdictional statement in this Court.

I.

The issue posed in this case is a narrow one. There is no challenge here to the validity of public intoxication statutes in general or to the Texas public intoxication statute in particular. This case does not concern the infliction of punishment upon the "social" drinker—or upon anyone other than a "chronic alcoholic" who, as the trier of fact here found, cannot "resist the constant, excessive consumption of alcohol." Nor does it relate to any offense other than the crime of public intoxication.

The sole question presented is whether a criminal penalty may be imposed upon a person suffering the disease of "chronic alcoholism" for a condition—being "in a state of intoxication" in public—which is a characteristic part of the pattern of his disease and which, the trial court found, was not the consequence of appellant's volition but of "a compulsion symptomatic of the disease of chronic alcoholism." We must consider whether the Eighth Amendment, made applicable to the States through the

know—that findings such as those made in this case are, in the view of competent medical authorities, perfectly plausible. See *infra*, at 560–562.

Fourteenth Amendment, prohibits the imposition of this penalty in these rather special circumstances as "cruel and unusual punishment." This case does not raise any question as to the right of the police to stop and detain those who are intoxicated in public, whether as a result of the disease or otherwise; or as to the State's power to commit chronic alcoholics for treatment. Nor does it concern the responsibility of an alcoholic for criminal *acts*. We deal here with the mere *condition* of being intoxicated in public.[2]

II.

As I shall discuss, consideration of the Eighth Amendment issue in this case requires an understanding of "the disease of chronic alcoholism" with which, as the trial court found, appellant is afflicted, which has destroyed his "will power to resist the constant, excessive consumption of alcohol," and which leads him to "appear in public [not] by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." It is true, of course, that there is a great deal that remains to be discovered about chronic alcoholism. Although many aspects of the disease remain obscure, there are some hard facts—medical and, especially, legal facts—that are accessible to us and that provide a context in which the instant case may be analyzed. We are similarly woefully deficient in our medical, diagnostic, and therapeutic

[2] It is not foreseeable that findings such as those which are decisive here—namely that the appellant's being intoxicated in public was a part of the pattern of his disease and due to a compulsion symptomatic of that disease—could or would be made in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery. Such offenses require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism. If an alcoholic should be convicted for criminal conduct which is not a characteristic and involuntary part of the pattern of the disease as it afflicts him, nothing herein would prevent his punishment.

knowledge of mental disease and the problem of insanity; but few would urge that, because of this, we should totally reject the legal significance of what we do know about these phenomena.

Alcoholism [3] is a major problem in the United States.[4] In 1956 the American Medical Association for the first time designated alcoholism as a major medical problem and urged that alcoholics be admitted to general hospitals for care.[5] This significant development marked the acceptance among the medical profession of the "disease concept of alcoholism." [6] Although there is some prob-

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[3] The term has been variously defined. The National Council on Alcoholism has defined "alcoholic" as "a person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." The American Medical Association has defined alcoholics as "those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning."

For other common definitions of alcoholism, see Keller, Alcoholism: Nature and Extent of the Problem, in Understanding Alcoholism, 315 Annals 1, 2 (1958); O. Diethelm, Etiology of Chronic Alcoholism 4 (1955); T. Plaut, Alcohol Problems—A Report to the Nation by the Cooperative Commission on the Study of Alcoholism 39 (1967) (hereafter cited as Plaut); Aspects of Alcoholism 9 (1963) (published by Roche Laboratories); The Treatment of Alcoholism—A Study of Programs and Problems 8 (1967) (published by the Joint Information Service of the American Psychiatric Association and the National Association for Mental Health) (hereafter cited as The Treatment of Alcoholism); 2 R. Cecil & R. Loeb, A Textbook of Medicine 1620, 1625 (1959).

[4] It ranks among the top four public health problems of the country. M. Block, Alcoholism—Its Facets and Phases (1962).

[5] American Medical Association: Report of Reference Committee on Medical Education and Hospitals, Proceedings of the House of Delegates, Seattle, Wash., Nov. 27–29, 1956, p. 33; 163 J. A. M. A. 52 (1957).

[6] See generally E. Jellinek, The Disease Concept of Alcoholism (1960).

lem in defining the concept, its core meaning, as agreed by authorities, is that alcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological make-up and history of the individual, cannot be controlled by him. Today most alcohologists and qualified members of the medical profession recognize the validity of this concept. Recent years have seen an intensification of medical interest in the subject.[7] Medical groups have become active in educating the public, medical schools, and physicians in the etiology, diagnosis, and treatment of alcoholism.[8]

Authorities have recognized that a number of factors may contribute to alcoholism. Some studies have pointed to physiological influences, such as vitamin deficiency, hormone imbalance, abnormal metabolism, and hereditary proclivity. Other researchers have found more convincing a psychological approach, emphasizing early environment and underlying conflicts and tensions. Numerous studies have indicated the influence of socio-cultural factors. It has been shown, for example, that the incidence of alcoholism among certain ethnic groups is far higher than among others.[9]

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[7] See, *e. g.*, H. Haggard & E. Jellinek, Alcohol Explored (1942); O. Diethelm, Etiology of Chronic Alcoholism (1955); A. Ullman, To Know the Difference (1960); D. Pittman & C. Snyder, Society, Culture, and Drinking Patterns (1962).

[8] See Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 113 (1966).

[9] See Alcohol and Alcoholism 24–28 (published by the Public Health Service of the U. S. Department of Health, Education, and Welfare). "Although many interesting pieces of evidence have been assembled, it is not yet known why a small percentage of those who use alcohol develop a destructive affinity for it." The Treatment of Alcoholism 9.

The manifestations of alcoholism are reasonably well identified. The late E. M. Jellinek, an eminent alcohologist, has described five discrete types commonly found among American alcoholics.[10] It is well established that alcohol may be habituative and "can be physically addicting." [11] . It has been said that "the main point for the nonprofessional is that alcoholism is not within the control of the person involved. He is not willfully drinking." [12]

Although the treatment of alcoholics has been successful in many cases,[13] physicians have been unable to discover any single treatment method that will invariably produce satisfactory results. A recent study of available treatment facilities concludes as follows: [14]

> "Although numerous kinds of therapy and intervention appear to have been effective with various kinds of problem drinkers, the process of matching patient and treatment method is not yet highly developed. There is an urgent need for continued experimentation, for modifying and improving exist-

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[10] See E. Jellinek, The Disease Concept of Alcoholism 35–41 (1960).

[11] Alcoholism 3 (1963) (published by the Public Health Service of the U. S. Department of Health, Education, and Welfare). See also Bacon, Alcoholics Do Not Drink, in Understanding Alcoholism, 315 Annals 55–64 (1958).

[12] A. Ullman, To Know the Difference 22 (1960).

[13] In response to the question "can a chronic alcoholic be medically treated and returned to society as a useful citizen?" Dr. Wade testified as follows:

"We believe that it is possible to treat alcoholics, and we have large numbers of individuals who are now former alcoholics. They themselves would rather say that their condition has been arrested and that they remain alcoholics, that they are simply living a pattern of life, through the help of medicine or whatever source, that enables them to refrain from drinking and enables them to combat the compulsion to drink."

[14] The Treatment of Alcoholism 13.

> ing treatment methods, for developing new ones, and for careful and well-designed evaluative studies. Most of the facilities that provide services for alcoholics have made little, if any, attempt to determine the effectiveness of the total program or of its components."

Present services for alcoholics include state and general hospitals, separate state alcoholism programs, outpatient clinics, community health centers, general practitioners, and private psychiatric facilities.[15] Self-help organizations, such as Alcoholics Anonymous, also aid in treatment and rehabilitation.[16]

The consequences of treating alcoholics, under the public intoxication laws, as criminals can be identified with more specificity. Public drunkenness is punished as a crime, under a variety of laws and ordinances, in every State of the Union.[17] The Task Force on Drunkenness of the President's Commission on Law Enforcement and Administration of Justice has reported that "[t]wo million arrests in 1965—one of every three arrests in America—were for the offense of public drunkenness." [18] Drunkenness offenders make up a large percentage of the population in short-term penal institutions.[19] Their arrest and processing place a tremendous burden upon the police, who are called upon to spend a large amount of time

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[15] *Id.*, at 13–26. See also Alcohol and Alcoholism 31–40; Plaut 53–85.

[16] See A. Ullman, To Know the Difference 173–191 (1960).

[17] For the most part these laws and ordinances, like Article 477 of the Texas Penal Code, cover the offense of being drunk in a public place. See Task Force Report: Drunkenness 1 (1967) (published by The President's Commission on Law Enforcement and Administration of Justice) (hereafter cited as Task Force Report).

[18] *Ibid.*

[19] See Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 110 (1966).

in arresting for public intoxication and in appearing at trials for public intoxication, and upon the entire criminal process.[20]

It is not known how many drunkenness offenders are chronic alcoholics, but "[t]here is strong evidence . . . that a large number of those who are arrested have a lengthy history of prior drunkenness arrests." [21] "There are instances of the same person being arrested as many as forty times in a single year on charges of drunkenness, and every large urban center can point to cases of individuals appearing before the courts on such charges 125, 150, or even 200 times in the course of a somewhat longer period." [22]

It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a "revolving door"—leading from arrest on the street through a brief, unprofitable sojourn in jail, back to the street and, eventually, another arrest.[23] The jails, overcrowded and put to a use for which they are not suit-

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[20] See Task Force Report 3–4.

[21] *Id.*, at 1.

[22] F. Allen, The Borderland of Criminal Justice 8 (1964). It does not, of course, necessarily follow from the frequency of his arrests that a person is a chronic alcoholic.

[23] See D. Pittman & C. Gordon, Revolving Door: A Study of the Chronic Police Case Inebriate (1958). See also Pittman, Public Intoxication and the Alcoholic Offender in American Society, Appendix A to Task Force Report.

Dr. Wade answered each time in the negative when asked:

"Is a chronic alcoholic going to be rehabilitated by simply confining him in jail without medical attention?

"Would putting a chronic alcoholic in jail operate to lessen his desire for alcohol when he is released?

"Would imposing a monetary fine on a chronic alcoholic operate to lessen his desire for alcohol?"

able, have a destructive effect upon alcoholic inmates.[24]

Finally, most commentators, as well as experienced judges,[25] are in agreement that "there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the enforcement of the laws against drunkenness." [26]

> "If all of this effort, all of this investment of time and money, were producing constructive results, then we might find satisfaction in the situation despite its costs. But the fact is that this activity accomplishes little that is fundamental. No one can seriously suggest that the threat of fines and jail sentences actually deters habitual drunkenness or alcoholic addiction. . . . Nor, despite the heroic efforts being made in a few localities, is there much reason to suppose that any very effective measures of cure and therapy can or will be administered in the jails. But the weary process continues, to the detriment of the total performance of the law-enforcement function." [27]

III.

It bears emphasis that these data provide only a context for consideration of the instant case. They should not dictate our conclusion. The questions for this Court are not settled by reference to medicine or penology. Our task is to determine whether the principles embodied in the Constitution of the United States place any limitations upon the circumstances under which punishment

[24] See, *e. g.*, MacCormick, Correctional Views on Alcohol, Alcoholism, and Crime, 9 Crime & Delin. 15 (1963).

[25] See, *e. g.*, Murtagh, Arrests for Public Intoxication, 35 Fordham L. Rev. 1 (1966).

[26] M. Guttmacher & H. Weihofen, Psychiatry and the Law 319 (1952).

[27] F. Allen, The Borderland of Criminal Justice 8–9 (1964).

may be inflicted, and, if so, whether, in the case now before us, those principles preclude the imposition of such punishment.

It is settled that the Federal Constitution places some substantive limitation upon the power of state legislatures to define crimes for which the imposition of punishment is ordered. In *Robinson* v. *California,* 370 U. S. 660 (1962), the Court considered a conviction under a California statute making it a criminal offense for a person to "be addicted to the use of narcotics." At Robinson's trial, it was developed that the defendant had been a user of narcotics. The trial court instructed the jury that "[t]o be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms." *Id.,* at 662–663.

This Court reversed Robinson's conviction on the ground that punishment under the law in question was cruel and unusual, in violation of the Eighth Amendment of the Constitution as applied to the States through the Fourteenth Amendment. The Court noted that narcotic addiction is considered to be an illness and that California had recognized it as such. It held that the State could not make it a crime for a person to be ill.[28] Although Robinson had been sentenced to only 90 days in prison for his offense, it was beyond the power of the State to prescribe such punishment. As MR. JUSTICE STEWART, speaking for the Court, said: "[e]ven one day

[28] "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." 370 U. S., at 678 (DOUGLAS, J., concurring).

in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U. S., at 667.

Robinson stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. In all probability, Robinson at some time before his conviction elected to take narcotics. But the crime as defined did not punish this conduct.[29] The statute imposed a penalty for the offense of "addiction"—a condition which Robinson could not control. Once Robinson had become an addict, he was utterly powerless to avoid criminal guilt. He was powerless to choose not to violate the law.

In the present case, appellant is charged with a crime composed of two elements—being intoxicated and being found in a public place while in that condition. The crime, so defined, differs from that in *Robinson*. The statute covers more than a mere status.[30] But the essen-

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[29] The Court noted in *Robinson* that narcotic addiction "is apparently an illness which may be contracted innocently or involuntarily." *Id.*, at 667. In the case of alcoholism it is even more likely that the disease may be innocently contracted, since the drinking of alcoholic beverages is a common activity, generally accepted in our society, while the purchasing and taking of drugs are crimes. As in *Robinson*, the State has not argued here that Powell's conviction may be supported by his "voluntary" action in becoming afflicted.

[30] In *Robinson*, we distinguished between punishment for the "status" of addiction and punishment of an "act":

"This statute . . . is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the 'status'

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tial constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid. The trial judge sitting as trier of fact found, upon the medical and other relevant testimony, that Powell is a "chronic alcoholic." He defined appellant's "chronic alcoholism" as "a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol." He also found that "a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." I read these findings to mean that appellant was powerless to avoid drinking; that having taken his first drink, he had "an uncontrollable compulsion to drink" to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places.[31]

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of narcotic addition a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there." *Id.*, at 666.

[31] I also read these findings to mean that appellant's disease is such that he cannot be deterred by Article 477 of the Texas Penal Code from drinking to excess and from appearing in public while intoxicated. See n. 23, *supra*.

Finally, contrary to the views of MR. JUSTICE WHITE, *ante*, at 549–551, I believe these findings must fairly be read to encompass the facts that my Brother WHITE agrees would require reversal, that is, that for appellant Powell, "resisting drunkenness" and "avoiding public places when intoxicated" on the occasion in question were "impossible." Accordingly, in MR. JUSTICE WHITE's words, "[the] statute is in effect a law which bans a single act for which [he] may not be convicted under the Eighth Amendment—the act of getting drunk." In my judgment, the findings amply show that "it was not feasible for [Powell] to have made arrangements to prevent his being in public when drunk and that his extreme drunkennesss sufficiently deprived him of his faculties on the occasion in issue."

Article 477 of the Texas Penal Code is specifically directed to the accused's presence while in a state of intoxication, "in any public place, or at any private house except his own." This is the essence of the crime. Ordinarily when the State proves such presence in a state of intoxication, this will be sufficient for conviction, and the punishment prescribed by the State may, of course, be validly imposed. But here the findings of the trial judge call into play the principle that a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease. This principle, narrow in scope and applicability, is implemented by the Eighth Amendment's prohibition of "cruel and unusual punishment," as we construed that command in *Robinson*. It is true that the command of the Eighth Amendment and its antecedent provision in the Bill of Rights of 1689 were initially directed to the type and degree of punishment inflicted.[32] But in *Robinson* we recognized that "the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." 370 U. S., at 676 (MR. JUSTICE DOUGLAS, concurring).[33]

The findings in this case, read against the background of the medical and sociological data to which I have referred, compel the conclusion that the infliction upon appellant of a criminal penalty for being intoxicated in

[32] See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86 (1958); *Weems* v. *United States*, 217 U. S. 349 (1910). See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635, 636–645 (1966).

[33] Convictions of chronic alcoholics for violations of public intoxication statutes have been invalidated on Eighth Amendment grounds in two circuits. See *Easter* v. *District of Columbia*, 124 U. S. App. D. C. 33, 361 F. 2d 50 (1966); *Driver* v. *Hinnant*, 356 F. 2d 761 (C. A. 4th Cir. 1966).

a public place would be "cruel and inhuman punishment" within the prohibition of the Eighth Amendment. This conclusion follows because appellant is a "chronic alcoholic" who, according to the trier of fact, cannot resist the "constant excessive consumption of alcohol" and does not appear in public by his own volition but under a "compulsion" which is part of his condition.

I would reverse the judgment below.

and when they were arraigned before a federal magistrate did not constitute unnecessary delay. Therefore, the statements made during interrogation will not be suppressed.

IT IS SO ORDERED.

Michael POTTINGER, Peter Carter, Berry Young, et al., Plaintiffs,

v.

CITY OF MIAMI, Defendant.

No. 88-2406-CIV-ATKINS.

United States District Court, S.D. Florida.

Nov. 16, 1992.

Class action was brought under § 1983 against city on behalf of homeless persons living in city, alleging violations of constitutional rights in connection with arrests and seizures of property. The District Court, Atkins, Senior District Judge, held that: (1) city's practice of arresting homeless persons for performing such activities as sleeping, standing, and congregating in public places violated Eighth Amendment and right to travel; (2) ordinances under which homeless persons were arrested were unconstitutionally overbroad; (3) homeless persons' privacy rights were not violated; and (4) seizures of homeless persons' personal belongings violated Fourth Amendment.

Ordered accordingly.

1. Civil Rights ⇐206(3)

Local government may be liable under § 1983 when execution of government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts injury. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐206(3)

To establish government policy or custom, for execution of which government may be held liable under § 1983, plaintiffs must show persistent and widespread practice; random acts and isolated incidents are insufficient. 42 U.S.C.A. § 1983.

3. Civil Rights ⇐206(4)

City's continued failure to prevent improper police conduct when it has knowledge of that conduct is type of informal policy or custom that is actionable under § 1983. 42 U.S.C.A. § 1983.

4. Civil Rights ⇐206(3)

Homeless persons established that unconstitutional arrests and property seizures by city police were executed pursuant to city custom or policy, so as to subject city to liability under § 1983; proof that arrests and seizures were not random isolated acts included memoranda directed to high-ranking police department officials, and evidence of city's policies of driving homeless persons from public areas and eliminating food distribution as strategy to disperse homeless. 42 U.S.C.A. § 1983.

5. Criminal Law ⇐1213.7

Eighth Amendment ban against cruel and unusual punishment was violated by city's arrests of homeless persons under various ordinances prohibiting them from lying down, sleeping, standing, sitting or performing other essential, life-sustaining activities in any public place at any time. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 8.

6. Process ⇐168

Action for abuse of process lies if prosecution is initiated legitimately but is thereafter used for purpose other than that intended by law.

7. Process ⇐168

Unlike malicious prosecution, tort of abuse of process does not involve bringing action without justification; rather, abuse of process is misuse of process justified in itself for end other than that which it was designed to accomplish.

8. Process ⇐168

Proof of lack of probable cause is not required to establish malicious abuse of process.

9. Process ⇐168

No abuse of process exists when process is used to accomplish result for which it is created, regardless of incidental motive of spite or ulterior purpose.

10. Process ⇐168

For purposes of action for malicious abuse of process, misuse must occur after process is issued.

11. Process ⇐168

Homeless persons who alleged that they were arrested for unlawful purpose of harassing and intimidating them in order to purge them from city streets and parks could not recover against city under theory of malicious abuse of process; city was not shown to have committed any definite act constituting alleged misuse that occurred after issuance of process.

12. Arrest ⇐63.1

Proper inquiry for determining whether or not seizure is pretextual is not whether officer could validly have made seizure, but whether under same circumstances reasonable officer would have made seizure in absence of invalid purpose. West's F.S.A. Const. Art. 1, § 2; U.S.C.A. Const.Amend. 4.

13. Arrest ⇐63.4(1)

Objectively reasonable seizure is not invalid just because officer acts out of improper motivation; rather, determination of whether Fourth Amendment violation has occurred requires objective assessment of officer's actions in light of facts and circumstances confronting him at time, and not on officer's actual state of mind at time of challenged action taken. West's F.S.A. Const. Art. 1, § 2; U.S.C.A. Const.Amend. 4.

14. False Imprisonment ⇐31

Homeless persons who alleged that city had pattern and practice of arresting homeless persons for harmless conduct such as eating, sleeping or congregating in public failed to establish that arrests were pretextual in violation of Fourth Amendment and corresponding provision of Florida Constitution; plaintiffs presented no specific evidence regarding any particular arrest, precluding court from finding that any one arrest was objectively unreasonable. West's F.S.A. Const. Art. 1, § 12; U.S.C.A. Const.Amend. 4.

15. Searches and Seizures ⇐23

Search or seizure is unreasonable if government's legitimate interests in search or seizure outweigh individual's legitimate expectation of privacy in object of search. West's F.S.A. Const. Art. 1, § 12; U.S.C.A. Const.Amend. 4.

16. Searches and Seizures ⇐23

Seizure that is initially lawful may nevertheless violate Fourth Amendment if there is some meaningful interference with individual's possessory interests in that property. West's F.S.A. Const. Art. 1, § 12; U.S.C.A. Const.Amend. 4.

17. Searches and Seizures ⇐26

For Fourth Amendment purposes, determining nature of any legitimate expectation of privacy that individuals have in their personal property involves two inquiries: first, whether individual has subjective expectation of privacy in belongings; and second, whether that expectation is one that society is prepared to recognize as reasonable. West's F.S.A. Const. Art. 1, § 12; U.S.C.A. Const.Amend. 4.

18. Searches and Seizures ⇐26

For Fourth Amendment purposes, homeless persons had legitimate expectation of privacy in their personal belongings that were seized in public areas. West's F.S.A. Const. Art. 1, § 12; U.S.C.A. Const. Amend. 4.

19. Searches and Seizures ⇐26

City's seizures of personal belongings of homeless persons in public areas violated Fourth Amendment. 42 U.S.C.A. § 1983; West's F.S.A. Const. Art. 1, § 12; U.S.C.A. Const.Amend. 4.

20. Constitutional Law ⇐82(7)

Once plaintiff shows that government has intruded into fundamental right of privacy, government must show that challenged regulation or act serves compelling state interest through least intrusive means. West's F.S.A. Const. Art. 1, § 23.

21. Constitutional Law ⇐82(7)

In determining whether reasonable expectation of privacy exists for purposes of provision of Florida Constitution protecting zone of privacy, court looks to individual's expectation of privacy regardless of whether society recognizes that expectation as reasonable; however, individual's subjective expectations are not dispositive, and in any given case court must consider all circumstances to determine whether individual has legitimate expectation of privacy. West's F.S.A. Const. Art. 1, § 23.

22. Constitutional Law ⇐82(7)

Individual does not have constitutionally protected legitimate expectation of privacy in such activities as sleeping and eating in public. West's F.S.A. Const. Art. 1, § 23.

23. Constitutional Law ⇐82(7)

City's arrest of homeless persons for activities such as sleeping, eating, standing and congregating in public did not violate privacy rights protected by Florida Constitution. West's F.S.A. Const. Art. 1, § 23.

24. Constitutional Law ⇐81, 82(4)

Law may be overbroad, even if it is clear and precise, if it reaches conduct that is constitutionally protected or conduct that is beyond reach of state's police power. West's F.S.A. Const. Art. 1, § 9.

25. Constitutional Law ⇐82(6)
Vagrancy ⇐1

City ordinances prohibiting sleeping in public, being in public park after hours, obstructing sidewalk, loitering and prowling and trespassing on public property were constitutionally overbroad as applied to homeless persons to extent that they resulted in homeless persons being arrested for harmless, inoffensive conduct that they were forced to perform in public places. West's F.S.A. Const. Art. 1, § 9; U.S.C.A. Const.Amend. 14.

26. Constitutional Law ⇐213.1(1), 215

When government actions discriminate on basis of suspect classification, such as race, alienage or national origin, they are subject to strict scrutiny and will be sustained only if they are suitably tailored to serve compelling state interest; in addition, government classifications that infringe on constitutionally protected rights also require heightened scrutiny. U.S.C.A. Const. Amend. 14.

27. Constitutional Law ⇐83(4)

Laws penalize right to travel if they deny person necessity of life, such as free medical care. U.S.C.A. Const.Amend. 14.

28. Arrest ⇐63.4(1)
Constitutional Law ⇐83(4), 225.1

City's arrests of homeless persons for such harmless acts as sleeping, eating, or lying down in public infringed on their fundamental right to travel, in violation of equal protection clause. U.S.C.A. Const. Amend. 14.

Valerie Jonas, Public Defender's Office, Benjamin Waxman, Weiner, Robbins, Tunkey & Ross, P.A., Miami, FL, for plaintiffs.

Leon M. Firtel, Asst. City Atty., Miami, FL, for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER ON PLAINTIFFS' REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

ATKINS, Senior District Judge.

THIS CAUSE is before the court on the non-jury portion of this bifurcated trial, which focused solely on the issue of liability. The background relevant to the court's findings and conclusions regarding the City's liability can be summarized as follows.

Plaintiffs ("plaintiffs" or "class members") filed this action in December of 1988 on behalf of themselves and approximately 6,000 other homeless people living in the

City of Miami. Plaintiffs' complaint alleges that the City of Miami ("defendant" or "City") has a custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily life—including sleeping and eating—in the public places where they are forced to live. Plaintiffs further claim that the City has arrested thousands of homeless people for such life-sustaining conduct under various City of Miami ordinances and Florida Statutes. In addition, plaintiffs assert that the City routinely seizes and destroys their property and has failed to follow its own inventory procedures regarding the seized personal property of homeless arrestees and homeless persons in general.

Plaintiffs allege, pursuant to 42 U.S.C. § 1983,[1] that the property destruction and arrests, which often result in no criminal charges, prosecutions or convictions, violate their rights under the United States and Florida Constitutions. Because the arrested plaintiffs are released without further official process, the argument continues, plaintiffs never have the opportunity to raise such valid defenses as necessity or duress. As discussed below, plaintiffs do not challenge the facial validity of the ordinances or statutes under which they are arrested. Rather, they contend that the City applies these laws to homeless individuals as part of a custom and practice of driving the homeless from public places. Accordingly, plaintiffs do not argue that any of the ordinances should be stricken; instead, they ask that the City be enjoined from arresting homeless individuals for inoffensive conduct, such as sleeping or bathing, that they are forced to perform in public.

Upon careful review the evidence presented at trial and at prior proceedings and after weighing the various arguments presented throughout this litigation, the court finds that injunctive relief is warranted in this case for the following reasons, which are discussed more fully below. First, plaintiffs have shown that the City has a pattern and practice of arresting homeless people for the purpose of driving them from public areas. *See* section III.B. Second, the City's practice of arresting homeless individuals for harmless, involuntary conduct which they must perform in public is cruel and unusual in violation of the Eighth Amendment to the United States Constitution. *See* section III.C. Third, such arrests violate plaintiffs' due process rights because they reach innocent and inoffensive conduct. *See* section III.G.2. Fourth, the City's failure to follow its own written procedure for handling personal property when seizing or destroying the property of homeless individuals violates plaintiffs' fourth amendment rights. *See* section III.F. Fifth, the City's practice of arresting homeless individuals for performing essential, life-sustaining acts in public when they have absolutely no place to go effectively infringes on their fundamental right to travel in violation of the equal protection clause. *See* section III.H.2.

In essence, this litigation results from an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets. The issues raised in this case reveal various aspects of this conflict which, unfortunately, has become intensified by the overwhelming increase in the number of homeless people in recent years and a corresponding decrease in federal aid to cities. Because some of these issues have arisen in prior proceedings in this case, we briefly outline the history of this litigation before turning to the merits of the present inquiries.

1. Section 1983 provides as follows:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory, or the District of Columbia, subjects, or causes to be subjected, any Citizen of the United States or any other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1983.

I. PROCEDURAL HISTORY

On December 23, 1988, plaintiffs filed this action against the City of Miami on behalf of themselves and thousands of other homeless persons living within the City. The court granted plaintiffs' request for certification of class action on July 21, 1989. As certified, the class consists of involuntarily homeless people living in the "geographic area bordered on the North by Interstate 395, on the South by Flagler Street, on the East by Biscayne Bay, and on the West by Interstate 95." *See* Order Granting Plaintiffs' Motion for Certification of Class Action, dated July 21, 1989, 720 F.Supp. 955.

A. *The Complaint*

Specifically, plaintiffs allege the following in their six-count complaint:

Count I: that the ordinances under which the City arrests class members for engaging in essential, life-sustaining activities—such as sleeping, eating, standing and congregating—are used by the City to punish homeless persons based on their involuntary homeless status in violation of the protection against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution;

Count II: that the City has used its legitimate arrest powers for the unlawful purpose of "pest control," that is, "sanitizing" its streets by removing unsightly homeless individuals, which amounts to malicious abuse of process;

Count III: that the arrests of homeless individuals are pretextual and amount to unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution;

Count IV: that the City's seizures of plaintiffs' property lack probable cause, are unreasonable and violate the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution;

Count V: that the City's arrests of homeless individuals for essential, life-sustaining activities violate their right to due process, privacy and decisional autonomy in violation of the Fourteenth Amendment to the United States Constitution and corresponding provisions of the Florida Constitution; and

Count VI: that the right of homeless persons publicly to engage in essential activities such as sleeping, eating, bathing and congregating is "fundamental" for purposes of equal protection under the Fifth and Fourteenth Amendments to the United States Constitution; that arresting the homeless infringes upon these fundamental rights and other fundamental rights, such as the right to travel, and burdens the homeless as a suspect class; and that the City has no compelling interest in making these arrests. *See* Second Amended Complaint for Declaratory, Injunctive and Compensatory Relief/Class Action, filed September 8, 1989.

B. *Prior Proceedings*

During the course of this litigation, plaintiffs have moved for injunctive relief on a number of occasions. On December 23, 1988, plaintiffs asked this court to enjoin the City from conducting systematic police "sweeps" of homeless areas prior to high-profile events such as the Orange Bowl Parade. Plaintiffs alleged that the City conducted the "sweeps" to harass the homeless and to remove them from sight. *See* December 23, 1988 Application for Preliminary Injunction and Incorporated Memorandum of Law. The court denied this motion based on an inability to fashion an injunction with the specificity required by Federal Rule of Civil Procedure 65(d).[2] *See* December 30, 1988 Order on Application for a Preliminary Injunction.

In April 1990, plaintiffs filed their Second Application for Preliminary Injunction after two burning incidents in Lummus Park in which City police officers awakened and handcuffed class members, dumped their personal possessions—includ-

2. Pursuant to Rule 65(d), "[e]very order granting an injunction and every restraining order ... shall be in specific terms [and] shall describe in reasonable detail ... the acts sought to be restrained." Fed.R.Civ.P. 65(d).

ing personal identification, medicine, clothing and a Bible—into a pile, and set the pile ablaze. Although the City expressed outrage over the incidents and reported that the officers were under investigation,[3] this court found the City's threat of disciplinary action insufficient and ordered it to issue a directive to its police units "not to destroy property collected at the time of contact with homeless persons and to follow their own written policy of preserving property obtained in any manner by their police units." April 26, 1990 Order on Plaintiffs' Second Application for Preliminary Injunction at 4. The court further stated that it would consider finding persons responsible for violating the order in criminal contempt. *Id.*

Despite the strong wording of this order, plaintiffs again sought injunctive relief in March of 1991 as a result of another incident related to the destruction of property as well as the forced removal of the homeless from certain public areas. *See* Motion for Order to Show Cause, Application for Further Injunctive Relief, and Request for Evidentiary Hearing, filed March 5, 1991. As established at the three-day hearing,[4] City police officers awakened homeless persons sleeping under the I–395 overpass and routed them to Lummus and Bicentennial Parks. The officers also distributed a notice advising homeless persons that the park closure hours would be strictly enforced and that unattended property would be confiscated and destroyed. Shortly thereafter, on February 11, 1991, police officers and solid waste workers arrived at Lummus and Bicentennial Parks with front-end loaders and dump trucks. The officers asked homeless persons to take their property and leave immediately. The officers and solid waste workers then removed belongings of both absent and present class members. Two homeless men present on the scene testified that the officers did not give them enough time to gather their belongings. Another man testified that when he returned from a health clinic to Bicentennial Park and attempted to retrieve his belongings from the City workers, he was threatened with arrest for obstructing justice.

Based on the record, the court found that the City had violated the court's April 26, 1991 order in two ways. *See* March 18, 1991 Order Finding City of Miami in Civil Contempt of Court's April 26, 1990 Order and Providing Further Injunctive Relief ("March 18, 1991 Order"). First, the City violated the court's express prohibition against the destruction of property collected at the time of contact with homeless persons. Second, the City violated its own written policy regarding the preservation of property. Although one of the officers present at the park clean-ups testified that the homeless persons' property looked like "junk to him," the court noted the following:

> [P]articularly under these circumstances, value is in the eyes of the beholder, as one man's junk is another man's treasure. Any police officer or city worker assigned to the various areas where homeless persons congregate should be well aware that homeless persons use shopping carts, plastic bags and cardboard boxes as means of transporting their possessions. Any asserted ignorance of this fact insinuates a narrow-minded attitude that this court will not tolerate.

Id. at 14. As a result of these violations, the court found the City in civil contempt and as a sanction ordered the City to pay the Camillus House, which provides clothing, food and medical care to homeless persons, the sum of $2,500. In addition, the court further enjoined the City "from destroying property which it knows or reasonably should know belongs to homeless individuals." *Id.* at 24.[5]

3. At trial, the City presented evidence that the officers were ultimately disciplined. *See* Defendant's Exhibits 2A and 2B.

4. The court held an evidentiary hearing on plaintiffs' motion on March 6, 13, and 14, 1991.

5. The City appealed this order and also filed a Motion Seeking Clarification and Reconsideration of Order Entered March 18. The Eleventh Circuit relinquished jurisdiction on this matter so that this court could rule on the City's motion. In ruling on the City's motion, this court directed the City to deposit the monetary sanc-

On November 22, 1991, the City notified the court of its intent to evacuate and close for renovations two primary outdoor refuges for homeless individuals, Lummus Park and the area under I–395. *See* Notification to Court and Counsel Regarding Certain Projects. In response, on December 4, 1991, plaintiffs asked the court to enjoin the City from executing the projects. The court denied plaintiffs' application for injunctive relief based on the City's assurance that it would offer comparable or better housing to the homeless individuals displaced from the two areas. *See* Order on Plaintiffs' Application for Preliminary Injunction, dated December 13, 1992.[6]

On June 11, 1991, the court granted plaintiffs' motion to bifurcate the trial of this case, with the first portion of the trial focusing solely on the issue of liability to be tried without a jury and, assuming liability was found, the second portion of the trial on damages to be tried before a jury. *See* Order on Motion to Bifurcate. After presiding over the non-jury portion of the trial from June 15 through June 19, 1992, and after reviewing the parties' proposed findings and conclusions and post-trial memoranda, the court makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. *The Homeless Plaintiffs*

The plaintiffs are homeless men, women and children who live in the streets, parks and other public areas in the area of the City of Miami bordered on the North by Interstate 395, on the South by Flagler Street, on the East by Biscayne Bay, and on the West by Interstate 95. In making the factual findings underlying this order, the court relies in large part on the testimony at trial of a number of expert witnesses familiar with the plight of these and other homeless people.

Professor James Wright, an expert in the sociology of the homeless, testified that most homeless individuals are profoundly poor, have high levels of mental or physical disability, and live in social isolation. He further testified that homeless individuals rarely, if ever, choose to be homeless. Generally, people become homeless as the result of a financial crisis or because of a mental or physical illness.

While a mental or physical illness may cause some people to become homeless, health problems are also aggravated by homelessness. Dr. Pedro J. Greer, Jr., Medical Director of the Camillus Health Concern[7] and an expert in medical treatment of homeless individuals, testified that a higher incidence of all diseases exists among the homeless. For example, hypertension, gastro-intestinal disorders, tuberculosis and peripheral vascular disease occur at a much higher rate in homeless people. This is due to a variety of factors such as exposure to the elements, constant walking, sleeping and eating in unsanitary conditions, lack of sleep and poor nutrition. In addition, people without a home general-

tion of $2,500 in the court registry pending resolution of the appeal from the March 18, 1991 order. *See* January 22, 1992 Order on Defendant's Motion Seeking Clarification and Reconsideration of Order Entered March 18. The court further directed both parties to meet in an effort to resolve their differences regarding the March 18, 1991 order. On June 12, 1992, the parties submitted a report outlining the points on which they could and could not agree. *See* Parties' Report on Defendant's Motion Seeking Clarification of Order Entered March 18, 1991.

6. Additionally, the City filed a motion to dismiss and both parties filed motions for summary judgment. The court denied each of these motions. *See* December 14, 1989 Order Denying Defendant's Motion to Dismiss; September 18, 1990 Order Adopting Report and Recommendation of the Magistrate and Denying Both Parties' Motions for Summary Judgment.

Most recently, the City notified this court of its intent to evacuate two homeless "settlements" located on Watson Island and in a portion of Bicentennial Park. *See* Defendant City of Miami's Notification of Intent to Take Action, dated November 13, 1992. The City plans to remove all makeshift shelters from these locations and to arrest all homeless persons who refuse to leave. The court will address this matter by separate order after the plaintiffs have had an opportunity to respond to the City's notice.

7. The Camillus House is a privately funded, local homeless shelter run by the Brothers of the Good Shepherd.

ly have no place to store medication, no clock to determine when to take a pill, and no water with which to take it. Medical treatment of the homeless is hampered by the lack of beds and other facilities in the areas where the homeless reside. Lack of transportation further enhances the difficulty of the homeless in obtaining follow-up medical care. Improper diet and the stress of living outside can also aggravate mental illness.

Substance abuse, a component of both physical and mental illness, is also a factor contributing to homelessness. Dr. Greer testified that studies have shown that people are genetically predisposed to alcoholism, but that no such genetic link has been established with regard to drug addictions. Substance abuse also may be a consequence of being homeless. Professor Wright testified that many homeless people do not begin drinking until they become homeless; they use alcohol as a self-medication to numb both psychological and physical pain.

Chronic unemployment is another problem that many homeless face. Joblessness among homeless individuals is exacerbated by certain barriers that impede them from searching for work, such as health problems, the fact that they have no place to bathe, no legal address, no transportation and no telephone.

Professor Wright also testified that the typical day in the life of a homeless individual is predominated by a quest to obtain food and shelter. Because the lines at feeding programs are often long, some homeless individuals skip meals because they will miss obtaining a space in a shelter if they wait for food.

In summary, many of the problems described by the expert witnesses are both a cause and a consequence of homelessness. Furthermore, Dr. David F. Fike, a professor of social work and an expert on homelessness in Dade County, Florida, testified that the longer a person has been on the streets, the more likely it is that he or she will remain homeless.

The City has made laudable attempts, particularly in recent years, to assist the homeless. For example, the City resolved to participate, in conjunction with Dade County, the State of Florida and all agencies providing services to the homeless, in the development of an interim plan to provide resources to the homeless. *See* Miami City Commission Resolution No. 91–544, dated July 11, 1991. In addition, the City stopped enforcing its ordinance against sleeping in public after an Eleventh Circuit ruling called into question the validity of a similar ordinance.[8] However, many factors have frustrated the City's efforts to alleviate the problem of homelessness. Perhaps the most significant factor is the escalating number of homeless people.

The number of homeless individuals in Miami has grown at an alarming rate. According to Dr. Greer, the number of homeless treated medically at the Camillus Health Concern increased dramatically from 1984 to 1991. A disturbing aspect of the rise in homelessness is the increase in the number of families without shelter. One of the more poignant photographs in evidence shows two small children living beneath the I–395 overpass with their pregnant mother. Plaintiffs' Exhibit 26. As Dr. Greer commented, a second generation of homeless persons is being born right under our bridges.

The lack of low-income housing or shelter space cannot be underestimated as a factor contributing to homelessness. At the time of trial, Miami had fewer than 700 beds available in shelters for the homeless. Except for a fortunate few, most homeless individuals have no alternative to living in public areas.

The evidence presented at trial regarding the magnitude of the homelessness problem was overwhelming in itself. Then, shortly after the trial, one of the worst possible scenarios for homelessness occurred when Hurricane Andrew struck South Florida. Overnight, approximately 200,000 people were left without homes.

8. *See Hershey v. City of Clearwater,* 834 F.2d 937, 940 (11th Cir.1987) (finding unconstitutional portion of ordinance prohibiting sleeping in public).

In sum, this court has no difficulty in finding that the majority of homeless individuals literally have no place to go.

B. *Property of the Homeless*

While most of the evidence presented at trial focused on the arrests of the homeless, the evidence presented at earlier proceedings related primarily to the property of homeless individuals. The court incorporates by reference the findings of fact and conclusions of law set forth in the orders dated April 26, 1990, concerning the Lummus park burning incidents, and March 18, 1991, concerning the property sweeps occurring in February of 1991.

The findings of fact concerning the nature of homeless persons' property can be summarized as follows: (1) property belonging to homeless individuals is typically found in areas where they congregate or reside; (2) such property is reasonably identifiable by its nature and organization; it typically includes bedrolls, blankets, clothing, toiletry items, food, identification, and a means for transporting the property such as a plastic bag, cardboard box, suitcase or shopping cart; (3) police officers and city workers assigned to the various areas where homeless persons congregate should be well aware of the appearance of such property; (4) homeless persons often make arrangements for others to watch property in their absence; (5) the homeless often arrange their belongings in such a manner as to suggest ownership—e.g., they may lean it against a tree or other object or cover it with a pillow or blanket; (6) by its appearance, the property belonging to homeless persons is reasonably distinguishable from truly abandoned property; (7) the loss of items such as clothes and medicine affects the health and safety of homeless individuals; (8) the prospect of such losses may discourage the homeless from leaving parks and other areas to seek work or medical care; and (9) a homeless person's personal property is generally all he owns; therefore, while it may look like "junk" to some people, its value should not be discounted. *See* March 18, 1991 Order.

Although the court has discussed the importance of safeguarding the personal possessions of the homeless in these earlier orders, the seriousness of the loss of such property cannot be overemphasized. Peter Carter, one of the named plaintiffs in this case, testified at trial that after being arrested for sleeping in Bicentennial Park, he returned to the park to find that all of his personal possessions were gone and that it took him three weeks to reassemble his personal papers. This loss affected his ability to obtain work because many prospective employers required identification. As a result, Carter, who now has a job and a place to live, remained on the street just that much longer.

For many of us, the loss of our personal effects may pose a minor inconvenience. However, as Carter's testimony illustrates, the loss can be devastating for the homeless.

C. *Arrests of Homeless Individuals*

The City, as evidenced by the records presented at trial, has arrested thousands of homeless individuals from 1987 to 1990 for misdemeanors such as obstructing the sidewalk, loitering, and being in the park after hours.[9] The records show that the City arrested homeless individuals for standing, sleeping or sitting on sidewalks in violation of City of Miami Code § 37–53.1 (prohibiting obstruction of sidewalks);[10] for sleeping on benches, sidewalks or in parks in violation of Miami Code § 37–63 (prohibiting sleeping in public);[11] for sleeping in the park in violation

9. The approximately 3,500 arrest records submitted at trial were printed from a database as the result of a computerized search for arrestees who gave as their address Camillus House, a local homeless shelter, or the streets of Miami.

10. Section 37–53.1 prohibits "any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city so as to obstruct free passage over, on or along said street or sidewalk after a request by a law enforcement officer to move on so as to cease blocking or obstructing free passage thereon." Miami, Fla., Code § 37–53.1 (1990).

11. Section 37–63 provides that "[i]t shall be unlawful for any person to sleep on any of the streets, sidewalks, public places or upon the private property of another without the consent

of Miami Code § 38–3 (prohibiting being in the park after hours); [12] for loitering and prowling in violation of Florida Statutes § 856.021 and Miami Code §§ 37–34 [13] and 35; [14] and for sleeping, sitting or standing in public buildings in violation of Florida Statutes § 810.08, .09 (prohibiting trespassing).

As discussed below in greater detail, the arrest records also show that many of the arrests for being in the park after hours were made less than an hour before the park was to reopen. In addition, the narrative sections of a majority of the arrest reports indicate that the individual arrestee was not disorderly, was not involved in any drug activity, and did not pose any apparent harm to anyone. Many of the records indicate that the arrestee was doing nothing more than sleeping. Peter Carter testified that he was doing just that when he was arrested in Bicentennial Park in 1988.

Carter stated that, during the time that he was homeless, he would sleep in Bicentennial Park or near Camillus House. He preferred the park because it had a restroom and running water. While in the park, he would stay with a group of fifteen to thirty other homeless people because it was safer to do so. Carter testified that, at around midnight on the night of his arrest, police officers arrived in cars and a paddy wagon. The officers told Carter and approximately fifteen others not to move, paired them, strapped their hands, put them into the paddy wagon and took them to the station. After taking statements in a room at the station, the officers took Carter and the others to jail and detained them another hour while they checked for any outstanding warrants. The officers released Carter and the other homeless individuals at approximately 4:00 a.m. Carter then walked back to Bicentennial Park with eight to ten other people and found that all of their belongings were gone. According to Carter, he and his companions were not bothering anyone while they were in the park; at the time of the arrest, he and the others were doing nothing more than sleeping.

The testimony and the documentary evidence regarding the arrests of the homeless—in addition to the sheer volume of homeless people in the City of Miami and the dearth of shelter space—support plaintiffs' claim that there is no public place where they can perform basic, essential acts such as sleeping without the possibility of being arrested.

III. CONCLUSIONS OF LAW [15]

A. *Jurisdiction*

Plaintiffs brought this action under the United States Constitution, Amendments I, IV, V, VI, VIII, IX, and XIV; the Florida Constitution, Article I, Sections 2, 5, 9, 12, 16, 17 and 23; and 42 U.S.C. §§ 1983 and 1988. The Court has jurisdiction based on 28 U.S.C. §§ 1331 and 1343.

of the owner thereof." Miami, Fla., Code § 37–63 (1990).

12. Section 38–3 provides that public parks shall be closed to the general public from 10:00 p.m. to 7:00 a.m. Miami, Fla., Code § 38–3 (1990).

13. Section 37–34 prohibits "any person to loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity." Miami, Fla., Code § 37–34(D) (1990). The section also defines circumstances justifying alarm and immediate concern for safety as

> those circumstances where peace and order are threatened or where the safety of persons or property jeopardized. The police officer must be able to point to specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant a finding that a breach of the peace is imminent or the safety of persons or property is threatened.

Id.

14. Section 37–35 provides in pertinent part that "A person commits the offense of loitering when he knowingly: (1) Loiters on any public street, public sidewalk, public overpass, public bridge or public place so as to obstruct the passage of pedestrians and vehicles." Miami, Fla., Code § 37–35 (1990).

15. To the extent that any findings of fact constitute conclusions of law, they are adopted as such; to the extent that any conclusions of law constitute findings of fact, they are so adopted.

As noted above, the City has displayed greater sensitivity toward the homeless and has made some attempts to address the problems of homelessness, particularly in recent years. However, the City's voluntary cessation of any of the allegedly illegal conduct does not deprive this court of the power to decide this case. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632–33, 73 S.Ct. 894, 897–98, 97 L.Ed. 1303 (1953) (citations omitted). Because the plaintiffs have a reasonable expectation that the City will resume the alleged illegal treatment of the homeless that it might have ceased, and because the public has an interest in having the legality of the City's practices settled, the court is obliged to address the very difficult issues the parties have raised. *See id.* at 632, 73 S.Ct. at 897. This is so particularly where the problem of homelessness is more pervasive than ever.

B. *Municipal Liability*

[1–3] The City contends that plaintiffs have failed to establish municipal liability. Accordingly, the threshold question is whether the City may be held liable for the alleged acts. A local government may be liable under 42 U.S.C. § 1983 when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. New York City Dept. of Soc. Svcs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037–38, 56 L.Ed.2d 611 (1978). To establish such a policy or custom, plaintiffs must show a persistent and widespread practice; random acts and isolated incidents are insufficient. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988); *DePew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir.1986). A city's continued failure to prevent improper police conduct when it has knowledge of that conduct is "precisely the type of informal policy or custom that is actionable under section 1983." *Id.* at 1499.

[4] In the present case, plaintiffs have shown that the alleged arrests and unreasonable seizures of their property were not random, isolated acts. Plaintiffs presented records of the arrests of approximately 3,500 homeless individuals. As discussed in more detail below, *see* section III.D, the time of day of many of these arrests alone suggests a custom or policy by the City's police department. In addition, plaintiffs presented police department internal memoranda dated from 1986 to 1991 regarding various aspects of the arrests of the homeless. *See* Plaintiffs Exhibits 2–7. Almost all of the memoranda are directed to high-ranking police department officials or indicate some direction from other City officials. *See* section III.D (discussing internal memoranda showing, *inter alia:* City policy of driving homeless from public areas; active search for ordinances to replace anti-sleeping ordinance and to enforce against homeless who were not observed violating any laws; elimination of food distribution as strategy to disperse homeless). Plaintiffs also presented evidence of local newspaper articles about the arrests of the homeless. *See* Plaintiffs' Exhibit 8. Based on the evidence presented, this court has no difficulty in determining that policy-makers within the police department and within the City knew or should have known of the alleged arrests and violations of plaintiffs' property rights and that the City failed to take any steps to stop such conduct. Accordingly, municipal liability exists.

C. *Cruel and Unusual Punishment*

[5] Plaintiffs contend that the City's arrests of class members under various ordinances prohibit them from lying down, sleeping, standing, sitting or performing other essential, life-sustaining activities in any public place at any time. Plaintiffs argue that their status of being homeless is involuntary and beyond their immediate ability to alter and that the conduct for which they are arrested is inseparable from their involuntary homeless status. Consequently, plaintiffs argue, application of these ordinances to them is cruel and unusual in violation of the eighth amend-

ment.[16]

The judicial prohibition of status-based abuse of police power under the eighth amendment is not without precedent. In a leading United States Supreme Court case addressing the issue, the Court held that punishment of a person for his involuntary status of being an addict was cruel and unusual in violation of the eighth amendment. *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Finding the status of being an addict similar to that of being mentally or physically ill, both of which are innocent and involuntary, the Court stated the following:

> a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Id. at 666, 82 S.Ct. at 1420. The Court distinguished the punishment of the involuntary status of being an addict and the punishment of voluntary acts such as the use, purchase, sale or possession of narcotics or the disorderly behavior resulting from their use. *See id.*

Based on *Robinson,* courts have overturned vagrancy laws because they punish status or condition. In *Wheeler v. Goodman,* a district court found a vagrancy law to be constitutionally invalid because it punished mere status. 306 F.Supp. 58, 64 (W.D.N.C.1969), *vacated on other grounds,* 401 U.S. 987, 91 S.Ct. 1219, 28 L.Ed.2d 524 (1971).[17] Similarly, in *Headley v. Selkowitz,* 171 So.2d 368 (Fla.1965), the Florida Supreme Court stated that a vagrancy statute, even if facially valid, should not be applied to "innocent victims of misfortune" who appear to be vagrants, but "who are not such either by choice or intentional conduct." *Id.* at 370; *see also Goldman v. Knecht,* 295 F.Supp. 897, 907–08 (D.Colo.1969) (finding vagrancy statute that punished status unconstitutional in violation of fourteenth amendment's substantive due process limitation); *Parker v. Municipal Judge,* 83 Nev. 214, 427 P.2d 642, 644 (1967) ("It is simply not a crime to be unemployed, without funds, and in a public place. To punish the unfortunate for this circumstance debases society."); *Hayes v. Municipal Court,* 487 P.2d 974, 981 (Okla.Crim.App.1971) (quoting *Parker* with approval); *Alegata v. Commonwealth,* 353 Mass. 287, 231 N.E.2d 201, 207 (1967) ("Idleness and poverty should not be treated as a criminal offense."). Again, voluntariness of the status or condition is the decisive factor.

The Supreme Court again applied the *Robinson* principle in *Powell v. Texas,* 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). Justice Marshall, writing for a plurality of four Justices, found that the appellant was convicted not for his status as 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 appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one from being an addict, being a chronic alcoholic, being "mentally ill, or a leper."

Id. at 532, 88 S.Ct. at 2154 (quoting *Robinson,* 370 U.S. at 666, 82 S.Ct. at 1420–21).

16. The eighth amendment provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The prohibitions of the eighth amendment apply to the states through the due process clause of the fourteenth amendment. *See Robinson v. California,* 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758 (1962).

17. Unlike the plaintiffs in the present case, the plaintiffs in *Wheeler* were arrested in their own home. Nevertheless, the idea that "[i]dleness and poverty should not be treated as a criminal offense" should be no less applicable to those who have no home. 306 F.Supp. at 63 (citing *Robinson v. State of California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)).

Although the law is well-established that a person may not be punished for involuntary status, it is less settled whether involuntary conduct that is inextricably related to that status may be punished. An initial reading of *Powell* suggests that all conduct is outside the rule of *Robinson*. The plurality in *Powell* stated that

> [t]he entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms has committed some *actus reus*. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or occasioned by compulsion.

Powell, 392 U.S. at 533, 88 S.Ct. at 2154–55.

However, the *Powell* plurality was not confronted with a critical distinguishing factor that is unique to the plight of the homeless plaintiffs in this case: that they have no realistic choice but to live in public places. Justice White identified this distinction in his concurrence:

> The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*. Although many chronics have homes, many others do not. For all practical purposes the public streets may become 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.

Id. at 551, 88 S.Ct. at 2163–64 (White, J., concurring) (emphasis in original). Although Justice White joined the majority in rejecting the appellant's challenge to his conviction, he did so only because he found the record insufficient to support the appellant's claim that his alcoholic condition compelled him to appear in public while drunk. *Id.* at 549–50, 88 S.Ct. at 2162–63. In contrast, as discussed below, the record in the present case amply supports plaintiffs' claim that their homeless condition compels them to perform certain life-sustaining activities in public.

As a number of expert witnesses testified, people rarely choose to be homeless. Rather, homelessness is due to various economic, physical or psychological factors that are beyond the homeless individual's control.

Professor Wright testified that one common characteristic of homeless individuals is that they are socially isolated; they are part of no community and have no family or friends who can take them in. Professor Wright also testified that homelessness is both a consequence and a cause of physical or mental illness. Many people become homeless after losing their jobs, and ultimately their homes, as a result of an illness. Many have no home of their own in the first place, but end up on the street after their families or friends are unable to care for or shelter them. Dr. Greer testified that once a person is on the street, illnesses can worsen or occur more frequently due to a variety of factors such as the difficulty or impossibility of obtaining adequate health care, exposure to the elements, insect and rodent bites, and the absence of sanitary facilities for sleeping, bathing or cooking.[18] Both Professor Wright and Dr. Greer testified that, except in rare cases, people do not choose to live under these conditions.

18. The photographs admitted during Dr. Greer's testimony depicting various locations where homeless people sleep and congregate show the filth, the exposure, and the lack of adequate facilities. For example, the photographs show that many of the homeless individuals sleep in the dirt on top of pieces of cardboard. A number of the photographs showed that plastic bottles were a common possession of homeless individuals. Dr. Greer testified that, without a fresh water supply, many homeless persons store water in plastic jugs when they can get it.

According to Professor Wright's testimony, joblessness, like physical and mental illness, becomes more of a problem once a person becomes homeless. This is so because of the barriers homeless individuals face in searching for a job. For example, they have no legal address or telephone. Also, they must spend an inordinate amount of time waiting in line or searching for seemingly basic things like food, a space in a shelter bed or a place to bathe.

In addition to the problems of social isolation, illness and unemployment, homelessness is exacerbated by the unavailability of many forms of government assistance. Gail Lucy, an expert in the area of government benefits available to homeless people, testified that many homeless individuals are ineligible for most government assistance programs. For example, Supplemental Security Income is available only to people who are sixty-five years of age or more, who are blind or disabled and who are without other resources. Social Security Disability Insurance is available only to workers who have paid into the social security fund for five of the past ten years prior to the onset of the disability. Aid to Families with Dependent Children is available only to low-income families with physical custody of children under the age of eighteen. The only benefit that is widely available to the homeless is food stamps.

Another notable form of assistance that is unavailable to a substantial number of homeless individuals is shelter space. Lucy testified that there are approximately 700 beds available in local shelters. However, approximately 200 of these are "program beds," for which one must qualify. In addition, some of these beds are set aside for families. Given the estimated 6,000 individuals who were homeless at the time of trial and the untold number of people left homeless by Hurricane Andrew, the lack of adequate housing alternatives cannot be overstated. The plaintiffs truly have no place to go.

In sum, class members rarely choose to be homeless. They become homeless due to a variety of factors that are beyond their control. In addition, plaintiffs do not have the choice, much less the luxury, of being in the privacy of their own homes. Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places. The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless. Consequently, arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless. This effect is no different from the vagrancy ordinances which courts struck because they punished "innocent victims of misfortune" and made a crime of being "unemployed, without funds, and in a public place." *See Headley v. Selkowitz*, 171 So.2d 368, 370 (Fla.1965); *Parker v. Municipal Judge*, 83 Nev. 214, 427 P.2d 642, 644 (1967). Therefore, just as application of the vagrancy ordinances to the displaced poor constitutes cruel and unusual punishment, *see, e.g., Wheeler v. Goodman*, 306 F.Supp. 58 (W.D.N.C.1969), *vacated on other grounds*, 401 U.S. 987, 91 S.Ct. 1219, 28 L.Ed.2d 524 (1971); *Headley v. Selkowitz*, 171 So.2d 368 (Fla.1965), arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual.

The City suggests, apparently in reference to the aftermath of Hurricane Andrew, that even if homelessness is an involuntary condition in that most persons would not consciously choose to live on the streets, "it is not involuntary in the sense of a situation over which the individual has absolutely no control such as a natural disaster which results in the destruction of one's place of residence so as to render that person homeless." City's Post–Trial Proposed Findings of Fact & Conclusions of Law at 7. The court cannot accept this distinction. An individual who loses his home as a result of economic hard times or physical or mental illness exercises no more control over these events than he would over a natural disaster. Furthermore, as was established at trial, the City does not have enough shelter to house Mia-

mi's homeless residents.[19] Consequently, the City cannot argue persuasively that the homeless have made a deliberate choice to live in public places or that their decision to sleep in the park as opposed to some other exposed place is a volitional act. As Professor Wright testified, the lack of reasonable alternatives should not be mistaken for choice.

For plaintiffs, 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. Moreover, plaintiffs have not argued that the City should not be able to arrest them for public drunkenness or any type of conduct that might be harmful to themselves or to others. To paraphrase Justice White, plaintiffs have no place else to go and no place else to be. *Powell*, 392 U.S. at 551, 88 S.Ct. at 2163–64. This is so particularly at night when the public parks are closed. 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 eighth amendment—sleeping, eating and other innocent conduct. Accordingly, the court finds that defendant's conduct violates the eighth amendment ban against cruel and unusual punishment and therefore that the defendant is liable on this count.

D. *Malicious Abuse of Process*

In their claim for malicious abuse of process, plaintiffs contend that the City, through its police department, has used its legitimate arrest process for the unlawful purpose of harassing and intimidating homeless individuals to purge them from streets and parks.[20]

[6–9] An action for abuse of process lies if prosecution is initiated legitimately but is thereafter used for a purpose other than that intended by the law.[21] *See, e.g., Miami Herald Publishing Co. v. Ferre*, 636 F.Supp. 970, 974 (S.D.Fla.1985); *Dunn v. Koehring Co.*, 546 F.2d 1193, 1199 (5th Cir.1977); *Jennings v. Shuman*, 567 F.2d 1213, 1217 (3d Cir.1977); Restatement (Second) of Torts § 682. Unlike malicious prosecution, the tort of abuse of process does not involve bringing an action without justification; rather, abuse of process is a misuse of "a process justified in itself for an end other than that which it was designed to accomplish." W. Prosser, Handbook of the Law of Torts 856 (4th ed. 1971); *see also Jennings*, 567 F.2d at 1218–19 (discussing differences between malicious use and malicious abuse of process).[22]

19. The City contends there is no legal basis for demanding that it provide low-cost housing for all of the county's homeless. The lack of sufficient shelter, of course, is not the City's problem alone. However, plaintiffs are not asking the City to shoulder the entire burden of solving the homeless problem. They ask only that the City not arrest them for performing harmless acts in public areas when they have no place else to go.

20. Additionally, plaintiffs urge this court to find that the City acted with malice. The court has found isolated instances that have occurred during this litigation, such as the Lummus Park burning incidents, to be "innately offensive and repulsive." *See* April 26, 1990 Order on Plaintiffs' Second Application for Preliminary Injunction. However, contrary to plaintiffs' contention, the evidence does not show that the City's objective of removing the homeless, however insensitive or improperly executed, was undertaken maliciously.

21. The City contends that a claim for abuse of process requires some official judicial process. However, this court is unaware of any case in which a court has held that the arrest process may not serve as the basis of an abuse of process claim.

22. In *Jennings*, the court explained the difference between malicious prosecution and malicious abuse of process as follows:

> We begin by distinguishing the justification given for issuance of process from the use to which process is put. The justification may be either legitimate or illegitimate. If it is illegitimate, there is malicious use. Likewise the use to which process is put can be either legitimate or illegitimate, and, if illegitimate, there is malicious abuse. For example, if the defendant justifies issuance of process by untruthfully saying that the plaintiff solicited burglary and uses the process only to have him jailed, this is malicious use only. It is not malicious abuse because jailing is the purpose for which criminal process was intended. If the defendant has process issued based on the truthful statement that the plaintiff solicited burglary and then uses the threat of prosecution for purposes of extortion, this is malicious abuse only.

While a plaintiff must prove lack of probable cause in a malicious prosecution action, proof of this element is not required to establish malicious abuse of process. Prosser at 856; *Jennings*, 567 F.2d at 1218. No abuse of process exists when the process is used to accomplish the result for which it is created, regardless of an incidental motive of spite or ulterior purpose. *See Ferre*, 636 F.Supp. at 975 (abuse of process arises only when there has been perversion of court process to accomplish end which process was not intended by law to accomplish, or which compels party to do some collateral thing he could not legally be compelled to do) (citation omitted); *Bothmann v. Harrington*, 458 So.2d 1163, 1169 (Fla. 3d DCA1984) (no abuse of process when process is used to accomplish result for which it was created, despite incidental or concurrent ulterior motive) (citing Restatement (Second) of Torts § 682 comment b; Prosser at § 121). Applying these principles to the facts of this case, we now consider whether plaintiffs have established a claim for abuse of process.

After weighing the evidence presented at trial and at other stages of this litigation and after reviewing the numerous arrest records, *see* Plaintiffs' Exhibits 1A–1AAA, the court finds that plaintiffs have shown that the City has used the arrest process for the ulterior purpose of driving the homeless from public areas. The City's arrest sweeps in Lummus and Bicentennial Parks in February and March of 1990,[23] and the harassment of homeless residents in the City's "clean up" of those parks in February and March of 1991,[24] are two prominent examples. The existence of a strategy to disperse the homeless is also supported by the arrest records and internal memoranda that were admitted into evidence at trial. *See* Plaintiffs' Exhibits 1–7.

567 F.2d at 1218–19.

23. *See* April 26, 1990 Order on Plaintiffs' Second Application for Preliminary Injunction.

24. *See* Order Finding City in Civil Contempt of Court's April 26, 1990 Order and Providing Further Injunctive Relief; Transcript of March 13, 1991 Hearing.

1. Arrest Records

The arrest records show that a number of homeless individuals have been arrested for being in the park after hours just minutes before the park was to reopen. *See* Plaintiffs' Exhibits 1A–1AAA. In addition, a majority of the arrest records indicate that the homeless arrestee was not drunk or disorderly, was not in possession of any drugs, and generally posed no harm to himself or to anyone else; in fact, many of the officers reported that the arrestee was sound asleep and had to be awakened, that the person had no reason to be in the park except to sleep or that he or she had no place to go. The records also show that once the validity of the ordinance against sleeping in public was called into question,[25] the City resorted to other ordinances to remove homeless individuals from public areas. *Compare* Plaintiffs' Exhibits 1A–1AA (Arrest Records from 1987 through January, 1988) *with* Exhibits 1AA–1AAA (Arrest Records from February, 1988 through March, 1990) (showing significant increase in arrests under park closure, trespass and loitering ordinances after arrests under sleeping in public ordinance ceased). Indeed, some of the internal memoranda also indicate that the police department was actively looking for ordinances to replace the law against sleeping in public in order to continue arrest sweeps near Camillus House, where homeless often line up for food or shelter. *See, e.g.*, Plaintiffs' Exhibits 4G, 4J, 4K. *See also* Plaintiffs' Exhibit 3K (December 1, 1987 memorandum from police sergeant to assistant chief regarding homeless congregating near homeless shelter: "The current problem is the quick release by the Dade County Correction System resulting in the almost immediate return of derelicts back to the area. Another problem is the lack of proper legislative laws dealing with vagrants.").

25. On December 27, 1987, the Eleventh Circuit found unconstitutional part of a Clearwater ordinance against sleeping in public. *Hershey v. City of Clearwater*, 834 F.2d 937, 940 (11th Cir. 1987).

In sum, the timing of the arrests, the shift to ordinances other than the anti-sleeping law, and the memoranda indicating an active search for new ordinances and suggesting a desire to eliminate the homeless presence, all support plaintiffs' contention that, at least in the past, the arrests were made for an ulterior purpose.[26]

2. Internal Memoranda

Like the arrest records, various internal memoranda from the police department suggest that the City's primary purpose was to keep the homeless moving in order to "sanitize" the parks and streets. *See generally* Plaintiffs' Exhibits 2A–7C. For example, a park development program proposed in April of 1986 listed "vagrant control" as an item including goals of removing "undesirables" from the park and discouraging their return. *See* Plaintiffs' Exhibit 2B.

References to goals or strategies of eliminating or eradicating the presence of homeless or of getting the homeless to move out of certain locations appear throughout the memoranda. *See, e.g.,* Plaintiffs' Exhibit 7C (February 7, 1991 memo from deputy police chief to chief of police reporting that city manager instructed police department to enforce all applicable violations in city parks to "address the homeless problems"). In an April 26, 1990 memorandum dealing with citizens' complaints about homeless people begging in a certain area, the chief of police advised the city manager as follows: "There are numerous homeless people wandering around this area *that are not violating any laws.* As you know, we must see a violation of law by these people before our officers can make an arrest on a misdemeanor charge." Plaintiffs' Exhibit 6G (emphasis added). In addition, the memorandum advised that a permanent watch order would be placed on the area, that "Directed Patrol Units" would be assigned to the area to enforce all violations of law, and that merchants would be encouraged to call the police when they observed a violation. *Id.* Here, the suggestion of an active search for any reason to arrest the homeless individuals in the targeted area, particularly in light of the acknowledgment that they were not violating any laws, supports plaintiffs' position that the City had a practice of arresting homeless individuals under various ordinances for the purpose of removing them from public areas.

As some of the memoranda reveal, one particularly troubling strategy was to eliminate food sources that attracted homeless people. For example, in a December 5, 1987 memorandum to an assistant police chief, a patrol supervisor responding to a citizen complaint about "derelicts" frequenting his property identified the problem as follows: "The Camilus [sic] House by giving free food at certain times during the day, causes the poor and needy to 'camp out' [in the area] awaiting their expected nourishment." Plaintiffs' Exhibit 3L. The supervisor reported that, to solve the problem, he had assigned a unit to "arrest and/or force an extraction of the undesirables from the area," and that the arrests "produced immediate positive results." *Id.* The patrol supervisor further explained that the

> reason for the results is that because of the arrest, they are taken from the immediate area where the food is located. They are placed in the east wing of the jail where food is not served. Consequently they do not get fed. What has occurred is that the vagrants now await food in hidden areas around the Camilus House.

Id. It is unclear whether the citizen ever benefitted from these "positive results," as the officer was unable to contact him. *See also* Plaintiffs' Exhibit 6A (January 11, 1990 memo from patrol commander to police chief regarding, *inter alia,* relocation of feeding line, lack of existing law governing dispensing of food by church groups and possible use of anti-litter ordinance to arrest homeless in feeding lines).

26. Although the evidence shows the existence of the City's ulterior purpose for arresting the homeless, nothing in this order is intended to diminish the conduct of those police officers who have treated the homeless in a compassionate and humane way.

The testimony of Stuart Savedoff and Judy Phillips also suggests that the City had a strategy of eliminating food sources. Savedoff and Phillips, both participants in a feeding program for the homeless, testified that in December of 1989, police officers ordered them to stop their program and to leave the City property just as they were about to finish serving meals to several hundred homeless individuals. Savedoff testified that he asked the officer in charge if he and the other volunteers could have fifteen more minutes to serve the hundred people who remained in the feeding line. The officer refused, stating that the program was disturbing the peace. However, according to both Savedoff and Phillips, there was no one else in the area but the program volunteers and the homeless; no one was disturbing the peace or obstructing the sidewalk. Savedoff testified that the officer threatened to arrest him if he did not leave. Phillips testified that she complained about the incident to assistant city manager Herbert Bailey, who explained that the City did not want unsightly homeless people in the developing downtown area.

Finally, the testimony of various witnesses at trial substantiates plaintiffs' allegations that the arrests were made for a purpose not intended by the various ordinances. For example, Brother Paul Johnson, former Executive Director of Camillus House testified that he was regularly awakened between 4:00 and 5:00 in the morning by police who passed by the shelter and used their loudspeakers to order people sleeping outside the shelter to move along. In reference to plaintiffs' pretextual arrest claim but equally applicable here, Lou Reiter, plaintiffs' expert witness in police practices and procedures, testified that a reasonable officer would not have arrested homeless individuals for engaging in harmless conduct such as sleeping, sitting or congregating in a public area absent the City's invalid purpose of intimidating and harassing the homeless in order to dissipate them.

In summary, the arrest records, the internal police memoranda and the testimony presented at trial support plaintiffs' claim that the City used the arrest process for the ulterior purpose of harassing and dissipating the homeless.

[10, 11] However, as reprehensible as arresting homeless individuals for this purpose may be, a defendant's ulterior purpose alone is an insufficient basis for an abuse of process claim:

> Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

Prosser at 857 (footnotes omitted). In other words, abuse of process cases generally involve some form of extortion. *Bothmann v. Harrington,* 458 So.2d 1163, 1169 (Fla. 3d DCA1984). In addition, as one court from this district has made clear, the act constituting the misuse must occur *after* the process is issued. *Ferre,* 636 F.Supp. at 974.

In *Ferre,* the defendant counterclaimed that plaintiffs filed the lawsuit against him in order to drive him from office. The court determined that the defendant failed to state a claim for abuse of process because there was no "*post*-issuance of process abuse." *Id.* at 975. Similarly, in *Jennings,* the court found that the defendants' abuse of process occurred with the act, *after* process had been issued, of threatening the plaintiff with extortion. 567 F.2d at 1219; *see also Dunn v. Koehring,* 546 F.2d 1193, 1199 (5th Cir.1977) (defendant brought criminal proceedings against plaintiff and *thereafter* attempted to extort funds).

Here, although plaintiffs have marshalled substantial evidence to demonstrate that they were arrested for a purpose other than that intended by the law, they have not shown that the City performed any act beyond carrying the arrest process to its authorized conclusion. The challenged arrests were authorized by the ordinances under which they were made. As in *Ferre,* even though the arrest process may have

been initiated with the worst intentions and for the ulterior purpose of driving plaintiffs from public streets and parks, such conduct is not actionable under this claim without proof of some "post-issuance" act. Here, plaintiffs have not shown that the City committed any definite act constituting the alleged misuse that occurred after the issuance of process. Therefore, plaintiffs' malicious abuse of process claim must fail.

E. *Unreasonable Search and Seizure*

Plaintiffs next contend that the City's arrests of homeless persons are pretextual in violation of the Fourth Amendment to the United States Constitution [27] and the corresponding provision of the Florida Constitution.[28]

[12, 13] The proper inquiry for determining whether or not a seizure is pretextual is not whether the officer *could* validly have made the seizure, but whether under the same circumstances a reasonable officer *would* have made the seizure in the absence of the invalid purpose. *United States v. Smith,* 799 F.2d 704, 709 (11th Cir.1986); *see also United States v. Wilson,* 853 F.2d 869, 871 (11th Cir.1988), *cert. denied,* 488 U.S. 1041, 109 S.Ct. 866, 102 L.Ed.2d 990 (1989); *United States v. Bates,* 840 F.2d 858, 860 (11th Cir.1988) (citing *Smith,* 799 F.2d at 708–09). However, an objectively reasonable seizure is not invalid just because an officer acts out of improper motivation. *Smith,* 799 F.2d at 708–09. Rather, determination of whether a fourth amendment violation has occurred requires an " 'objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time of the challenged action taken." *Id.* at 709 (quoting *Maryland v. Macon,* 472 U.S. 463, 470–71, 105 S.Ct. 2778, 2782–83, 86 L.Ed.2d 370 (1985)).

[14] As stated, plaintiffs allege that the City has a pattern and practice of arresting homeless individuals for harmless conduct such as eating, sleeping or congregating in public when they have no place else to go. In support of their pretextual arrest claim, plaintiffs rely on the same evidence discussed in the previous section to show the City's improper purpose. They contend that, under the *Smith* analysis, no reasonable officer would have made these arrests absent the impermissible purpose of dissipating the homeless.

Unlike the courts in *Smith, Wilson,* and *Bates,* this court does not have before it the details surrounding the numerous challenged arrests. *Smith, Wilson* and *Bates* involved a single arrest with detailed evidence regarding the arresting officer's actions and the circumstances that existed at the time of the arrest. While plaintiffs have presented voluminous documentary evidence to support their contention that, in general, the City had an improper motive in arresting homeless people, plaintiffs have presented no specific evidence regarding any particular arrest. This court cannot determine whether a fourth amendment pretextual violation has occurred without being able to examine more detailed evidence related to "the facts and circumstances confronting [the arresting officer] at the time [of the arrest]." *Smith,* 799 F.2d at 709 (quoting *Maryland v. Macon,* 472 U.S. 463, 470–71, 105 S.Ct. 2778, 2782–83, 86 L.Ed.2d 370 (1985)). Accordingly, the court cannot find that any one of the arrests was objectively unreasonable in violation of the fourth amendment and therefore plaintiffs' pretextual arrest claim must fail.

27. The fourth amendment states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

28. Article I, section 12 of the Florida Constitution provides that the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures ... shall not be violated." *See* Fla. Const. art. 1, § 12.

F. *Unlawful Seizure and Taking of Property*

Plaintiffs allege that the City has a pattern and practice of seizing and destroying their personal property or forcing them to abandon it at arrest sites in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution. In addition, plaintiffs contend that the City routinely fails to follow its own inventory procedures with respect to the personal property of homeless people. In response, the City argues that plaintiffs have failed to establish that it has such a policy considering the City's written procedure regarding personal property that has been found or seized.[29] The City further argues that any interest plaintiffs have in their property is far outweighed by the government's interest in keeping public areas sanitary, in not being burdened by the logistics of handling property belonging to the homeless and in not having incriminating evidence that might be found subject to challenge. After carefully weighing the arguments of both parties in light of the relevant law, the court finds that plaintiffs' property rights are protected by the fourth amendment and that the City is liable on this count.[30]

[15, 16] The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. A search or seizure is unreasonable if the government's legitimate interests in the search or seizure outweigh the individual's legitimate expectation of privacy in the object of the search. *See Maryland v. Buie,* 494 U.S. 325, 331, 110 S.Ct. 1093, 1096, 108 L.Ed.2d 276 (1990); *Colorado v. Bertine,* 479 U.S. 367, 372, 107 S.Ct. 738, 741, 93 L.Ed.2d 739 (1987). In addition, a seizure that is initially lawful may nevertheless violate the fourth amendment if "there is some meaningful interference with an individual's pos-

29. The City claims that the acts that gave rise to this Court's orders dated April 26, 1990 and March 18, 1991 were aberrations or random conduct, which do not amount to a pattern or practice of violating plaintiffs' property rights. *See City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). However, as discussed herein, plaintiffs presented substantial evidence at trial showing that the City has a pattern and practice of arresting homeless individuals for the purpose of dissipating them. The evidence presented at trial and at earlier proceedings further indicates that the arrests and confiscations of property were pursuant to a City policy and that City officials were aware of such a policy towards the homeless. *See also* March 18, 1991 Order at 18 (regarding existence of a custom or practice of confiscating and destroying homeless persons' property); *cf. Stone v. Agnos,* 960 F.2d 893, 896 (9th Cir.1992) (rejecting homeless man's claim that his property, which was seized after he refused to leave public plaza, was destroyed in violation of the fourth amendment because neither mayor nor police chief effected destruction and such destruction was against city policy).

30. The court further finds that the City's seizure and destruction of plaintiffs' personal property violate the fifth amendment, which prohibits the taking of private property for public use without just compensation. U.S. Const. amend. V.

The City argues that plaintiffs' fifth amendment claim must fail because they have not shown that their property was taken for a "public use." However, the United States Supreme Court has defined "public use" very broadly. *See Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 240, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984). In *Midkiff,* the Court stated that "[t]he "public use" requirement is ... coterminous with the scope of a sovereign's police powers," *id.,* and that the proper test is whether "exercise of the eminent domain power is rationally related to a conceivable public purpose," *id.* at 241, 104 S.Ct. at 2329. In rejecting the argument that the government must use or possess the condemned property, the Court stated that "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." *Id.* at 244, 104 S.Ct. at 2331. Similarly, under the *Midkiff* analysis, the fact that the City does not actually use or possess the property taken from the homeless does not mean that there is no "public use," and therefore no taking under the fifth amendment.

Although the evidence does substantiate plaintiffs' claim that there have been "takings" of class members' property, the more difficult question in this case is how plaintiffs may be "justly compensated." The Supreme Court has defined "just compensation" as placing the property owner in the same position monetarily as he would have been if his property had not been taken. *United States v. Reynolds,* 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970). The court is unable to address this issue based on the evidence presented. Consequently, the issue of "just compensation" will have to be the subject of a separate evidentiary hearing.

sessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). For the reasons discussed below, we have no difficulty concluding that the gathering and destruction of class members' personal property is a meaningful interference with their possessory interest in that property. Balancing the "nature and quality of the intrusion on the [class members'] fourth amendment interests against the importance of the governmental interests alleged to justify the intrusion," such seizures unquestionably have more than a "*de minimis* impact" on the property interests of the homeless. *See Jacobsen*, 466 U.S. at 125, 104 S.Ct. at 1663. The more difficult question is whether an individual has a legitimate privacy interest in property that is seized in a public area.

[17] Determining the nature of any legitimate expectation of privacy plaintiffs have in their personal property involves two inquiries: first, whether the individual has a subjective expectation of privacy in the belongings; and second, whether that expectation is one that society is prepared to recognize as reasonable. *See Wells v. Florida*, 402 So.2d 402, 404 (Fla.1981) (citing *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

[18] Based on the evidence presented at trial and at earlier proceedings in this case, the court finds that plaintiffs have exhibited a subjective expectation of privacy in their belongings and personal effects. Evidence presented at the March, 1991 hearing showed that the class members maintain their belongings—e.g., bags or boxes of personal effects and bedrolls—in a manner strongly manifesting an expectation of privacy. *See* March 18, 1991 Order at 21. As this court previously found, property belonging to homeless individuals is reasonably identifiable by its appearance and its organization in a particular area. *Id.* Typical possessions of homeless individuals include bedrolls, blankets, clothing, toiletry items, food and identification, and are usually contained in a plastic bag, cardboard box, suitcase or some other type of container. In addition, homeless individuals often arrange their property in a manner that suggests ownership, for example, by placing their belongings against a tree or other object or by covering them with a pillow or blanket. *Id.* Such characteristics make the property of homeless persons reasonably distinguishable from truly abandoned property, such as paper refuse or other items scattered throughout areas where plaintiffs reside. Additionally, when class members leave their living areas for work or to find food, they often designate a person to remain behind to secure their belongings. Thus, whether or not they are present at their living site, plaintiffs exhibit a subjective expectation that their property will remain unmolested until they return.

Given plaintiffs' subjective expectation of privacy in their property, we must address the more difficult question of whether that expectation is legitimate, i.e., whether society is prepared to recognize plaintiffs' expectation of privacy as reasonable. Courts have identified several factors indicating whether or not a person's expectation of privacy in a particular place is one that society is prepared to recognize as reasonable. The two most relevant factors are whether the person occupying the property is a trespasser, *see Rakas v. Illinois*, 439 U.S. 128, 143–44 n. 12, 99 S.Ct. 421, 430–31 n. 12, 58 L.Ed.2d 387 (1979) (suggesting that wrongful presence on property supports no reasonable expectation of privacy); *United States v. Ruckman*, 806 F.2d 1471, 1473–74 (10th Cir.1986) (holding that person with no legal right to occupy land had no reasonable expectation of privacy in structure built thereon), and whether the property is left in a manner readily accessible and exposed to the public, *see California v. Greenwood*, 486 U.S. 35, 40–41, 108 S.Ct. 1625, 1628–29, 100 L.Ed.2d 30 (1988) (finding no reasonable expectation of privacy in garbage bags, or their contents, left for collection outside the home). Given these two factors, we must review the facts in the present case to determine whether society is prepared to recognize

privacy rights in the plaintiffs' property. Before doing so, however, it is worthwhile to emphasize that

> factors such as whether the [party asserting the privacy right] was a trespasser and whether the place involved was public "are, of course, relevant as helpful guides, but should not be undertaken mechanistically. They are not ends in themselves; they merely aid in evaluating the ultimate question in all fourth amendment cases—whether the defendant had a legitimate expectation of privacy, in the eyes of our society, in the area searched."

State v. Mooney, 218 Conn. 85, 588 A.2d 145, 153–54 (quoting *United States v. Ruckman,* 806 F.2d at 1476 (McKay, J., dissenting)), *cert. denied,* — U.S. ——, 112 S.Ct. 330, 116 L.Ed.2d 270 (1991).

In *Mooney,* the court found that the homeless defendant had a reasonable expectation of privacy in the contents of his duffel bag and box, which he kept under the bridge abutment where he slept. 588 A.2d at 154. In so finding, the court considered society's high degree of deference to expectations of privacy in closed containers, the fact that the containers were located in a place that the defendant regarded as his home and the fact that, because the defendant was under arrest, he could not be at the place he regarded as his home to assert his fourth amendment rights when the search occurred. *Id.* at 160. Under these circumstances, the court concluded that "society's code of values and notions of custom and civility would cause it to recognize as reasonable the defendant's expectation of privacy in his duffel bag and box." *Id.* at 161. The court further stated the following:

> [t]he interior of [these items is], in effect, the defendant's last shred of privacy from the prying eyes of outsiders, including the police. Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy, and would recognize it as reasonable under the circumstances of this case.

Id. Similarly, the interior of the bedrolls and bags or boxes of personal effects belonging to homeless individuals in this case is perhaps the last trace of privacy they have. In addition, the property of homeless individuals is often located in the parks or under the overpasses that they consider their homes. As in *Mooney,* under the circumstances of this case, it appears that society is prepared to recognize plaintiffs' expectation of privacy in their personal property as reasonable.

Having determined that plaintiffs have a legitimate expectation of privacy in their personal property, the next consideration is whether the government's interest in searching or seizing the property of homeless individuals outweighs the individuals' expectation of privacy in their property. The City identifies three factors constituting its interest.

First, the City argues that any contraband or incriminating evidence that might be found during the process of inventorying homeless persons' property would be subject to challenge as "fruit of the poisonous tree." While the government has a legitimate interest in this area, the court cannot overlook the plaintiffs' interest in having their fourth amendment rights protected. This is so particularly where, as the *Mooney* court recognized, the interior of the bags, bundles or other containers in which homeless persons carry their belongings is the "last shred of privacy" they have. *Mooney,* 588 A.2d at 161. As in *Mooney,* this court finds that such property is protected by the fourth amendment, and that, if improperly seized, such seizure *should* be subject to challenge.

Second, the City contends that logistical problems associated with gathering, inventorying and storing personal property belonging to homeless persons will be unduly burdensome. Here, the City refers to its own written policy for handling personal property and found property. *See* Defendant's Exhibit 3 (describing "Policy for Handling Evidence, Found Property and Personal Property"). The policy requires, among other things, that property taken into custody by a police officer be marked,

tagged and packaged and that all containers be opened and the contents inventoried. *Id.* The court appreciates the City's concern about becoming a "clearinghouse" for personal property. However, following its own established procedure in treating the property of a homeless individual should place no more of a burden on the City than it does with respect to the property of any other person. For example, a homeless person's bedroll should be no more difficult to handle than a picnic blanket; possessions that are contained in a plastic bag, box or cloth bundle should be no more burdensome to inventory or store than possessions contained in a suitcase or a briefcase. In fact, the City's written policy regarding treatment of personal property expressly includes bags and boxes in its definition of containers.[31] Additionally, contrary to the concern expressed by the City, the City would not be expected to gather and store mattresses, cardboard shelters, lumber or illegally possessed shopping carts. The City would be required to do no more than to follow its own written policy.

Third, the City asserts its interest in having clean parks and streets. The court recognizes the City's interest in keeping its parks and public areas clear of unsightly and unsafe items. However, the City's interest in having clean parks is outweighed by the more immediate interest of the plaintiffs in not having their personal belongings destroyed. As this court previously found, the loss of items such as clothes and medicine threatens the already precarious existence of homeless individuals by posing health and safety hazards; additionally, the prospect of such losses may discourage them from leaving the parks and other areas to seek work, food or medical attention. *See* March 18, 1991 Order at 20. Furthermore, as provided in the March 18, 1991 Order, the City would not be prohibited from taking appropriate measures to guard against dangerous conditions posed by items such as mattresses with exposed springs. *Id.* at 22.

31. The policy defines containers as including, but not limited to, bags, boxes, briefcases and luggage. *See* Defendant's Exhibit 3.

[19] In sum, the property of homeless individuals is due no less protection under the fourth amendment than that of the rest of society. Requiring the City to follow its own written policy with respect to the property of the homeless class members should not be significantly more burdensome than it is with respect to any other property. Accordingly, the court finds the City liable for its unlawful seizures of class members' property.

G. *Due Process, Privacy and Decisional Autonomy*

1. Right to Privacy and Decisional Autonomy

Plaintiffs contend that the City's arrests of homeless individuals for essential activities such as sleeping, eating, standing and congregating in public violate their fundamental privacy rights. In support of this contention, plaintiffs cite Article I, Section 23 of the Florida Constitution, which provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life." Plaintiffs also rely on the Florida Supreme Court's interpretation of this provision:

> One of [the] ultimate goals of [this provision] is to foster the independence and individualism which is a distinguishing mark of our society and which can thrive only by assuring a zone of privacy into which not even government may intrude without invitation or consent.
>
> The right of privacy, assured to Florida's citizens, demands that individuals be free from uninvited observation of or interference in those aspects of their lives which fall within the ambit of the zone of privacy.

Shaktman v. State, 553 So.2d 148, 150 (Fla.1989).

[20] Once a plaintiff shows that the government has intruded into a fundamental right of privacy, the government must show that the challenged regulation or act

serves a compelling state interest through the least intrusive means. *Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Reg.*, 477 So.2d 544, 547 (Fla. 1985). In *Winfield*, the court recognized that it is the state, not the federal government, which is responsible for the protection of personal privacy, *id.* at 547–48 (citing *Katz v. United States*, 389 U.S. 347, 350–51, 88 S.Ct. 507, 510–11, 19 L.Ed.2d 576 (1967)), and noted that Florida has a stronger right of privacy and greater protection from governmental intrusion than is found in the United States Constitution. *Id.* at 548. However, the court also stated that the right to privacy is not an absolute shield against all governmental intrusion and that it will yield to a compelling governmental interest. *Id.* at 547. Furthermore, before the right of privacy attaches, "a reasonable expectation of privacy must exist." *Stall v. State*, 570 So.2d 257, 260 (Fla.1990), *cert. denied, Long v. Florida*, — U.S. —, 111 S.Ct. 2888, 115 L.Ed.2d 1054 (1991) (quoting *Winfield*, 477 So.2d at 547).

[21] We first consider whether the zone of privacy protected by Article I, Section 23, of the Florida Constitution covers such acts as sleeping, eating or lying down in public. In determining whether a reasonable expectation of privacy exists, we look to the individual's expectation of privacy regardless of whether society recognizes that expectation as reasonable. *Shaktman*, 553 So.2d at 153 (Ehrlich, C.J., concurring). On the other hand, the "emphasis on each individual's expectations of privacy does not mean that the individual's subjective expectations are dispositive." *Id.* Rather, in any given case, the court must consider all the circumstances to determine whether an individual has a legitimate expectation of privacy. *Id.*

Plaintiffs argue that the essential, harmless activities which they are forced to conduct in public areas fall within the broad brush of Florida's right to privacy provision. Although, as discussed above, plaintiffs have shown a reasonable expectation of privacy in their personal effects, based partly on the high degree of deference to expectations of privacy in closed containers, they have not demonstrated a reasonable expectation of privacy in performing certain activities in public places. While the focus of the right-to-privacy inquiry is the person, not the place, *see Shaktman*, 553 So.2d at 151; *Winfield*, 477 So.2d at 548, in analyzing whether a reasonable expectation of privacy exists, we cannot ignore the fact that the activities at issue in this case take place in public areas. Even in *Shaktman*, where the court placed great emphasis on the broad reach of Florida's protection of privacy rights, one factor the court considered in finding that an individual had a right to privacy in telephone records was the fact that the records were not open to the public. *Id.* at 151; *see also id.* at 153 (Ehrlich, C.J., concurring); *Stall*, 570 So.2d at 262 (holding that, although Florida's right to privacy is broader than federal right, the right to possess obscene material in the home does not equate to the right to sell it publicly).

The *Shaktman* court reasoned that although the telephone company had access to the records, the expectation of privacy was not defeated where there was no intention that the records would be divulged to any other party. *Id.* at 151 (quoting *People v. Sporleder*, 666 P.2d 135, 141 (Colo. 1983)). Implicit in the court's reasoning is that Shaktman's expectation of privacy would have been defeated, or at least diminished, if the telephone records had been open to the public. In the present case, where plaintiffs are in the unfortunate position of having to perform certain life-sustaining activities in public, this court has difficulty finding that they have a reasonable expectation of privacy in those activities.

In addition, the cases on which plaintiffs rely provide little support for their privacy argument because the cases involve either public disclosure of personal matters or government interference with personal decisionmaking. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 680, 54 L.Ed.2d 618 (1978) (recognizing individual's right to marry part of fundamental "right of privacy" implicit in fourteenth amendment's due process clause); *Roe v.*

Wade, 410 U.S. 113, 152–55, 93 S.Ct. 705, 726–28, 35 L.Ed.2d 147 (1973) (addressing individual's decision to terminate pregnancy); *Griswold v. Connecticut*, 381 U.S. 479, 481–86, 85 S.Ct. 1678, 1680–83, 14 L.Ed.2d 510 (1965) (extending right of privacy to protect individual's decision about contraception); *In re Guardianship of Browning*, 568 So.2d 4, 10 (Fla.1990) (holding that right of privacy requires courts to safeguard individual's right to choose or refuse medical treatment); *In re T.W.*, 551 So.2d 1186, 1193 (Fla.1989) (extending freedom of choice concerning abortion encompassed by Florida's privacy amendment to minors); *Shaktman v. State*, 553 So.2d 148, 150 (Fla.1989) (finding privacy rights implicated by law enforcement's installation of pen register device on individual's telephone). In contrast to each of these cases, none of the activities for which plaintiffs seek protection under article I, section 23 involves public disclosure or government intrusion into matters that involve personal decisionmaking.

[22, 23] In sum, the law does not yet recognize an individual's legitimate expectation of privacy in such activities as sleeping and eating in public. Therefore, the court respectfully rejects plaintiffs contention that such activities fall within the ambit of Article I, Section 23 of the Florida Constitution and the corresponding claim.

2. Procedural Due Process [32]

[24, 25] Plaintiffs further contend that, as applied to them, the challenged ordinances violate their right to due process. To review, these ordinances prohibit sleeping in public, being in a public park after hours, obstructing the sidewalk, loitering and prowling and trespassing on public property.

The procedural due process guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution require that a criminal law be clear and precise, not overbroad. However, a law may be overbroad, even if it is clear and precise, if it reaches conduct that is constitutionally protected, *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972), or conduct that is beyond the reach of the state's police power. *Fenster v. Leary*, 20 N.Y.2d 309, 282 N.Y.S.2d 739, 229 N.E.2d 426, 428 (1967).

A number of courts have overturned vagrancy and loitering statutes on due process grounds after finding them unconstitutionally vague. Before an individual may be criminally punished, he or she must be given fair notice of what type of conduct is prohibited. *Lanzetta v. New Jersey*, 306 U.S. 451, 452, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). Therefore, if a person of ordinary intelligence is unable to ascertain from the language of a statute what conduct will subject him to criminal penalties, the statute is unconstitutionally vague. *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954). For example, writing for a unanimous Court in a leading United States Supreme Court case, Justice Douglas stated that a Jacksonville, Florida vagrancy ordinance was void for vagueness because it failed to give fair notice of the forbidden conduct and because it encouraged arbitrary arrests and convictions. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). In *Kolender v. Lawson*, the Supreme Court overturned a California loitering statute that punished failure by any person wandering the streets to produce credible identification when so requested by a police officer. 461 U.S. 352, 361, 103 S.Ct. 1855, 1860, 75 L.Ed.2d 903 (1983). The Court held that this statute, like the vagrancy law invalidated in *Papachristou*, was too vague to satisfy the requirements of due process. *Id.* 461 U.S. at 358, 103 S.Ct. at 1858; *see also Ricks v. District of Columbia*, 414 F.2d 1097, 1100 (D.C.Cir.1968) (holding vagrancy law unconstitutional where it did not provide "reasonable degree of guidance

32. Plaintiffs also contend that the City's actions violate the substantive component of the due process clause. Because the same standard would apply under the equal protection analysis, *see* text *infra*, the court finds it unnecessary to address separately the issues plaintiffs advance in their substantive due process argument.

to citizens, the police and the courts as to just what constitutes the offenses with which appellant is charged").

Courts also have overturned vagrancy and loitering statutes on due process grounds after finding them overbroad. A statute is overbroad when it reaches constitutionally protected conduct or conduct which is beyond the police power of the state to regulate. *See Sawyer v. Sandstrom,* 615 F.2d 311, 318 (5th Cir.1980) (striking Dade County's loitering statute as unconstitutionally overbroad because it punished essentially innocent association in violation of first amendment associational rights); *Fenster v. Leary,* 20 N.Y.2d 309, 282 N.Y.S.2d 739, 229 N.E.2d 426, 428 (1967) (finding statute violated due process and constituted overreaching of police power because it criminalized conduct that in no way impinged on others' rights and had only tenuous connection with prevention of crime and preservation of the public order); *City of Seattle v. Drew,* 70 Wash.2d 405, 423 P.2d 522, 525 (1967) (holding statute prohibiting wandering at night violated due process where it did not distinguish between "conduct calculated to harm and that which is essentially innocent").

Like the vagrancy and loitering statutes, courts have overturned statutes against sleeping in public on overbreadth grounds. In *State v. Penley,* the court declared unconstitutional an anti-sleeping ordinance which provided as follows: "No person shall sleep upon or in any street, park, wharf or other public place (Code 1955, ch. 25, § 47)." *State v. Penley,* 276 So.2d 180, 180 (Fla. 2d DCA1973). The court noted the similarity between the anti-sleeping ordinance and most vagrancy laws, namely, that both punish unoffending behavior. *Id.* at 181. The court further reasoned that the ordinance drew no distinction between conduct that is calculated to harm and that which is essentially innocent, that the ordinance failed to provide fair notice of the forbidden conduct, and that the ordinance could result in arbitrary and erratic convictions. *Id.* (citations omitted). Similarly, another Florida court partially invalidated an ordinance prohibiting sleeping in cars parked on public streets because the ordinance criminalized conduct that "in no way impinge[d] on the rights or interests of others." *City of Pompano Beach v. Capalbo,* 455 So.2d 468, 470–71 (Fla. 4th DCA1984), *cert. denied,* 474 U.S. 824, 106 S.Ct. 80, 88 L.Ed.2d 65 (1985) (quoting *Lazarus v. Faircloth,* 301 F.Supp. 266, 272 (S.D.Fla.1969)). The court found that such conduct was beyond the scope of the city's police power. *Id. But see Seeley v. State,* 134 Ariz. 263, 655 P.2d 803 (Ariz.App.1982) (finding ordinance prohibiting lying, sleeping or sitting on public streets or sidewalks constitutional).

The City maintains that plaintiffs' due process claim must fail because none of the challenged ordinances is facially vague. However, plaintiffs have not challenged any of the ordinances on vagueness grounds; [33] rather, plaintiffs contend that the ordinances are overbroad, as applied to them, because they reach conduct that is beyond the reach of the City's police power. In addition, plaintiffs do not argue that the challenged ordinances should be stricken. Rather, as in their eighth amendment argument, plaintiffs ask that the City be enjoined from arresting homeless individuals for harmless, involuntary conduct. We now consider plaintiffs' due process claim based on overbreadth.

As with their eighth amendment argument, plaintiffs challenge the City's practice, under any ordinance, of arresting homeless individuals for harmless acts that they are forced to perform in public. For example, arresting a homeless person under the park closure ordinance may reach

33. Accordingly, this court does not reach the question of whether any of the ordinances is facially vague. We do note however, that some of the ordinances appear to be subject to challenge on facial vagueness grounds. For example, the ordinance against disorderly conduct, which provides that a "person shall be deemed guilty of disorderly conduct who: ... (2) [i]s idle, dissolute or found begging," Miami, Fla., Code § 37–17 (1990), would probably not survive a facial challenge under *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

any number of innocent and essential acts such as sleeping, lying down, or eating.

At first glance, it appears that the law of this circuit may not support plaintiffs' overbreadth claim. In analyzing a challenge to an anti-sleeping ordinance on overbreadth grounds, the Eleventh Circuit has stated as follows:

> The concept of overbreadth will usually only apply when a case involves constitutionally protected conduct. Such a challenge will be upheld only when "the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *Village of Hoffman Estates v. Flipside,* 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). Nothing in the pertinent ordinance is aimed at curbing expressive conduct; the sleeping prohibited appears to be "of the general kind, which enjoys no peculiar constitutional advantage." *People v. Davenport,* 222 Cal.Rptr. 736, 738, 176 Cal.App.3d Supp. 10 (Cal.Super.1985), *cert. denied,* 475 U.S. 1141, 106 S.Ct. 1794, 90 L.Ed.2d 339 (1986). The overbreadth challenge, then, would probably fail because the Clearwater ordinance did not reach a substantial amount of constitutionally protected activity (and probably reached no constitutionally protected conduct at all): it was in the nature of a valid exercise of the city's broad police powers.

Hershey v. City of Clearwater, 834 F.2d 937, 940 n. 5 (11th Cir.1987) (citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). Arguably, based on the above-quoted footnote in *Hershey,* plaintiffs have not established that the park closure ordinance, or any other ordinance, "reaches a substantial amount of constitutionally protected conduct." *Id.* The acts of sleeping, sitting down or eating in themselves are not constitutionally protected. However, unlike *Hershey,* under the unique circumstances of this case, the challenged ordinances as applied to class members do implicate constitutionally protected rights under the eighth amendment and, as discussed in greater detail below, the equal protection clause of the fourteenth amendment.

While sleeping "of the general kind" may "enjoy no peculiar constitutional advantage," *id.,* under the facts of this case arresting plaintiffs for performing innocent conduct in public places—in particular, for being in a park or on public streets at a time of day when there is no place where they can lawfully be—most definitely interferes with their right under the constitution to be free from cruel and unusual punishment and, as will be addressed, their right to freedom of movement. Thus, plaintiffs have shown that the challenged ordinances as applied to them are overbroad to the extent that they result in class members being arrested for harmless, inoffensive conduct that they are forced to perform in public places. Accordingly, the court finds the City liable as to this count.

H. *Equal Protection*

[26] The equal protection clause of the fourteenth amendment prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." In other words, it requires that all persons similarly situated be treated alike. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). The general rule is that legislation is presumed to be valid and should be sustained if the classification it draws is rationally related to a legitimate state interest. *Id.* at 440, 105 S.Ct. at 3254. However, when government actions discriminate on the basis of a suspect classification, such as race, alienage or national origin, they are subject to strict scrutiny and will be sustained only if they are "suitably tailored to serve a compelling state interest." *Id.* Actions or statutes that classify by gender or illegitimacy are also subject to heightened scrutiny and will be sustained only if they are substantially related to a sufficiently important state interest. *Id.* at 440–41, 105 S.Ct. at 3254–55. In addition, government classifications that infringe on constitutionally protected rights also require heightened scrutiny. *See Attorney General of New York v. Soto-Lopez,* 476 U.S. 898, 904, 106 S.Ct.

2317, 2321, 90 L.Ed.2d 899 (1986) (plurality opinion).

1. Suspect Class

Plaintiffs claim that they are a suspect class based on their involuntary status of being homeless. They argue that, because there are only two types of property in this country, public and private, and because the homeless have no access to private property, they are an insular minority which has no place to retreat from the public domain.

A classification is suspect if it is directed to a "discrete and insular minority." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938). As stated, courts have found that race, alienage, national origin, and to a lesser degree, gender and illegitimacy, are suspect classes. *See, e.g., Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254. However, the United States Supreme Court repeatedly has held that classifications based on wealth alone are not suspect. *See, e.g., Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458, 108 S.Ct. 2481, 2487, 101 L.Ed.2d 399 (1988) ("We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny.") (citing *Harris v. McRae*, 448 U.S. 297, 322–23, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980) (noting that poverty, standing alone, is not a suspect classification); *Maher v. Roe*, 432 U.S. 464, 470–71, 97 S.Ct. 2376, 2380–81, 53 L.Ed.2d 484 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."); *Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S.Ct. 1172, 1175, 35 L.Ed.2d 572 (1973) (rejecting argument that filing fee discriminates against poor where no suspect classification such as race, nationality or alienage is present). *See also Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1269 n. 6 (3d Cir.1992) (summarily concluding that homeless do not constitute a suspect class).

In concluding that poverty is not a suspect classification, the Supreme Court has stated as follows:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973). This court is not entirely convinced that homelessness as a class has none of these "traditional indicia of suspectness." It can be argued that the homeless are saddled with such disabilities, or have been subjected to a history of unequal treatment or are so politically powerless that extraordinary protection of the homeless as a class is warranted. However, resolution of this issue is beyond the scope of the evidence presented at trial and, in any event, is unnecessary for, as discussed below, we resolve the question of the appropriate standard to apply based on our determination that the City has infringed upon plaintiffs' fundamental right to travel.

2. Fundamental Rights

Plaintiffs claim that the City's actions have infringed directly on their fundamental right to engage in life-sustaining activities in public and indirectly on their fundamental right to travel.

Plaintiffs argue that the life-sustaining activities they must perform in public are "fundamental" rights. However, plaintiffs have offered no legal support for their contention that these are rights that a court may recognize as "fundamental" for purposes of equal protection analysis. On the other hand, the United States Supreme Court has long recognized the right to travel as a fundamental constitutional right. For example, in *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), the Court held that any classification penalizing the exercise of the fundamental right to travel is unconstitutional

absent a showing that it is necessary to promote a compelling governmental interest. *Id.* at 634, 89 S.Ct. at 1330; *see also Attorney General of New York v. Soto–Lopez,* 476 U.S. 898, 902 n. 2, 106 S.Ct. 2317, 2321 n. 2, 90 L.Ed.2d 899 (1986) (stating that right to travel receives "its most forceful expression in the context of equal protection analysis") (quoting *Zobel v. Williams,* 457 U.S. 55, 67, 102 S.Ct. 2309, 2316, 72 L.Ed.2d 672 (1982) (Brennan, J., concurring)); *Sosna v. Iowa,* 419 U.S. 393, 409–10, 95 S.Ct. 553, 562–63, 42 L.Ed.2d 532 (1975) (addressing right to travel in context of due process analysis); *United States v. Guest,* 383 U.S. 745, 757, 86 S.Ct. 1170, 1177, 16 L.Ed.2d 239 (1966) (noting that constitutional right to travel is fundamental right that has been "firmly established and repeatedly recognized").

Although the Supreme Court has not directly addressed the question of whether the right to travel includes intrastate travel, the Court has found that arresting individuals for loitering or wandering on public streets without identification "implicates consideration of the constitutional right to freedom of movement." *Kolender v. Lawson,* 461 U.S. 352, 358, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); *see also Papachristou v. City of Jacksonville,* 405 U.S. 156, 164, 92 S.Ct. 839, 844, 31 L.Ed.2d 110 (1972) (stating that "wandering and strolling" are "historically part of the amenities of life as we have known them"). In addition, lower courts specifically have found that the right extends to travel that occurs within one state. *See, e.g., King v. New Rochelle Municipal Housing Auth.,* 442 F.2d 646, 648 (2d Cir.) (finding five-year residency requirement for state-subsidized housing violated rights of interstate and intrastate plaintiffs), *cert. denied,* 404 U.S. 863, 92 S.Ct. 113, 30 L.Ed.2d 107 (1971); *Lutz v. City of York,* 899 F.2d 255, 268 (3d Cir. 1990) ("the right to move freely about one's neighborhood or town ... is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history' ") (citation omitted); *Stoner v. Miller,* 377 F.Supp. 177, 180 (E.D.N.Y.1974) ("It is immaterial whether travel is interstate or intrastate."); *see also* Ades, *The Constitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel,* 77 Cal.L.Rev. 595, 609–13 (1989) (hereafter *"Antihomeless Laws"*) (discussing decisions supporting fundamental right to intrastate travel). In *King,* the court stated that it would be "meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." 442 F.2d at 648. Based on this line of cases, the City's arrests of the homeless may burden their fundamental right to travel even if the effect on their freedom of movement occurs only intrastate.

The right to travel can be burdened in a number of ways. For example, in *Shapiro v. Thompson* the Supreme Court struck down statutes denying welfare assistance to residents who had not resided in a state for at least one year on the grounds that the statutes effectively penalized interstate travel. 394 U.S. at 634, 89 S.Ct. at 1330. The court stated that "moving from State to State or to the District of Columbia, appellees were exercising a constitutional right, and any classification which serves to penalize that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Id.* (citations omitted) (emphasis in original). Similarly, in *Memorial Hospital v. Maricopa County,* the Court found that a statute which conditioned free medical care on a one-year residency requirement violated the equal protection clause because it penalized the exercise of the right to travel by denying a basic "necessity of life." 415 U.S. 250, 259, 94 S.Ct. 1076, 1082, 39 L.Ed.2d 306 (1974). The Court further held that actual deterrence of travel was not a requisite to finding a violation of the equal protection clause. *Id.* at 257–58, 94 S.Ct. at 1081–82 (citing *Dunn v. Blumstein,* 405 U.S. 330, 339–40, 92 S.Ct. 995, 1001–02, 31 L.Ed.2d 274 (1972) (finding durational-residence requirement for voter registration penalized the right to travel)).

In *Edwards v. California,* 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941), the Su-

preme Court held unconstitutional a law prohibiting the transportation of "indigents" into California. While the majority based its decision on the commerce clause, four Justices concluded that the statute impermissibly erected a barrier to interstate travel by indigents. Justice Douglas found that the challenged statute "prevents a citizen because he [is] poor from seeking new horizons in other States." *Id.* at 181, 62 S.Ct. at 170 (Douglas, J., concurring). Also finding that the statute infringed upon the right to travel, Justice Jackson stated as follows:

> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but also is a short-sighted blow at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights.

Id. at 182, 62 S.Ct. at 171 (Jackson, J., concurring).

Courts also have found that laws infringe on the right to travel where their primary objective is to impede migration. One court struck a zoning ordinance that limited the construction of new homes because its express purpose and intended and actual effect was to exclude large numbers of people who otherwise would have immigrated to the city. *See Construction Industry Association v. City of Petaluma,* 375 F.Supp. 574, 581 (N.D.Cal.1974), *rev'd on other grounds,* 522 F.2d 897 (9th Cir. 1975).

One commentator argues persuasively that anti-sleeping ordinances can burden the right to travel of homeless individuals when they create direct barriers to travel, are intended to impede travel or penalize migration. *Antihomeless Laws* at 616. This is so particularly when no alternative shelters are available because laws that prevent homeless individuals from seeking shelter in the limited areas that do exist result in their facing the choice of being arrested for violating the law or of leaving the jurisdiction altogether.[34]

[27, 28] Like the anti-sleeping ordinances, the City's enforcement of laws that prevent homeless individuals who have no place to go from sleeping, lying down, eating and performing other harmless life-sustaining activities burdens their right to travel. As the Supreme Court explained, laws penalize travel if they deny a person a "necessity of life," such as free medical care. *Memorial Hosp.,* 415 U.S. at 258–59, 94 S.Ct. at 1082–83. Similarly, preventing homeless individuals from performing activities that are "necessities of life," such as sleeping, in any public place when they have nowhere else to go effectively penalizes migration. Indeed, forcing homeless individuals from sheltered areas or from public parks or streets affects a number of "necessities of life"—for example, it deprives them of a place to sleep, of minimal safety and of cover from the elements.

In addition to depriving homeless individuals of certain life necessities, arresting them for such harmless conduct also acts as a deterrent to their movement. Although, unlike the anti-sleeping ordinances, the park closure ordinance is not in effect twenty-four hours a day, homeless individuals are subject to arrest for being in public places under other ordinances, for example, for loitering or for obstructing the sidewalk. The evidence overwhelmingly shows that plaintiffs have no place where they can be without facing the threat of arrest. Given the vast number of homeless individuals and the disproportionate lack of shelter space, the plaintiffs truly have no place to go. Because they offer no protection from the elements or from crime, many of the plaintiffs' choices for alternative shel-

34. For example, even where there is available space in a shelter, it may not be a viable alternative "if, as is likely, the shelter is dangerous, drug infested, crime-ridden, or especially unsanitary.... Giving one the option of sleeping in a space where one's health and possessions are seriously endangered provides no more choice than does the option of arrest and prosecution." *Antihomeless Laws* at 620 n. 183.

ter—e.g., the space under bridges or the streets—cannot be considered reasonable or realistic choices at all. Consequently, the enforcement of ordinances, e.g., against being in the park after hours or against loitering, effectively bans homeless individuals from all public areas and denies them a single place where they can be without violating the law. Like the anti-sleeping ordinances, enforcement of the challenged ordinances against homeless individuals significantly burdens their freedom of movement. It has the effect of preventing homeless people from coming into the City. Primarily, however, it has the effect of expelling those already present and of significantly burdening their freedom of movement within the City and the state. For example, a homeless person who is forced to sleep in public must keep moving within the city or leave it altogether to avoid being arrested.

Finally, as discussed above, various internal memoranda admitted into evidence at trial indicate that, at least in the past, the primary purpose behind enforcing the challenged ordinances against homeless persons was to drive them from public areas. *See* Plaintiffs' Exhibits 2–7. This purpose was also evidenced by the arrest records showing the shift to other ordinances for arresting homeless individuals after the City stopped enforcing the ordinance against sleeping in public and by the internal memoranda revealing the City's active search for laws to replace the anti-sleeping ordinance.

In sum, whether characterized as a penalty, a deterrent or a purposeful expulsion, enforcement of the ordinances against the homeless when they have absolutely no place to go effectively burdens their right to travel. Having concluded that arresting class members infringes upon their right to travel, we next consider whether the City's action of arresting plaintiffs for harmless, life-sustaining conduct serves a compelling state interest through the least intrusive means.

The interests advanced by the City to justify the arrests of homeless individuals for conduct such as congregating under bridges, lying down on public sidewalks or being in the park after hours may be summarized as follows. The City contends that it has a compelling interest in keeping its parks and streets free of litter, vandalism and general deterioration; in preventing crime and ensuring safety in public parks; and in promoting tourism, business and the development of the downtown area, which are negatively affected by the presence of the homeless. We must weigh these interests to determine whether or not they are compelling and, if so, whether they are accomplished through the least intrusive means.

The City claims that it has a compelling interest in maintaining its parks and public areas, an interest which is related to its desire to promote tourism, business and the downtown area. The City has a legitimate interest in having aesthetically pleasing parks and streets and in maintaining facilities in public areas. However, this interest is not compelling, especially in light of the necessity of homeless persons to be in some public place when no shelter is available. The Supreme Court has recognized the governmental interest in park maintenance as being only "substantial," [35] which does not satisfy the "compelling governmental interest" standard. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 31–34, 89 S.Ct. 5, 10–12, 21 L.Ed.2d 24 (1968) (finding compelling state interest standard not satisfied despite existence of substantial and desirable governmental interests). Similarly, the City's interest in promoting tourism and business and in developing the downtown area are at most substantial, rather than compelling, interests.

Even assuming these asserted interests

35. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296, 104 S.Ct. 3065, 3070, 82 L.Ed.2d 221 (1984) (recognizing government interest in maintaining park as "substantial" in upholding prohibition against camping, includ-

could be considered compelling,[36] the City could certainly accomplish them through some manner that is less intrusive than arresting homeless individuals. Provision of alternative shelter and services would be the ideal means of accomplishing the same goals. However, in the absence of available shelter space or funds for services, the parks and streets could be cleaned and maintained without arresting the homeless. For example, the City could ask homeless individuals to relocate temporarily to another public area while maintenance crews work on a particular site. It could also establish regular times for each park to be cleaned so that homeless individuals would know not to be in a certain park on a particular day. Instead of arresting homeless individuals for being in the park after hours, the City could allow them to stay in a designated area in exchange for maintaining that area. Similarly, promotion of tourism and business and the development of the downtown area could be accomplished without arresting the homeless for inoffensive conduct. Because the City's interests in maintaining public areas and in promoting tourism and business can be achieved without arresting homeless individuals, these interests cannot justify the burden that the arrests place on the right to travel.

The City further contends that it has a compelling interest in ensuring that its parks are free of crime. The court recognizes the tremendous responsibility that the City has and agrees that the City's interest in this regard is a compelling one. However, the City has not shown that arresting the homeless for being in the park after hours when they have no place else to go is the least intrusive means of addressing the interest in crime prevention.[37]

The City claims that the arrests are necessary, or at least justified, because unlike the arrests made under vagrancy ordinances, the arrests of homeless individuals under various ordinances are effected after citizens file complaints and police officers observe other criminal activity. However, the arrests records and the internal police memoranda refute this contention. This evidence shows that numerous arrests were made not in response to citizen complaints, but as a result of police sweeps targeting areas where the homeless were known to reside or congregate.

The City further argues that it would be disingenuous to ignore the criminal element among the homeless. However, there is a criminal element among all of society, not just among the homeless. The United States Supreme Court, in rejecting the idea that criminality can be ascribed to the unfortunate, stated that no one can seriously contend that a person without funds and without a job constitutes a "moral pestilence." *Edwards v. California,* 314 U.S. 160, 177, 62 S.Ct. 164, 168, 86 L.Ed. 119 (1941). The Court further stated that "[p]overty and immorality are not synonymous." *Id.; see also Papachristou,* 405 U.S. at 171, 92 S.Ct. at 848 (criticizing presumption of criminality in vagrancy statutes). In fact, the City presented no evidence that a homeless person committed any of the crimes reported in the citizen complaints. Furthermore, as the narrative sections of the arrest records show, many of the homeless individuals arrested under the park closure ordinance were doing nothing more than sleeping. *See* Plaintiffs' Exhibits 1A–1AAA.

In addressing a recent first amendment challenge by homeless people to a statute prohibiting begging, one court considered whether arresting homeless individuals for begging was a sufficiently narrow means of serving the government's interest in preserving public order and preventing crime. *Loper v. New York City Police Dept.,* 802 F.Supp. 1029, 1046 (S.D.N.Y.1992). The court stated as follows:

ing ban on sleeping overnight, in national parks).

36. The City's interest in maintaining public areas for the purpose of preventing health hazards would be compelling.

37. As is implicit in this order, the court does not in any manner intimate that police officers should not arrest promptly any of the homeless for any criminal activity.

> A peaceful beggar poses no threat to society. The beggar has arguably only committed the offense of being needy. The message one or one hundred beggars sends society can be disturbing. If some portion of society is offended, the answer is not in criminalizing those people, debtor's prisons being long gone, but addressing the root cause of their existence. The root cause is not served by removing them from sight, however; society is then just able to pretend that they do not exist a little longer.

Id. Similarly, although the idea of homeless people sleeping in public parks may disturb or offend some portion of society, the answer is not in arresting individuals who have arguably only committed the offense of being without shelter. There exist other means of preventing crime that are less drastic than arresting the homeless for harmless conduct that poses no threat to society. Rather than arrest the homeless, the City could increase police patrols of the park. It could allow homeless persons who have no alternative place to sleep to remain in a limited area instead of banishing them from the park entirely. In addition, the City could issue warnings to both homeless and non-homeless people about high-crime areas. In short, arresting homeless people is not the least intrusive means of achieving the City's compelling interest in preventing crime in public parks. Accordingly, the court rejects the City's contention that its interest in crime prevention justifies the infringement on the fundamental right to travel.

In summary, arresting homeless individuals for such harmless acts as sleeping, eating, or lying down in public generally serves no compelling governmental interest. Furthermore, in no case are such arrests the least intrusive means of accomplishing the City's interests. Consequently, arresting the homeless for the harmless acts which they are forced to perform in public infringes on their fundamental right to travel.

IV. CONCLUSION

For the reasons set forth above, the court finds that plaintiffs have established that the City has a policy and practice of arresting homeless individuals for the purpose of driving them from public areas. The court concludes that the City's practice of arresting homeless individuals for performing inoffensive conduct in public when they have no place to go is cruel and unusual in violation of the eighth amendment, is overbroad to the extent that it reaches innocent acts in violation of the due process clause of the fourteenth amendment and infringes on the fundamental right to travel in violation of the equal protection clause of the fourteenth amendment. The court further concludes that the City's seizure of plaintiffs' personal property violates their fourth amendment rights. For these reasons, the court finds that plaintiffs' claim for injunctive relief is warranted.

As a threshold matter, this court finds that it can fashion relief with the specificity required by Rule 65(d) of the Federal Rules of Civil Procedure. Unlike December of 1988, when this court denied plaintiffs' application for injunctive relief because it was unable to redress the general allegation of "harassment" of homeless individuals with the requisite specificity, the court now has before it plaintiffs' more detailed allegations of specific conduct. Additionally, the court has had the benefit of having heard substantial evidence, which brings greater definition to the problems of homelessness as they affect both parties.

Obviously, the ideal solution would be to provide housing and services to the homeless. However, assembling and allocating such resources is a matter for the government—at all levels—to address, not for the court to decide. Rather, our immediate task is to fashion relief that accommodates the two predominant interests in this litigation. First, such relief must protect the homeless from one approach that clearly is not the answer to homelessness, that is, arresting homeless people for innocent, involuntary acts. Second, any relief granted must not unduly hamper the City's ability to preserve public order. For these reasons and for the reasons set forth above in the findings of fact and conclusions of law, it is

ORDERED AND ADJUDGED that

(1) The City's practice of arresting homeless individuals for the involuntary, harmless acts they are forced to perform in public is unconstitutional because such arrests are cruel and unusual in violation of the eighth amendment, reach innocent and inoffensive conduct in violation of the due process clause of the fourteenth amendment and burden the fundamental right to travel in violation of the equal protection clause; and

(2) The City's practice of seizing and destroying the property of homeless individuals without following its own written procedure for handling found or seized personal property violates plaintiffs' rights under the fourth amendment. Accordingly, it is further

ORDERED AND ADJUDGED that plaintiffs' request for injunctive relief is granted as follows:

(3) The City, through its Police Department, is enjoined from arresting homeless individuals who are forced to live in public for performing innocent, harmless, inoffensive acts such as sleeping, eating, lying down or sitting in at least two public areas to be agreed upon by the parties;

(4) Counsel for both parties are directed to meet within fifteen (15) days from the date of this order to establish two "safe zones" where homeless people who have no alternative shelter can remain without being arrested for harmless conduct such as sleeping or eating. In establishing these arrest-free zones, counsel should consider the proximity of the areas to feeding programs, health clinics and other services. In addition, the parties are encouraged to develop a procedure for maintaining the areas.[38] Counsel are directed to submit a joint report within thirty (30) days regarding the outcome of their meeting.

(5) Until the parties reach an agreement on two arrest-free zones, the City is enjoined from arresting homeless individuals for sleeping or eating in a portion of Bicentennial Park to be designated by the City and in the area beneath the I–395 overpass that is still occupied by the homeless;

(6) The court emphasizes that nothing in this order prevents the City from arresting any individual for any criminal activity or for any conduct that is harmful to others or to himself. In addition, nothing in this order affects the ability of police officers to make arrests on private property;

(7) As in the March 18, 1991 order, the City, through the Police Department or any other city department, is enjoined from destroying property which it knows or reasonably should know belongs to homeless individuals. In determining whether property belongs to the homeless, police officers and other city officials should consider factors such as the nature and appearance of the items. As discussed above, property belonging to the homeless is typically located in areas where the homeless congregate or reside and is often arranged in a manner suggesting ownership;

(8) In addition, the City shall follow its own written procedure concerning the handling of personal property and found property. *See* Defendant's Exhibit 3 (describing "Policy for Handling Evidence, Found Property and Personal Property"). This requirement does not apply to property that poses a health or safety hazard; and

(9) To avoid hindering the City's ability to maintain public parks, while at the same time protecting plaintiffs' property interests, the City is encouraged to arrange the cleaning schedule agreed to by the parties in their June 12, 1992 report. *See* Parties' Report on Defendant's Motion Seeking Clarification of Order Entered March 18, 1991, filed June 12, 1992 (D.E. 250) (setting forth parties' agreement, at least during pendency of suit, as to procedure for handling property of homeless). The City is also directed to provide the public with at least five days' notice of the days and times that particular parks will be cleaned. This

38. For example, a cleaning schedule could be established which would involve the participation of homeless individuals in maintaining the areas where they are permitted to stay.

will enable homeless individuals to move their property temporarily from the area scheduled to be cleaned to a nearby place designated by the City.

Finally, it is ORDERED AND ADJUDGED that

(10) Plaintiffs' Unopposed Motion to Supplement Trial Record with Exhibits (D.E. 271) is GRANTED.

DONE AND ORDERED.

BAXTER, Associate Justice.

I. BACKGROUND

In October 1992, Santa Ana added article VIII, section 10–400 et seq. (the ordinance) to its municipal code. The declared purpose of the ordinance was to maintain public streets and other public areas in the city in a clean and accessible condition. Camping and storage of personal property in those areas, the ordinance recited, interfered with the rights of others to use those areas for the purposes for which they were intended.

The ordinance provides:

"Sec. 10–402. Unlawful Camping.
"It shall be unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in the following areas, except as otherwise provided:
"(a) any street;
"(b) any public parking lot or public area, improved or unimproved.

"Sec. 10–403. Storage of Personal Property in Public Places.
"It shall be unlawful for any person to store personal property, including camp facilities and camp paraphernalia, in the following areas, except as otherwise provided by resolution of the City Council:
"(a) any park;
"(b) any street;
"(c) any public parking lot or public area, improved or unimproved."[1]

Plaintiffs in these consolidated actions are: (1) homeless persons and taxpayers who appealed from a superior court order which struck "to live temporarily in a camp facility or outdoors" from the ordinance, but otherwise denied their petition for writ of mandate by which they sought to bar enforcement of the ordinance (Tobe), and (2) persons who, having been charged with violating the ordinance, demurred unsuccessfully to the complaints and thereafter sought mandate to compel the respondent municipal court to sustain their demurrers (Zuckernick).

Plaintiffs offered evidence to demonstrate that the ordinance was the culmination of a four-year effort by Santa Ana to expel homeless persons. There was evidence that in 1988 a policy was developed to show "vagrants" that they were not welcome in the city. To force them out, they were to be continually moved from locations they frequented by a task force from the city's police and recreation and parks departments; early park closing times were to be posted and strictly enforced; sleeping bags and accessories were to be disposed of; and abandoned shopping carts were to be confiscated. Providers of free food were to be monitored; sprinklers in the Center Park were to be turned on often; and violations of the city code by businesses and social service agencies in that area were to be strictly enforced. This effort led to a lawsuit which the city settled in April 1990.

Santa Ana then launched an August 15, 1990, sweep of the civic center area arresting and holding violators for offenses which included blocking passageways, drinking in public, urinating in public, jaywalking, destroying vegetation, riding bicycles on the sidewalk, glue sniffing, removing trash from a bin, and violating the fire code. Some conduct involved nothing more than dropping a match, leaf, or piece of paper, or jaywalking. The arrestees were handcuffed and taken to an athletic

[1] Section 10–401 of the ordinance defines the terms:
"(a) *Camp* means to pitch or occupy camp facilities; to use camp paraphernalia.
"(b) *Camp facilities* include, but are not limited to, tents, huts, or temporary shelters.
"(c) *Camp paraphernalia* includes, but is not limited to, tarpaulins, cots, beds, sleeping bags, hammocks or non-city designated cooking facilities and similar equipment.
"(d) *Park* means the same as defined in section 31–1 of this Code.
"(e) *Store* means to put aside or accumulate for use when needed, to put for safekeeping, to place or leave in a location.
"(f) *Street* means the same as defined in section 1–2 of this Code."

field where they were booked, chained to benches, marked with numbers, and held for up to six hours, after which they were released at a different location. Homeless persons among the arrestees claimed they were the victims of discriminatory enforcement. The municipal court found that they had been singled out for arrest for offenses that rarely, if ever, were the basis for even a citation.

In October 1990, Santa Ana settled a civil action for injunctive relief, agreeing to refrain from discriminating on the basis of homelessness, from taking action to drive the homeless out of the city, and from conducting future sweeps and mass arrests. That case, which was to be dismissed in 1995, was still pending when the camping ordinance was passed in 1992.

Evidence in the form of declarations regarding the number of homeless and facilities for them was also offered. In 1993 there were from 10,000 to 12,000 homeless persons in Orange County and 975 permanent beds available to them. When National Guard armories opened in cold weather, there were 125 additional beds in Santa Ana and another 125 in Fullerton. On any given night, however, the number of shelter beds available was more than 2,500 less than the need.

The Court of Appeal majority, relying in part on this evidence, concluded that the purpose of the ordinance—to displace the homeless—was apparent. On that basis, it held that the ordinance infringed on the right to travel, authorized cruel and unusual punishment by criminalizing status, and was vague and overbroad. The city contends that the ordinance is constitutional on its face. We agree. We also conclude that, if the Tobe petition sought to mount an as applied challenge to the ordinance, it failed to perfect that type of challenge.

II. PRELIMINARY CONSIDERATIONS

A. Facial or As Applied Challenge.

Plaintiffs argue that they have mounted an as applied challenge to the ordinance as well as a facial challenge. While they may have intended both, we conclude that no as applied challenge to the ordinance was perfected. The procedural posture of the Zuckernick action precludes an as applied challenge, which may not be made on demurrer to a complaint which does not describe the allegedly unlawful conduct or the circumstances in which it occurred. The Tobe plaintiffs did not clearly allege such a challenge or seek relief from specific allegedly impermissible applications of the ordinance. Moreover, assuming that an as applied attack on the ordinance was stated, the plaintiffs did not establish that the ordinance has been applied in a constitutionally impermissible manner either to themselves or to others in the past.

Because the Court of Appeal appears to have based its decision in part on reasoning that would be appropriate to a constitutional challenge based on a claim that, as applied to particular defendants, the Santa Ana ordinance was invalid, we must first consider the nature of the challenge made by these petitioners.

1. The Tobe petition.

[A]n as applied challenge assumes that the statute or ordinance violated is valid and asserts that the manner of enforcement against a particular individual or individuals or the circumstances in which the statute or ordinance is applied is unconstitutional. All of the declarants who had been cited under the ordinance described conduct in which they had engaged and that conduct appears to have violated the ordinance. None describes an impermissible means of enforcement of the ordinance or enforcement in circumstances that violated the constitutional rights the petition claimed had been violated. None demonstrated that the circumstances in which he or she was cited affected the declarant's right to travel. None states facts to support a conclusion that any punishment, let alone cruel and unusual punishment proscribed by the Eighth Amendment, had been imposed. Since no constitutionally impermissible pattern, or even single instance, of constitutionally impermissible enforcement was shown, no injunction against such enforcement could be issued and none was sought by plaintiffs.

Because the Tobe plaintiffs sought only to enjoin *any* enforcement of the ordinance and did not demonstrate a pattern of unconstitutional enforcement, the petition must be considered as one which presented only a facial challenge to the ordinance.

2. The Zuckernick petition.

None of the complaints in the Zuckernick proceedings included any allegations identifying the defendant as an involuntarily homeless person whose violation of the ordinance was involuntary and/or occurred at a time when shelter beds were unavailable. Although the petition for writ of mandate included allegations regarding Santa Ana's past efforts to rid the city of its homeless population, those allegations, even if true, were irrelevant to the legal sufficiency of the complaints.

Therefore, while we are not insensitive to the importance of the larger issues petitioners and amici curiae seek to raise in these actions, or to the disturbing nature of the evidence which persuaded the Court of Appeal to base its decision on what it believed to be the impact of the ordinance on homeless persons, the only question properly before the municipal and superior courts and the Court of Appeal for decision was the facial validity of the ordinance.

This court's consideration will, therefore, be limited to the facial validity of the ordinance.

B. Motive of Legislators.

The Court of Appeal also considered the evidence of Santa Ana's past attempts to remove homeless persons from the city significant evidence of the purpose for which the ordinance was adopted. It then considered that purpose in assessing the validity of the ordinance. While the intent or purpose of the legislative body must be considered in construing an ambiguous statute or ordinance, the motive of the legislative body is generally irrelevant to the validity of the statute or ordinance.

The Court of Appeal relied in part on *Pottinger v. City of Miami* (S.D.Fla.1992) 810 F.Supp. 1551, 1581, for its assumption that consideration of the motives of the Santa Ana City Council may be considered in assessing the validity of the ordinance. That is not the rule in this state, but even were it so, *Pottinger* was not a challenge to the facial validity of the Miami ordinance in question there. Moreover, the district court's conclusion that the ordinance was invalid as applied was not based on the motives of the legislators in enacting the ordinance. The court considered internal memoranda and evidence of arrest records as evidence of the purpose underlying *enforcement* of the ordinance against homeless persons.

Absent a basis for believing that the ordinance would not have been adopted if the public areas of Santa Ana had been appropriated for living accommodation by any group other than the homeless, or that it was the intent of that body that the ordinance be enforced only against homeless persons, the ordinance is not subject to attack on the basis that the city council may have hoped that its impact would be to discourage homeless persons from moving to Santa Ana.

We cannot assume … that the sole purpose of the Santa Ana ordinance was to force the homeless out of the city. The city had agreed to discontinue such attempts when it settled the prior litigation. The record confirms that the city faced a problem common to many urban areas, the occupation of public parks and other public facilities by homeless persons. Were we to adopt the approach suggested by the dissent, any facially valid ordinance enacted by a city that had once acted in a legally impermissible manner to achieve a permissible objective could be found invalid on the basis that its past conduct established that the ordinance was not enacted for a permissible purpose. Absent evidence other than the enactment of a facially valid ordinance, we cannot make that assumption here.

III. FACIAL VALIDITY OF THE SANTA ANA ORDINANCE

A. Right to Travel.

Although no provision of the federal Constitution expressly recognizes a right to travel among and between the states, that right is recognized as a

fundamental aspect of the federal union of states. "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." (*Passenger Cases* (1849) 48 U.S. (7 How.) 283, 492, 12 L.Ed. 702 (dis. opn. of Taney, C.J.).)

In the *Passenger Cases, supra,* 48 U.S. (7 How.) 283 the court struck down taxes imposed by the States of New York and Massachusetts on aliens who entered the state from other states and countries by ship. The basis for the decision, as found in the opinions of the individual justices, was that the tax invaded the power of Congress over foreign and interstate commerce. The opinion of Chief Justice Taney, in which he disagreed with the majority on the commerce clause issue, also addressed the tax as applied to citizens of the United States arriving from other states. That tax he believed to be impermissible. Some later decisions of the court trace recognition of the constitutional right of unburdened interstate travel to that opinion. (See, e.g., *Shapiro v. Thompson* (1969) 394 U.S. 618, 630. And, relying on the dissenting opinion of the Chief Justice in the *Passenger Cases,* the court struck down a tax on egress from the State of Nevada in *Crandall v. Nevada* (1867) 73 U.S. (6 Wall.) 35, 18 L.Ed. 745, holding that the right of interstate travel was a right of national citizenship which was essential if a citizen were to be able to pass freely through another state to reach the national or a regional seat of the federal government.

Other cases find the source of the right in the privileges and immunities clause. In *Paul v. Virginia* (1868) 75 U.S. (8 Wall.) 168, 19 L.Ed. 357, the court rejected a challenge predicated on the privileges and immunities clause made by a corporation to a tax imposed by the State of Virginia on out-of-state insurance companies. In so doing, it recognized interstate travel as a right guaranteed to citizens. "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; *it gives them the right of free ingress into other States, and egress from them;* it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws." (*Id.,* at p. 180, italics added.)

In the *Slaughter–House Cases* (1872) 83 U.S. (16 Wall.) 36, the court equated the rights protected by the privileges and immunities clause to those in the corresponding provision of the Articles of Confederation which provided that the inhabitants of each state were to have " 'the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State....' "

The privileges and immunities clause was also the source of the right of interstate travel as an incident of national citizenship. The right to travel, or right of migration, now is seen as an aspect of personal liberty which, when united with the right to travel, requires "that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."

In a line of cases originating with *Shapiro v. Thompson,* the court has considered the right to travel in the context of equal protection challenges to state laws creating durational residency requirements as a condition to the exercise of a fundamental right or receipt of a state benefit. In those cases the court has held that a law which *directly* burdens the fundamental right of migration or interstate travel is constitutionally impermissible. Therefore a state may not create classifications which, by imposing burdens or restrictions on newer residents which do not apply to all residents, deter or penalize migration of persons who exercise their right to travel to the

state.

In *Shapiro,* where public assistance was denied residents who had lived in the state for less than one year, the court held that durational residence as a condition of receiving public assistance constituted invidious discrimination between residents, and that if a law had no other purpose than chilling the exercise of a constitutional right such as that of migration of needy persons into the state the law was impermissible. Further, "any classification which serves to penalize the exercise of [the right of migration], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."

Next, durational residence requirements for voting were struck down by the court in *Dunn v. Blumstein* (1972) 405 U.S. 330.

The court's focus on whether the law directly burdened, by penalizing, interstate travel continued in *Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250, in which a durational residence requirement for indigent, nonemergency medical care at county expense was challenged. The court held that the restriction denied newcomers equal protection, impinged on the right to travel by denying basic necessities of life, and penalized interstate migration.

In each of these cases the court had before it a law which denied residents a fundamental constitutional right (voting) or a governmental benefit (public assistance, medical care) on the basis of the duration of their residence. The law created two classes of residents. In *Zobel v. Williams* (1982) 457 U.S. 55, where the right to share in oil revenues was based on the duration of residence in Alaska, the court noted that the right to travel analysis in those cases, which did not create an actual barrier to travel, was simply a type of equal protection analysis. "In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents. In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents."

The right of intrastate travel has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution.

Neither the United States Supreme Court nor this court has ever held, however, that the incidental impact on travel of a law having a purpose other than restriction of the right to travel, and which does not discriminate among classes of persons by penalizing the exercise by some of the right to travel, is constitutionally impermissible.

By contrast, in a decision clearly relevant here, a zoning law which restricted occupancy to family units or nonfamily units of no more than two persons was upheld by the Supreme Court, notwithstanding any incidental impact on a person's preference to move to that area, because the law was not aimed at transients and involved no fundamental right. (*Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 7.

Courts of this state have taken a broader view of the right of intrastate travel, but have found violations only when a direct restriction of the right to travel occurred.

This court has also rejected an argument that any legislation that burdens the right to travel must be subjected to strict scrutiny and sustained only if a compelling need is demonstrated.

We do not question the conclusion of the Court of Appeal that a local ordinance which forbids sleeping on public streets or in public parks and other public places may have the effect of deterring travel by persons who are unable to afford or obtain other accommodations in the location to which they travel. Assuming that there may be some state actions short of imposing a direct barrier to migration or denying benefits to a newly arrived resident which violate the right to travel, the ordinance does not do so. It is a nondiscrimi-

natory ordinance which forbids use of the public streets, parks, and property by residents and nonresidents alike for purposes other than those for which the property was designed. It is not constitutionally invalid because it may have an incidental impact on the right of some persons to interstate or intrastate travel.

As we have pointed out above, to succeed in a facial challenge to the validity of a statute or ordinance the plaintiff must establish that " 'the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions.' " All presumptions favor the validity of a statute. The court may not declare it invalid unless it is clearly so.

Since the Santa Ana ordinance does not on its face reflect a discriminatory purpose, and is one which the city has the power to enact, its validity must be sustained unless it cannot be applied without trenching upon constitutionally protected rights. The provisions of the Santa Ana ordinance do not inevitably conflict with the right to travel. The ordinance is capable of constitutional application. The ordinance prohibits "any person" from camping and/or storing personal possessions on public streets and other public property. It has no impact, incidental or otherwise, on the right to travel except insofar as a person, homeless or not, might be discouraged from traveling to Santa Ana because camping on public property is banned. An ordinance that bans camping and storing personal possessions on public property does not directly impede the right to travel. Even assuming that the ordinance may constitute an incidental impediment to some individuals' ability to travel to Santa Ana, since it is manifest that the ordinance is capable of applications which do not offend the Constitution in the manner suggested by petitioners and the Court of Appeal, the ordinance must be upheld.

Our conclusion that the Santa Ana ordinance does not impermissibly infringe on the right of the homeless, or others, to travel, finds support in the decision of the United States District Court in *Joyce v. City and County of San Francisco* (1994) 846 F.Supp. 843. The plaintiffs, on behalf of a class of homeless individuals, sought a preliminary injunction to prevent implementation of a program of enforcement (the Matrix Program) of state and municipal laws which were commonly violated by the homeless residents of the City. Among the laws to be enforced were those banning "camping" or "lodging" in public parks and obstructing sidewalks. It was claimed, inter alia, that the Matrix Program infringed on the right to travel. The court rejected that argument and refused to require the City to show a compelling state interest to justify any impact the program might have on the right of the class members to travel. It noted that the program was not facially discriminatory as it did not distinguish between persons who were residents of the City and those who were not. In so doing, the court suggested that the opinion of the Court of Appeal in this case was among those which constituted extensions of the right to travel that appeared to be "unwarranted under the governing Supreme Court precedent." We agree.

The right to travel does not, as the Court of Appeal reasoned in this case, endow citizens with a "right to live or stay where one will." While an individual may travel where he will and remain in a chosen location, that constitutional guaranty does not confer immunity against local trespass laws and does not create a right to remain without regard to the ownership of the property on which he chooses to live or stay, be it public or privately owned property.

Moreover, lest we be understood to imply that an as applied challenge to the ordinance might succeed on the right to travel ground alone, we caution that, with few exceptions, the creation or recognition of a constitutional right does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy that right. Santa Ana has no constitutional obligation to make accommodations on or in public property available to the transient homeless to facilitate their exercise of the right to travel. and on the Mall in the nation's capital violated the First Amendment rights of the demonstrators. The

court held that it did not, as other areas were available for the purpose. *Clark* dealt with an affirmative right—that of free speech—which could be restricted in public fora only by reasonable, content-neutral time, place and manner restrictions. (*Id.* at p. 293, 104 S.Ct. at p. 3069). The court expressly recognized the authority of the National Park Service "to promulgate rules and regulations for the use of the

The Court of Appeal erred in holding that the Santa Ana ordinance impermissibly infringes on the right of the homeless to travel.

B. Punishment for Status.

The Court of Appeal invalidated the ordinance for the additional reason that it imposed punishment for the "involuntary status of being homeless." On that basis the court held the ordinance was invalid because such punishment violates the Eighth Amendment prohibition of cruel and unusual punishment, and the ban on cruel or unusual punishment of article I, section 17 of the California Constitution. We disagree with that construction of the ordinance and of the activity for which punishment is authorized. The ordinance permits punishment for proscribed conduct, not punishment for status.

The holding of the Court of Appeal is not limited to the face of the ordinance, and goes beyond even the evidence submitted by petitioners. Neither the language of the ordinance nor that evidence supports a conclusion that a person may be convicted and punished under the ordinance solely on the basis that he or she has no fixed place of abode. No authority is cited for the proposition that an ordinance which prohibits camping on public property punishes the involuntary status of being homeless or, as the Court of Appeal also concluded, is punishment for poverty. *Robinson v. California* (1962) 370 U.S. 660, on which the court relied, dealt with a statute which criminalized the status of being addicted to narcotics. The court made it clear, however, that punishing the conduct of using or possessing narcotics, even by an addict, is not impermissible punishment for status.

A plurality of the high court reaffirmed the *Robinson* holding in *Powell v. State of Texas* (1968) 392 U.S. 514, where it rejected a claim that punishment of an alcoholic for being drunk in public was constitutionally impermissible. "The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus.* It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'"

[T]he Supreme Court has not held that the Eighth Amendment prohibits punishment of acts derivative of a person's status. Indeed, the district court questioned whether "homelessness" is a status at all within the meaning of the high court's decisions. "As an analytical matter, more fundamentally, homelessness is not readily classified as a 'status.' Rather, as expressed for the plurality in *Powell* by Justice Marshall, there is a 'substantial definitional distinction between a "status" ... and a "condition"....' While the concept of status might elude perfect definition, certain factors assist in its determination, such as the involuntariness of the acquisition of that quality (including the presence or not of that characteristic at birth), and the degree to which an individual has control over that characteristic."

The declarations submitted by petitioners in this action demonstrate the analytical difficulty to which the *Joyce* court referred. Assuming arguendo the accuracy of the declarants' descriptions of the circumstances in which they were cited under the ordinance, it is far from clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations.

The Court of Appeal erred, therefore, in concluding that the ordinance is invalid because it permits punishment for the status of being indi-

gent or homeless.

C. Vagueness and Overbreadth.

The Court of Appeal concluded that the Santa Ana ordinance was vague and overbroad. It based its vagueness conclusion on the nonexclusive list of examples of camping "paraphernalia" and "facilities" in the definitions of those terms. Those definitions were so unspecific, the court reasoned, that they invited arbitrary enforcement of the ordinance in the unfettered discretion of the police. The overbreadth conclusion was based on reasoning that the ordinance could be applied to constitutionally protected conduct. In that respect the court held that the verb "store" was overbroad as it could be applied to innocent conduct such as leaving beach towels unattended at public pools and wet umbrellas in library foyers.

1. Vagueness.

The Tobe respondents and the People, real party in interest in the Zuckernick matter, argue that the Court of Appeal failed to apply the tests enunciated by the United States Supreme Court and this court in applying the vagueness doctrine. It has isolated particular terms rather than considering them in context. We agree.

A penal statute must define the offense with sufficient precision that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." "The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of 'life, liberty, or property without due process of law,' as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7)."

To satisfy the constitutional command, a statute must meet two basic requirements: (1) the statute must be sufficiently definite to provide adequate notice of the conduct proscribed; and (2) the statute must provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. Only a reasonable degree of certainty is required, however. The analysis begins with "the strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.' "

The Court of Appeal erred in holding that the ordinance is unconstitutionally vague. The terms which the Court of Appeal considered vague are not so when the purpose clause of the ordinance is considered and the terms are read in that context as they should be. Contrary to the suggestion of the Court of Appeal, we see no possibility that any law enforcement agent would believe that a picnic in a public park constituted "camping" within the meaning of the ordinance or would believe that leaving a towel on a beach or an umbrella in a library constituted storage of property in violation of the ordinance.

The stated purpose of the ordinance is to make public streets and other areas readily accessible to the public and to prevent use of public property "for camping purposes or storage of personal property" which "interferes with the rights of others to use the areas for which they were intended." No reasonable person would believe that a picnic in an area designated for picnics would constitute camping in violation of the ordinance. The ordinance defines camping as occupation of camp facilities, living temporarily in a camp facility or outdoors, or using camp paraphernalia. The Court of Appeal's strained interpretation of "living," reasoning that we all use public facilities for "living" since all of our activities are part of living, ignores the context of the ordinance which prohibits living not in the sense of existing, but dwelling or residing on public property. Picnicking is not living on public property. It does not involve occupation of "tents, huts, or temporary shelters" "pitched" on public property or residing on public property.

Nor is the term "store" vague. Accumulating or putting aside items, placing them for safekeeping, or leaving them in public parks, on public streets, or in a public parking lot or other public area is prohibited by the ordinance. When read in light of the express purpose of the ordinance—to avoid interfering with use of those areas for the purposes for which they are intended—it is clear that leaving a towel on a beach, an umbrella in the public library, or a student backpack in a school, or using picnic supplies in a park in which picnics are permitted is not a violation of the ordinance.

The ordinance is not vague. It gives adequate notice of the conduct it prohibits. It does not invite arbitrary or capricious enforcement. The superior court properly rejected that basis of the Tobe plaintiffs' challenge to the ordinance. The Court of Appeal erred in reversing that judgment on that ground.

2. Overbreadth.

The Court of Appeal reasoned that the ordinance was broader than necessary since it banned camping on all public property. There is no such limitation on the exercise of the police power, however, unless an ordinance is vulnerable on equal protection grounds or directly impinges on a fundamental constitutional right.

If the overbreadth argument is a claim that the ordinance exceeds the police power of that city, it must also fail. There is no fundamental right to camp on public property; persons who do so are not a suspect classification; and neither of the petitions claims that the ordinance is invidiously discriminatory on its face. The Legislature has expressly recognized the power of a city "to regulate conduct upon a street, sidewalk, or other public place or on or in a place open to the public" and has specifically authorized local ordinances governing the use of municipal parks. Adoption of the ordinance was clearly within the police power of the city, which may "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." As the more than 90 cities and the California State Association of Counties that have filed an amicus curiae brief in this court have observed, a city not only has the power to keep its streets and other public property open and available for the purpose to which they are dedicated, it has a duty to do so.

The Court of Appeal also failed to recognize that a facial challenge to a law on grounds that it is overbroad and vague is an assertion that the law is invalid in all respects and cannot have *any* valid application, or a claim that the law sweeps in a substantial amount of constitutionally protected conduct. The concepts of vagueness and overbreadth are related, in the sense that if a law threatens the exercise of a constitutionally protected right a more stringent vagueness test applies.

Neither the Tobe plaintiffs nor the Zuckernick petitioners have identified a constitutionally protected right that is impermissibly restricted by application or threatened application of the ordinance. There is no impermissible restriction on the right to travel. There is no right to use of public property for living accommodations or for storage of personal possessions except insofar as the government permits such use by ordinance or regulation. Therefore, the ordinance is not overbroad, and is not facially invalid in that respect. It is capable of constitutional application.

Since the ordinance is not unconstitutionally overbroad, and the facial vagueness challenge must fail, the Court of Appeal erred in ordering dismissal of the complaints in the Zuckernick prosecution and enjoining enforcement of the ordinance.

IV. DISPOSITION

The judgment of the Court of Appeal is reversed.

Robert MARTIN; Lawrence Lee Smith; Robert Anderson; Janet F. Bell; Pamela S. Hawkes; and Basil E. Humphrey, Plaintiffs-Appellants,

v.

CITY OF BOISE, Defendant-Appellee.

No. 15-35845

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 13, 2017 Portland, Oregon

Filed April 1, 2019

Background: Homeless persons brought § 1983 action challenging city's public camping ordinance on Eighth Amendment grounds. The United States District Court for the District of Idaho, Ronald E. Bush, United States Magistrate Judge, 834 F.Supp.2d 1103, entered summary judgment in defendants' favor, and plaintiffs appealed. The Court of Appeals, 709 F.3d 890, reversed and remanded. On remand, defendants moved for summary judgment, and the District Court, Bush, United States Magistrate Judge, 993 F.Supp.2d 1237, granted motion in part and denied it in part. Appeal was taken.

Holdings: On denial of panel rehearing and rehearing en banc, the Court of Appeals, Berzon, Circuit Judge, held that:

(1) homeless persons had standing to pursue their claims even after city adopted protocol not to enforce its public camping ordinance when available shelters were full;

(2) plaintiffs were generally barred by *Heck* doctrine from commencing § 1983 action to obtain retrospective relief based on alleged unconstitutionality of their convictions;

(3) *Heck* doctrine had no application to homeless persons whose citations under city's public camping ordinance were dismissed before the state obtained a conviction;

(4) *Heck* doctrine did not apply to prevent homeless persons allegedly lacking alternative types of shelter from pursuing § 1983 action to obtain prospective relief preventing enforcement of city's ordinance; and

(5) Eighth Amendment prohibited the imposition of criminal penalties for sitting, sleeping, or lying outside on public property on homeless individuals who could not obtain shelter.

Reversed and remanded.

Opinion, 902 F.3d 1031, superseded.

Owens, Circuit Judge, filed opinion concurring in part and dissenting in part.

Berzon, Circuit Judge, filed opinion concurring in the denial of rehearing en banc.

M. Smith, Circuit Judge, filed opinion dissenting from the denial of rehearing en banc, in which Callahan, Bea, Ikuta, Ben-

nett, and R. Nelson, Circuit Judges, joined.

Bennett, Circuit Judge, filed opinion dissenting from the denial of rehearing en banc, in which Bea, Ikuta, and R. Nelson, Circuit Judges, joined, and in which M. Smith, Circuit Judge, joined in part.

1. Federal Courts ⚿3675

On appeal from grant of summary judgment for city on § 1983 claims against it, the Court of Appeals would review the record in light most favorable to plaintiffs. 42 U.S.C.A. § 1983.

2. Federal Civil Procedure ⚿103.2, 103.3

For plaintiff to have Article III standing, he must demonstrate an injury that is concrete, particularized, and actual or imminent, fairly traceable to the challenged action, and redressable by a favorable ruling. U.S. Const. art. 3, § 1 et seq.

3. Federal Civil Procedure ⚿103.2

While concept of "imminent" injury, such as plaintiff must demonstrate to establish his Article III standing, is concededly somewhat elastic, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes, i.e., that the injury is certainly impending. U.S. Const. art. 3, § 1 et seq.

4. Constitutional Law ⚿699

Plaintiff need not await an arrest or prosecution to have constitutional standing to challenge the constitutionality of criminal statute. U.S. Const. art. 3, § 1 et seq.

5. Constitutional Law ⚿699

Plaintiff should not be required to await and undergo a criminal prosecution as the sole means of challenging the constitutionality of statute, but will have standing to seek immediate determination on that issue, where plaintiff has alleged an intention to engage in course of conduct arguably affected with a constitutional interest but proscribed by statute, and where there exists a credible threat of prosecution thereunder. U.S. Const. art. 3, § 1 et seq.

6. Federal Civil Procedure ⚿2467

To defeat a motion for summary judgment premised on alleged lack of standing, plaintiffs need not establish that they in fact have standing, but only that there is genuine question of material fact as to the standing elements. U.S. Const. art. 3, § 1 et seq.

7. Federal Civil Procedure ⚿2491.5

Even assuming that homeless shelters within city accurately self-reported when they were full, genuine issues of material fact as to whether, due to limits on number of consecutive days on which homeless people could obtain housing at shelters, or due to deadlines by which people had to request accommodation at shelters, people might be without any available housing in city even on nights when not all shelters reported as being full, precluded entry of summary judgment for city on § 1983 claim that its public camping ordinance violated homeless persons' Eighth Amendment rights, on theory that homeless persons no longer had standing to pursue their claims once city adopted protocol not to enforce ordinance when available shelters were full. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

8. Constitutional Law ⚿1374
Vagrancy ⚿6

Consistent with the Establishment Clause of the First Amendment, city could not, via the threat of prosecution under its public camping ordinance, coerce homeless individuals into participating in religion-based programs at city shelters. U.S. Const. Amend. 1.

9. Civil Rights ⚿1088(5)

Under *Heck* doctrine, in order to recover damages for allegedly unconstitutional conviction or imprisonment or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to make such determination, or called into question by federal court's issuance of writ of habeas corpus. 42 U.S.C.A. § 1983.

10. Civil Rights ⚿1454
Declaratory Judgment ⚿84

Heck doctrine bars § 1983 suits even when the relief sought is prospective, injunctive or declaratory relief, if success in that action would necessarily demonstrate the invalidity of plaintiff's confinement or its duration. 42 U.S.C.A. § 1983.

11. Civil Rights ⚿1088(5)

Homeless persons who not only failed to file direct appeal challenging, on Eighth Amendment grounds, their convictions under city's public camping ordinance, but also expressly waived right to do so as condition of their guilty pleas, were barred by *Heck* doctrine from later commencing § 1983 action to obtain retrospective relief based on alleged unconstitutionality of their convictions. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

12. Civil Rights ⚿1088(5)

Heck doctrine had no application to homeless persons whose citations under city's public camping ordinance were dismissed before the state obtained a conviction, as the pre-conviction dismissal of citations meant that there was no conviction or sentence that could be undermined by grant of relief to these persons on their § 1983 claim that city's criminalization of sleeping in public parks or on public sidewalks by persons, like them, who allegedly had no available shelter violated their Eighth Amendment rights. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

13. Sentencing and Punishment ⚿1435, 1452, 1482

Cruel and Unusual Punishments Clause of the Eighth Amendment limits not only the types of punishment that may be imposed and prohibits the imposition of punishment grossly disproportionate to severity of crime, but also imposes substantive limits on what can be made criminal and punished as such. U.S. Const. Amend. 8.

14. Sentencing and Punishment ⚿1452

Cruel and Unusual Punishments Clause of the Eighth Amendment, by imposing substantive limits on what can be made criminal and punished as such, governs the criminal law process as whole, and not only the imposition of punishment postconviction. U.S. Const. Amend. 8.

15. Sentencing and Punishment ⚿1453
Vagrancy ⚿6

In order for homeless persons to mount an Eighth Amendment challenge to city's public camping ordinance, on theory that it was cruel and unusual for city to criminalize the sleeping in public parks and on public sidewalks by those who had no alternative shelter, homeless persons needed to demonstrate only initiation of criminal process against them, not convictions. U.S. Const. Amend. 8.

16. Civil Rights ⚿1454

Heck doctrine did not apply to prevent homeless persons allegedly lacking alternative types of shelter from pursuing § 1983 action to obtain prospective relief preventing enforcement of city's public camping ordinance against them on Eighth

Amendment grounds. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

17. Civil Rights ⚿1454

Heck doctrine serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge.

18. Civil Rights ⚿1454

Claims for future relief, which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration, are distant from the "core" of habeas corpus with which *Heck* doctrine is concerned, and are not precluded by *Heck* doctrine.

19. Sentencing and Punishment ⚿1435

Cruel and Unusual Punishments Clause of the Eighth Amendment circumscribes the criminal process in three ways: (1) by limiting the type of punishment that government may impose; (2) by proscribing punishment that is grossly disproportionate to severity of crime; and (3) by placing substantive limits on what government may criminalize. U.S. Const. Amend. 8.

20. Sentencing and Punishment ⚿1452

Even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold. U.S. Const. Amend. 8.

21. Sentencing and Punishment ⚿1452

While the Cruel and Unusual Punishments Clause places substantive limits on what the government may criminalize, such limits are applied only sparingly. U.S. Const. Amend. 8.

22. Sentencing and Punishment ⚿1452

Under the Cruel and Unusual Punishment Clause of the Eighth Amendment, criminal penalties may be inflicted only if accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. U.S. Const. Amend. 8.

23. Sentencing and Punishment ⚿1452

Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being. U.S. Const. Amend. 8.

24. Sentencing and Punishment ⚿1453
Vagrancy ⚿6

Eighth Amendment prohibited the imposition of criminal penalties for sitting, sleeping, or lying outside on public property on homeless individuals who could not obtain shelter; while this was not to say that city had to provide sufficient shelter for the homeless, as long as there were a greater number of homeless individuals in city than the number of available beds in shelters, city could not prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public on the false premise they had some choice in the matter. U.S. Const. Amend. 8.

Appeal from the United States District Court for the District of Idaho, Ronald E. Bush, Chief Magistrate Judge, Presiding, D.C. No. 1:09-cv-00540-REB

Michael E. Bern (argued) and Kimberly Leefatt, Latham & Watkins LLP, Washington, D.C.; Howard A. Belodoff, Idaho Legal Aid Services Inc., Boise, Idaho; Eric Tars, National Law Center on Homelessness & Poverty, Washington, D.C.; Plaintiffs-Appellants.

Brady J. Hall (argued), Michael W. Moore, and Steven R. Kraft, Moore Elia Kraft & Hall LLP, Boise, Idaho; Scott B. Muir, Deputy City Attorney; Robert B.

Luce, City Attorney; City Attorney's Office, Boise, Idaho; for Defendant-Appellee.

Before: Marsha S. Berzon, Paul J. Watford, and John B. Owens, Circuit Judges.

Concurrence in Order by Judge Berzon;

Dissent to Order by Judge Milan D. Smith, Jr.;

Dissent to Order by Judge Bennett;

Partial Concurrence and Partial Dissent by Judge Owens

ORDER

The Opinion filed September 4, 2018, and reported at 902 F.3d 1031, is hereby amended. The amended opinion will be filed concurrently with this order.

The panel has unanimously voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

Future petitions for rehearing or rehearing en banc will not be entertained in this case.

BERZON, Circuit Judge, concurring in the denial of rehearing en banc:

I strongly disfavor this circuit's innovation in en banc procedure—ubiquitous dissents in the denial of rehearing en banc, sometimes accompanied by concurrences in the denial of rehearing en banc. As I have previously explained, dissents in the denial of rehearing en banc, in particular, often engage in a "distorted presentation of the issues in the case, creating the impression of rampant error in the original panel opinion although a majority—often a decisive majority—of the active members of the court . . . perceived no error." *Defs. of Wildlife Ctr. for Biological Diversity v. EPA*, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurring in denial of rehearing en banc); *see also* Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 Calif. L. Rev. 1479 (2012). Often times, the dramatic tone of these dissents leads them to read more like petitions for writ of certiorari on steroids, rather than reasoned judicial opinions.

Despite my distaste for these separate writings, I have, on occasion, written concurrences in the denial of rehearing en banc. On those rare occasions, I have addressed arguments raised for the first time during the en banc process, corrected misrepresentations, or highlighted important facets of the case that had yet to be discussed.

This case serves as one of the few occasions in which I feel compelled to write a brief concurrence. I will not address the dissents' challenges to the *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), and Eighth Amendment rulings of *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), as the opinion sufficiently rebuts those erroneous arguments. I write only to raise two points.

First, the City of Boise did not initially seek en banc reconsideration of the Eighth Amendment holding. When this court solicited the parties' positions as to whether the Eighth Amendment holding merits en banc review, the City's initial submission, before mildly supporting en banc reconsideration, was that the opinion is quite "narrow" and its "interpretation of the [C]onstitution raises little actual conflict with Boise's Ordinances or [their] enforcement." And the City noted that it viewed

prosecution of homeless individuals for sleeping outside as a "last resort," not as a principal weapon in reducing homelessness and its impact on the City.

The City is quite right about the limited nature of the opinion. On the merits, the opinion holds only that municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment. *Martin*, 902 F.3d at 1035. Nothing in the opinion reaches beyond criminalizing the biologically essential need to sleep when there is no available shelter.

Second, Judge M. Smith's dissent features an unattributed color photograph of "a Los Angeles public sidewalk." The photograph depicts several tents lining a street and is presumably designed to demonstrate the purported negative impact of *Martin*. But the photograph fails to fulfill its intended purpose for several reasons.

For starters, the picture is not in the record of this case and is thus inappropriately included in the dissent. It is not the practice of this circuit to include outside-the-record photographs in judicial opinions, especially when such photographs are entirely unrelated to the case. And in this instance, the photograph is entirely unrelated. It depicts a sidewalk in Los Angeles, not a location in the City of Boise, the actual municipality at issue. Nor can the photograph be said to illuminate the impact of *Martin* within this circuit, as it predates our decision and was likely taken in 2017.[1]

But even putting aside the use of a pre-*Martin*, outside-the-record photograph from another municipality, the photograph does not serve to illustrate a concrete effect of *Martin*'s holding. The opinion clearly states that it is not outlawing ordinances "barring the obstruction of public rights of way or the erection of certain structures," such as tents, *id.* at 1048 n.8, and that the holding "in no way dictate[s] 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 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

What the pre-*Martin* photograph *does* demonstrate is that the ordinances criminalizing sleeping in public places were never a viable solution to the homelessness problem. People with no place to live will sleep outside if they have no alternative. Taking them to jail for a few days is both unconstitutional, for the reasons discussed in the opinion, and, in all likelihood, pointless.

The distressing homelessness problem—distressing to the people with nowhere to live as well as to the rest of society—has grown into a crisis for many reasons, among them the cost of housing, the drying up of affordable care for people with mental illness, and the failure to provide adequate treatment for drug addiction. *See, e.g.*, U.S. Interagency Council on Homelessness, *Homelessness in America: Focus on Individual Adults* 5–8 (2018), https://www.usich.gov/resources/?uploads/asset_library/HIA_Individual_Adults.pdf. The crisis continued to burgeon while ordi-

1. Although Judge M. Smith does not credit the photograph to any source, an internet search suggests that the original photograph is attributable to Los Angeles County. *See Implementing the Los Angeles County Homelessness Initiative*, L.A. County, http://homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/ [https://web.archive.org/web/?20170405225036/homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/#]; *see also* Los Angeles County (@CountyofLA), Twitter (Nov. 29, 2017, 3:23 PM), https://twitter.com/CountyofLA/status/936012841533894657.

nances forbidding sleeping in public were on the books and sometimes enforced. There is no reason to believe that it has grown, and is likely to grow larger, because *Martin* held it unconstitutional to criminalize simply sleeping *somewhere* in public if one has nowhere else to do so.

For the foregoing reasons, I concur in the denial of rehearing en banc.

M. SMITH, Circuit Judge, with whom CALLAHAN, BEA, IKUTA, BENNETT, and R. NELSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

In one misguided ruling, a three-judge panel of our court badly misconstrued not one or two, but three areas of binding Supreme Court precedent, and crafted a holding that has begun wreaking havoc on local governments, residents, and businesses throughout our circuit. Under the panel's decision, local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions. Moreover, the panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination. Perhaps most unfortunately, the panel's opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness.[1]

I respectfully dissent from our court's refusal to correct this holding by rehearing the case en banc.

1. With almost 553,000 people who experienced homelessness nationwide on a single night in January 2018, this issue affects communities across our country. U.S. Dep't of Hous. & Urban Dev., Office of Cmty. Planning & Dev., The 2018 Annual Homeless Assessment Report (AHAR) to Congress 1 (Dec. 2018), https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf.

I.

The most harmful aspect of the panel's opinion is its misreading of Eighth Amendment precedent. My colleagues cobble together disparate portions of a fragmented Supreme Court opinion to 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." *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018). That holding is legally and practically ill-conceived, and conflicts with the reasoning of every other appellate court [2] that has considered the issue.

A.

The panel struggles to paint its holding as a faithful interpretation of the Supreme Court's fragmented opinion in *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). It fails.

To understand *Powell*, we must begin with the Court's decision in *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). There, the Court addressed a statute that made it a "criminal offense for a person to 'be addicted to the use of narcotics.' " *Robinson*, 370 U.S. at 660, 82 S.Ct. 1417 (quoting Cal. Health & Safety Code § 11721). The statute allowed defendants to be convicted so long as they were drug addicts, regardless of whether they actually used or possessed drugs. *Id.* at 665, 82 S.Ct. 1417. The Court struck

2. Our court previously adopted the same Eighth Amendment holding as the panel in *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), but that decision was later vacated. 505 F.3d 1006 (9th Cir. 2007).

down the statute under the Eighth Amendment, reasoning that because "narcotic addiction is an illness . . . which may be contracted innocently or involuntarily . . . a state law which imprisons a person thus afflicted as criminal, even though he has never touched any narcotic drug" violates the Eighth Amendment. *Id.* at 667, 82 S.Ct. 1417.

A few years later, in *Powell*, the Court addressed the scope of its holding in *Robinson*. *Powell* concerned the constitutionality of a Texas law that criminalized public drunkenness. *Powell*, 392 U.S. at 516, 88 S.Ct. 2145. As the panel's opinion acknowledges, there was no majority in *Powell*. The four Justices in the plurality interpreted the decision in *Robinson* as standing for the limited proposition that the government could not criminalize one's status. *Id.* at 534, 88 S.Ct. 2145. They held that because the Texas statute criminalized conduct rather than alcoholism, the law was constitutional. *Powell*, 392 U.S. at 532, 88 S.Ct. 2145.

The four dissenting Justices in *Powell* read *Robinson* more broadly: They believed that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Although the statute in *Powell* differed from that in *Robinson* by covering involuntary conduct, the dissent found the same constitutional defect present in both cases. *Id.* at 567–68, 88 S.Ct. 2145.

Justice White concurred in the judgment. He upheld the defendant's conviction because Powell had not made a showing that he was unable to stay off the streets on the night he was arrested. *Id.* at 552–53, 88 S.Ct. 2145 (White, J., concurring in the result). He wrote that it was "unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place." *Id.* at 553, 88 S.Ct. 2145.

The panel contends that because Justice White concurred in the judgment alone, the views of the dissenting Justices constitute the holding of *Powell*. *Martin*, 902 F.3d at 1048. That tenuous reasoning—which metamorphosizes the *Powell* dissent into the majority opinion—defies logic.

Because *Powell* was a 4–1–4 decision, the Supreme Court's decision in *Marks v. United States* guides our analysis. 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). There, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgments on the narrowest grounds.' " *Id.* at 193, 97 S.Ct. 990 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion)) (emphasis added). When *Marks* is applied to *Powell*, the holding is clear: The defendant's conviction was constitutional because it involved the commission of an act. Nothing more, nothing less.

This is hardly a radical proposition. I am not alone in recognizing that "there is definitely no Supreme Court holding" prohibiting the criminalization of involuntary conduct. *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (en banc). Indeed, in the years since *Powell* was decided, courts—including our own—have routinely upheld state laws that criminalized acts that were allegedly compelled or involuntary. *See, e.g.*, *United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) (holding that it was constitutional for the defendant to be punished for violating the terms of his parole by consuming alcohol because he "was not punished for his status as an alcoholic but for his conduct");

Joshua v. Adams, 231 F. App'x 592, 594 (9th Cir. 2007) ("Joshua also contends that the state court ignored his mental illness [schizophrenia], which rendered him unable to control his behavior, and his sentence was actually a penalty for his illness .... This contention is without merit because, in contrast to *Robinson*, where a statute specifically criminalized addiction, Joshua was convicted of a criminal offense separate and distinct from his 'status' as a schizophrenic."); *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989) ("The considerations that make any incarceration unconstitutional when a statute punishes a defendant for his status are not applicable when the government seeks to punish a person's actions.").[3]

To be sure, *Marks* is controversial. Last term, the Court agreed to consider whether to abandon the rule *Marks* established (but ultimately resolved the case on other grounds and found it "unnecessary to consider ... the proper application of *Marks*"). *Hughes v. United States*, —— U.S. ——, 138 S.Ct. 1765, 1772, 201 L.Ed.2d 72 (2018). At oral argument, the Justices criticized the logical subset rule established by *Marks* for elevating the outlier views of concurring Justices to precedential status.[4] The Court also acknowledged that lower courts have inconsistently interpreted the holdings of fractured decisions under *Marks*.[5]

Those criticisms, however, were based on the assumption that *Marks* means what it says and says what it means: Only the views of the Justices concurring in the judgment may be considered in construing the Court's holding. *Marks*, 430 U.S. at 193, 97 S.Ct. 990. The Justices did not even think to consider that *Marks* allows dissenting Justices to create the Court's holding. As a *Marks* scholar has observed, such a method of vote counting "would paradoxically create a precedent that contradicted the judgment in that very case."[6] And yet the panel's opinion flouts that common sense rule to extract from *Powell* a holding that does not exist.

What the panel really does is engage in a predictive model of precedent. The panel opinion implies that if a case like *Powell* were to arise again, a majority of the Court would hold that the criminalization of involuntary conduct violates the Eighth Amendment. Utilizing such reasoning, the panel borrows the Justices' robes and adopts that holding on their behalf.

But the Court has repeatedly discouraged us from making such predictions when construing precedent. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). And, for good reason. Predictions about how Justices will rule rest on unwarranted speculation about what goes on in their minds. Such amateur fortunetelling also precludes us from considering new insights on the issues—difficult as they may be in the case of 4–1–4 decisions like *Powell*—that have arisen since the Court's fragmented opinion. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (noting "the wisdom of allowing difficult issues to mature through

3. That most of these opinions were unpublished only buttresses my point: It is uncontroversial that *Powell* does not prohibit the criminalization of involuntary conduct.

4. Transcript of Oral Argument at 14, *Hughes v. United States*, —— U.S. ——, 138 S.Ct. 1765, 201 L.Ed.2d 72 (2018) (No. 17-155).

5. *Id.* at 49.

6. Richard M. Re, *Beyond the* Marks *Rule*, 132 Harv. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620.

full consideration by the courts of appeals").

In short, predictions about how the Justices will rule ought not to create precedent. The panel's Eighth Amendment holding lacks any support in *Robinson* or *Powell*.

B.

Our panel's opinion also conflicts with the reasoning underlying the decisions of other appellate courts.

The California Supreme Court, in *Tobe v. City of Santa Ana*, rejected the plaintiffs' Eighth Amendment challenge to a city ordinance that banned public camping. 892 P.2d 1145 (1995). The court reached that conclusion despite evidence that, on any given night, at least 2,500 homeless persons in the city did not have shelter beds available to them. *Id.* at 1152. The court sensibly reasoned that because *Powell* was a fragmented opinion, it did not create precedent on "the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.* at 1166 (quoting *Powell*, 392 U.S. at 533, 88 S.Ct. 2145). Our panel—bound by the same Supreme Court precedent—invalidates identical California ordinances previously upheld by the California Supreme Court. Both courts cannot be correct.

The California Supreme Court acknowledged that homelessness is a serious societal problem. It explained, however, that:

> Many of those issues are the result of legislative policy decisions. The arguments of many amici curiae regarding the apparently intractable problem of homelessness and the impact of the Santa Ana ordinance on various groups of homeless persons (e.g., teenagers, families with children, and the mentally ill) should be addressed to the Legislature and the Orange County Board of Supervisors, not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible.

Id. at 1157 n.12. By creating new constitutional rights out of whole cloth, my well-meaning, but unelected, colleagues improperly inject themselves into the role of public policymaking.[7]

The reasoning of our panel decision also conflicts with precedents of the Fourth and Eleventh Circuits. In *Manning v. Caldwell*, the Fourth Circuit held that a Virginia statute that criminalized the possession of alcohol did not violate the Eighth Amendment when it punished the involuntary actions of homeless alcoholics. 900 F.3d 139, 153 (4th Cir. 2018), *reh'g en banc granted* 741 F. App'x 937 (4th Cir. 2018).[8]

7. Justice Black has also observed that solutions for challenging social issues should be left to the policymakers:

> I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem .... [I]t seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that any use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

Powell, 392 U.S. at 539–40, 88 S.Ct. 2145 (Black, J., concurring).

8. Pursuant to Fourth Circuit Local Rule 35(c), "[g]ranting of rehearing en banc vacates the previous panel judgment and opinion." I mention *Manning*, however, as an illustration of other courts' reasoning on the Eighth Amendment issue.

The court rejected the argument that Justice White's opinion in *Powell* "requires this court to hold that Virginia's statutory scheme imposes cruel and unusual punishment because it criminalizes [plaintiffs'] status as homeless alcoholics." *Id.* at 145. The court found that the statute passed constitutional muster because "it is the act of possessing alcohol—not the status of being an alcoholic—that gives rise to criminal sanctions." *Id.* at 147.

Boise's Ordinances at issue in this case are no different: They do not criminalize the status of homelessness, but only the act of camping on public land or occupying public places without permission. *Martin*, 902 F.3d at 1035. The Fourth Circuit correctly recognized that these kinds of laws do not run afoul of *Robinson* and *Powell*.

The Eleventh Circuit has agreed. In *Joel v. City of Orlando*, the court held that a city ordinance prohibiting sleeping on public property was constitutional. 232 F.3d 1353, 1362 (11th Cir. 2000). The court rejected the plaintiffs' Eighth Amendment challenge because the ordinance "targets conduct, and does not provide criminal punishment based on a person's status." *Id.* The court prudently concluded that "[t]he City is constitutionally allowed to regulate where 'camping' occurs." *Id.*

We ought to have adopted the sound reasoning of these other courts. By holding that Boise's enforcement of its Ordinances violates the Eighth Amendment, our panel has needlessly created a split in authority on this straightforward issue.

C.

One would think our panel's legally incorrect decision would at least foster the common good. Nothing could be further from the truth. The panel's decision generates dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein.

The panel opinion masquerades its decision as a narrow one by representing that it "in no way dictate[s] 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." *Martin*, 902 F.3d at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

That excerpt, however, glosses over the decision's actual holding: "We hold only that . . . as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property." *Id.* Such a holding leaves cities with a Hobson's choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety. The Constitution has no such requirement.

* * *

Under the panel's decision, local governments can enforce certain of their public health and safety laws only when homeless individuals have the choice to sleep indoors. That inevitably leads to the question of how local officials ought to know whether that option exists.

The number of homeless individuals within a municipality on any given night is not automatically reported and updated in real time. Instead, volunteers or government employees must painstakingly tally the number of homeless individuals block by block, alley by alley, doorway by doorway. Given the daily fluctuations in the homeless population, the panel's opinion would require this labor-intensive task be done every single day. Yet in massive cit-

ies such as Los Angeles, that is simply impossible. Even when thousands of volunteers devote dozens of hours to such "a herculean task," it takes three days to finish counting—and even then "not everybody really gets counted."[9] Lest one think Los Angeles is unique, our circuit is home to many of the largest homeless populations nationwide.[10]

If cities do manage to cobble together the resources for such a system, what happens if officials (much less volunteers) miss a homeless individual during their daily count and police issue citations under the false impression that the number of shelter beds exceeds the number of homeless people that night? According to the panel's opinion, that city has violated the Eighth Amendment, thereby potentially leading to lawsuits for significant monetary damages and other relief.

And what if local governments (understandably) lack the resources necessary for such a monumental task?[11] They have no choice but to stop enforcing laws that prohibit public sleeping and camping.[12] Ac-

9. Matt Tinoco, *LA Counts Its Homeless, But Counting Everybody Is Virtually Impossible*, LAist (Jan. 22, 2019, 2:08 PM), https://laist.com/2019/01/22/los_angeles_homeless_count_2019_how_volunteer.php. The panel conceded the imprecision of such counts in its opinion. *See Martin*, 902 F.3d at 1036 n.1 (acknowledging that the count of homeless individuals "is not always precise"). But it went on to disregard that fact when tying a city's ability to enforce its laws to these counts.

10. The U.S. Department of Housing and Urban Development's 2018 Annual Homeless Assessment Report to Congress reveals that municipalities within our circuit have among the highest homeless populations in the country. In Los Angeles City and County alone, 49,955 people experienced homelessness in 2018. The number was 12,112 people in Seattle and King County, Washington, and 8,576 people in San Diego City and County, California. *See supra* note 1, at 18, 20. In 2016, Las Vegas had an estimated homeless population of 7,509 individuals, and California's Santa Clara County had 6,556. Joaquin Palomino, *How Many People Live On Our Streets?*, S.F. Chronicle (June 28, 2016), https://projects.sfchronicle.com/sf-homeless/numbers.

11. Cities can instead provide sufficient housing for every homeless individual, but the cost would be prohibitively expensive for most local governments. Los Angeles, for example, would need to spend $403.4 million to house every homeless individual not living in a vehicle. *See* Los Angeles Homeless Services Authority, Report on Emergency Framework to Homelessness Plan 13 (June 2018), https://assets.documentcloud.org/documents/4550980/LAHSA-ShelteringReport.pdf. In San Francisco, building new centers to provide a mere 400 additional shelter spaces was estimated to cost between $10 million and $20 million, and would require $20 million to $30 million to operate each year. *See* Heather Knight, *A Better Model, A Better Result?*, S.F. Chronicle (June 29, 2016), https://projects.sfchronicle.com/sfhomeless/shelters. Perhaps these staggering sums are why the panel went out of its way to state that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless." *Martin*, 902 F.3d at 1048.

12. Indeed, in the few short months since the panel's decision, several cities have thrown up their hands and abandoned any attempt to enforce such laws. *See, e.g.*, Cynthia Hubert, *Sacramento County Cleared Homeless Camps All Year. Now It Has Stopped Citing Campers*, Sacramento Bee (Sept. 18, 2019, 4:27 PM), https://www.sacbee.com/news/local/homeless/article218605025.html ("Sacramento County park rangers have suddenly stopped issuing citations altogether after a federal court ruling this month."); Michael Ellis Langley, *Policing Homelessness*, Golden State Newspapers (Feb. 22, 2019), http://www.goldenstatenewspapers.com/tracy_press/news/policing-homelessness/article_5fe6a9ca-3642-11e9-9b25-37610ef2dbae.html (Sheriff Pat Withrow stating that, "[a]s far as camping ordinances and things like that, we're probably holding off on [issuing citations] for a while" in light of *Martin v. City of Boise*); Kelsie Morgan, *Moses Lake Sees Spike in Homeless Activity Following 9th Circuit Court Decision*, KXLY (Oct. 2, 2018, 12:50 PM), https://www.kxly.com/news/moses-lake-sees-spike-in-homeless-activityfollowing-9th-circuit-court-decision/

cordingly, our panel's decision effectively allows homeless individuals to sleep and live wherever they wish on most public property. Without an absolute confidence that they can house every homeless individual, city officials will be powerless to assist residents lodging valid complaints about the health and safety of their neighborhoods.[13]

As if the panel's actual holding wasn't concerning enough, the logic of the panel's opinion reaches even further in scope. The opinion reasons that because "resisting the need to ... engage in [ ] life-sustaining activities is impossible," punishing the homeless for engaging in those actions in public violates the Eighth Amendment. *Martin*, 902 F.3d at 1048. What else is a life-sustaining activity? Surely bodily functions. By holding that the Eighth Amendment proscribes the criminalization of involuntary conduct, the panel's decision will inevitably result in the striking down of laws that prohibit public defecation and urination.[14] The panel's reasoning also casts doubt on public safety laws restricting drug paraphernalia, for the use of hypodermic needles and the like is no less involuntary for the homeless suffering from the scourge of addiction than is their sleeping in public.

It is a timeless adage that states have a "universally acknowledged power and duty to enact and enforce all such laws ... as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people." *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20, 22 S.Ct. 1, 46 L.Ed. 55 (1901) (internal quotations omitted). I fear that the panel's decision will prohibit local governments from fulfilling their duty to enforce an array of public health and safety laws. Halting enforcement of such laws will potentially wreak havoc on our communities.[15] As we have already begun to witness, our neighborhoods will soon feature "[t]ents ... equipped with mini refrigerators, cupboards, televisions, and heaters, [that] vie with pedestrian traffic" and "human waste appearing on sidewalks and at local playgrounds."[16]

801772571 (''Because the City of Moses Lake does not currently have a homeless shelter, city officials can no longer penalize people for sleeping in public areas.''); Brandon Pho, *Buena Park Residents Express Opposition to Possible Homeless Shelter*, Voice of OC (Feb. 14, 2019), https://voiceofoc.org/2019/02/buena-park-residents-express-opposition-to-possible-homeless-shelter/ (stating that Judge David Carter of the U.S. District Court for the Central District of California has ''warn[ed] Orange County cities to get more shelters online or risk the inability the enforce their anti-camping ordinances''); Nick Welsh, *Court Rules to Protect Sleeping in Public: Santa Barbara City Parks Subject of Ongoing Debate*, Santa Barbara Indep. (Oct. 31, 2018), http://www.independent.com/news/2018/oct/31/court-rules-protect-sleeping-public/?jqm (''In the wake of what's known as 'the Boise decision,' Santa Barbara city police found themselves scratching their heads over what they could and could not issue citations for.'').

13. In 2017, for example, San Francisco received 32,272 complaints about homeless encampments to its 311-line. Kevin Fagan, *The Situation On The Streets*, S.F. Chronicle (June 28, 2018), https://projects.sfchronicle.com/sf-homeless/2018-state-of-homelessness.

14. *See* Heater Knight, *It's No Laughing Matter—SF Forming Poop Patrol to Keep Sidewalks Clean*, S.F. Chronicle (Aug. 14, 2018), https://www.sfchronicle.com/bayarea/heatherknight/article/It-s-nolaughing-matter-SF-forming-Poop-13153517.php.

15. *See* Anna Gorman and Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, The Atlantic (Mar. 8, 2019), https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosismedieval-diseases-spreading-homeless/584380/ (describing the recent outbreaks of typhus, Hepatitis A, and shigellosis as ''disaster[s] and [a] public-health crisis'' and noting that such ''diseases spread quickly and widely among people living outside or in shelters'').

A Los Angeles Public Sidewalk

II.

The panel's fanciful merits-determination is accompanied by a no-less-inventive series of procedural rulings. The panel's opinion also misconstrues two other areas of Supreme Court precedent concerning limits on the parties who can bring § 1983 challenges for violations of the Eighth Amendment.

A.

The panel erred in holding that Robert Martin and Robert Anderson could obtain prospective relief under *Heck v. Humphrey* and its progeny. 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). As recognized by Judge Owens's dissent, that conclusion cuts against binding precedent on the issue.

The Supreme Court has stated that *Heck* bars § 1983 claims if success on that claim would "necessarily demonstrate the invalidity of [the plaintiff's] confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005); *see also Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) (stating that *Heck* applies to claims for declaratory relief). Martin and Anderson's prospective claims did just that. Those plaintiffs sought a declaration that the Ordinances under which they were convicted are unconstitutional and an injunction against their future enforcement on the grounds of unconstitutionality. It is clear that *Heck* bars these claims because Martin and Anderson necessarily seek to demonstrate the invalidity of their previous convictions.

The panel opinion relies on *Edwards* to argue that *Heck* does not bar plaintiffs' requested relief, but *Edwards* cannot bear the weight the panel puts on it. In *Ed-*

16. Scott Johnson and Peter Kiefer, *LA's Battle for Venice Beach: Homeless Surge Puts Hollywood's Progressive Ideals to the Test*, Hollywood Reporter (Jan. 11, 2019, 6:00 AM), https://www.hollywoodreporter.com/features/las-homeless-surge-puts-hollywoods-progressive-ideals-test-1174599.

wards, the plaintiff sought an injunction that would require prison officials to date-stamp witness statements at the time received. 520 U.S. at 643, 117 S.Ct. 1584. The Court concluded that requiring prison officials to date-stamp witness statements did not necessarily imply the invalidity of previous determinations that the prisoner was not entitled to good-time credits, and that *Heck*, therefore, did not bar prospective injunctive relief. *Id.* at 648, 117 S.Ct. 1584.

Here, in contrast, a declaration that the Ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. According to data from the U.S. Department of Housing and Urban Development, the number of homeless individuals in Boise exceeded the number of available shelter beds during each of the years that the plaintiffs were cited.[17] Under the panel's holding that "the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property" "as long as there is no option of sleeping indoors," that data necessarily demonstrates the invalidity of the plaintiffs' prior convictions. *Martin*, 902 F.3d at 1048.

B.

The panel also erred in holding that Robert Martin and Pamela Hawkes, who were cited but not convicted of violating the Ordinances, had standing to sue under the Eighth Amendment. In so doing, the panel created a circuit split with the Fifth Circuit.

The panel relied on *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), to find that a plaintiff "need demonstrate only the initiation of the criminal process against him, not a conviction," to bring an Eighth Amendment challenge. *Martin*, 902 F.3d at 1045. The panel cites *Ingraham*'s observation that the Cruel and Unusual Punishments Clause circumscribes the criminal process in that "it imposes substantive limits on what can be made criminal and punished as such." *Id.* at 1046 (citing *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401). This reading of *Ingraham*, however, cherry picks isolated statements from the decision without considering them in their accurate context. The *Ingraham* Court plainly held that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." 430 U.S. at 671 n.40, 97 S.Ct. 1401. And, "the State does not acquire the power to punish with which the Eighth Amendment is concerned until *after* it has secured a formal adjudication of guilt." *Id.* (emphasis added). As the *Ingraham* Court recognized, "[T]he decisions of [the Supreme] Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those *convicted* of crimes." *Id.* at 664, 97 S.Ct. 1401 (emphasis added). Clearly, then, *Ingraham* stands for the proposition that to challenge a criminal statute as violative of the Eighth Amendment, the individual must be convicted of that relevant crime.

The Fifth Circuit recognized this limitation on standing in *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995). There, the court confronted a similar action brought by homeless individuals challenging a sleeping in public ordinance. *John-*

17. *See* U.S. Dep't of Hous. & Urban Dev., PIT Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018-PITCounts-by-CoC.xlsx; U.S. Dep't of Hous. & Urban Dev., HIC Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018HIC-Counts-by-CoC.xlsx. Boise is within Ada County and listed under CoC code ID-500.

son, 61 F.3d at 443. The court held that the plaintiffs did not have standing to raise an Eighth Amendment challenge to the ordinance because although "numerous tickets ha[d] been issued . . . [there was] no indication that any Appellees ha[d] been convicted" of violating the sleeping in public ordinance. *Id.* at 445. The Fifth Circuit explained that *Ingraham* clearly required a plaintiff be convicted under a criminal statute before challenging that statute's validity. *Id.* at 444–45 (citing *Robinson*, 370 U.S. at 663, 82 S.Ct. 1417; *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401).

By permitting Martin and Hawkes to maintain their Eighth Amendment challenge, the panel's decision created a circuit split with the Fifth Circuit and took our circuit far afield from "[t]he primary purpose of (the Cruel and Unusual Punishments Clause) . . . [which is] the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401 (quoting *Powell*, 392 U.S. at 531–32, 88 S.Ct. 2145).

III.

None of us is blind to the undeniable suffering that the homeless endure, and I understand the panel's impulse to help such a vulnerable population. But the Eighth Amendment is not a vehicle through which to critique public policy choices or to hamstring a local government's enforcement of its criminal code. The panel's decision, which effectively strikes down the anti-camping and anti-sleeping Ordinances of Boise and that of countless, if not all, cities within our jurisdiction, has no legitimate basis in current law.

I am deeply concerned about the consequences of our panel's unfortunate opinion, and I regret that we did not vote to reconsider this case en banc. I respectfully dissent.

BENNETT, Circuit Judge, with whom BEA, IKUTA, and R. NELSON, Circuit Judges, join, and with whom M. SMITH, Circuit Judge, joins as to Part II, dissenting from the denial of rehearing en banc:

I fully join Judge M. Smith's opinion dissenting from the denial of rehearing en banc. I write separately to explain that except in extraordinary circumstances not present in this case, and based on its text, tradition, and original public meaning, the Cruel and Unusual Punishments Clause of the Eighth Amendment does not impose substantive limits on what conduct a state may criminalize.

I recognize that we are, of course, bound by Supreme Court precedent holding that the Eighth Amendment encompasses a limitation "on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (citing *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)). However, the *Ingraham* Court specifically "recognized [this] limitation as one to be applied sparingly." *Id.* As Judge M. Smith's dissent ably points out, the panel ignored *Ingraham*'s clear direction that Eighth Amendment scrutiny attaches only after a criminal conviction. Because the panel's decision, which allows pre-conviction Eighth Amendment challenges, is wholly inconsistent with the text and tradition of the Eighth Amendment, I respectfully dissent from our decision not to rehear this case en banc.

I.

The text of the Cruel and Unusual Punishments Clause is virtually identical to Section 10 of the English Declaration of

Rights of 1689,[1] and there is no question that the drafters of the Eighth Amendment were influenced by the prevailing interpretation of Section 10. *See Solem v. Helm*, 463 U.S. 277, 286, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (observing that one of the themes of the founding era "was that Americans had all the rights of English subjects" and the Framers' "use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection"); *Timbs v. Indiana*, 586 U.S. ——, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019) (Thomas, J., concurring) ("[T]he text of the Eighth Amendment was 'based directly on . . . the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.' " (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989))). Thus, "not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular 'rights of English subjects' it was designed to vindicate." *Harmelin v. Michigan*, 501 U.S. 957, 967, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Scalia, J., concurring).

Justice Scalia's concurrence in *Harmelin* provides a thorough and well-researched discussion of the original public meaning of the Cruel and Unusual Punishments Clause, including a detailed overview of the history of Section 10 of the English Declaration of Rights. *See id.* at 966–85, 111 S.Ct. 2680 (Scalia, J., concurring). Rather than reciting Justice Scalia's *Harmelin* discussion in its entirety, I provide only a broad description of its historical analysis. Although the issue Justice Scalia confronted in *Harmelin* was whether the Framers intended to graft a proportionality requirement on the Eighth Amendment, *see id.* at 976, 111 S.Ct. 2680, his opinion's historical exposition is instructive to the issue of what the Eighth Amendment meant when it was written.

The English Declaration of Rights's prohibition on "cruell and unusuall Punishments" is attributed to the arbitrary punishments imposed by the King's Bench following the Monmouth Rebellion in the late 17th century. *Id.* at 967, 111 S.Ct. 2680 (Scalia, J., concurring). "Historians have viewed the English provision as a reaction either to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the perjury prosecution of Titus Oates in the same year." *Ingraham*, 430 U.S. at 664, 97 S.Ct. 1401 (footnote omitted).

Presiding over a special commission in the wake of the Monmouth Rebellion, Chief Justice Jeffreys imposed "vicious punishments for treason," including "drawing and quartering, burning of women felons, beheading, [and] disemboweling." *Harmelin*, 501 U.S. at 968, 111 S.Ct. 2680. In the view of some historians, "the story of The Bloody Assizes . . . helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual Punishments." *Furman v. Georgia*, 408 U.S. 238, 254, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring).

More recent scholarship suggests that Section 10 of the Declaration of Rights was motivated more by Jeffreys's treatment of Titus Oates, a Protestant cleric and convicted perjurer. In addition to the pillory, the scourge, and life imprisonment, Jeffreys sentenced Oates to be "stript of [his] Canonical Habits." *Harmelin*, 501 U.S. at

1. 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689) (Section 10 of the English Declaration of Rights) ("excessive Baile ought not to be required, nor excessive Fines imposed; nor cruell and unusuall Punishments inflicted.").

970, 111 S.Ct. 2680 (Scalia, J., concurring) (quoting Second Trial of Titus Oates, 10 How. St. Tr. 1227, 1316 (K.B. 1685)). Years after the sentence was carried out, and months after the passage of the Declaration of Rights, the House of Commons passed a bill to annul Oates's sentence. Though the House of Lords never agreed, the Commons issued a report asserting that Oates's sentence was the sort of "cruel and unusual Punishment" that Parliament complained of in the Declaration of Rights. *Harmelin*, 501 U.S. at 972, 111 S.Ct. 2680 (citing 10 Journal of the House of Commons 247 (Aug. 2, 1689)). In the view of the Commons and the dissenting Lords, Oates's punishment was " 'out of the Judges' Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence to a discretionary Power.' " *Id.* at 973, 111 S.Ct. 2680 (quoting 1 Journals of the House of Lords 367 (May 31, 1689); 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

Thus, Justice Scalia concluded that the prohibition on "cruell and unusuall punishments" as used in the English Declaration, "was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition." *Harmelin*, 501 U.S. at 974, 111 S.Ct. 2680 (Scalia, J., concurring) (citing *Ingraham*, 430 U.S. at 665, 97 S.Ct. 1401; 1 J. Chitty, Criminal Law 710–12 (5th Am. ed. 1847); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839, 859 (1969)).

But Justice Scalia was careful not to impute the English meaning of "cruell and unusuall" directly to the Framers of our Bill of Rights: "the ultimate question is not what 'cruell and unusuall punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment." *Id.* at 975, 111 S.Ct. 2680. "Wrenched out of its common-law context, and applied to the actions of a legislature ... the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." *Id.* at 976, 111 S.Ct. 2680.

As support for his conclusion that the Framers of the Bill of Rights intended for the Eighth Amendment to reach only certain punishment methods, Justice Scalia looked to "the state ratifying conventions that prompted the Bill of Rights." *Id.* at 979, 111 S.Ct. 2680. Patrick Henry, speaking at the Virginia Ratifying convention, "decried the absence of a bill of rights," arguing that "Congress will loose the restriction of not ... inflicting cruel and unusual punishments. ... What has distinguished our ancestors?—They would not admit of tortures, or cruel and barbarous punishment." *Id.* at 980, 111 S.Ct. 2680 (quoting 3 J. Elliot, Debates on the Federal Constitution 447 (2d ed. 1854)). The Massachusetts Convention likewise heard the objection that, in the absence of a ban on cruel and unusual punishments, "racks and gibbets may be amongst the most mild instruments of [Congress's] discipline." *Id.* at 979, 111 S.Ct. 2680 (internal quotation marks omitted) (quoting 2 J. Debates on the Federal Constitution, at 111). These historical sources "confirm[ ] the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment." *Id.* (internal quotation marks omitted) (quoting Granucci, 57 Calif. L. Rev. at 842) (emphasis in *Harmelin*).

In addition, early state court decisions "interpreting state constitutional provisions with identical or more expansive wording (i.e., 'cruel or unusual') concluded that these provisions ... proscribe[d] ... only certain modes of punishment." *Id.* at 983, 111 S.Ct. 2680; *see also id.* at 982, 111

S.Ct. 2680 ("Many other Americans apparently agreed that the Clause only outlawed certain *modes* of punishment.").

In short, when the Framers drafted and the several states ratified the Eighth Amendment, the original public meaning of the Cruel and Unusual Punishments Clause was "to proscribe . . . methods of punishment." *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). There is simply no indication in the history of the Eighth Amendment that the Cruel and Unusual Punishments Clause was intended to reach the substantive authority of Congress to criminalize acts or status, and certainly not before conviction. Incorporation, of course, extended the reach of the Clause to the States, but worked no change in its meaning.

II.

The panel here held 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." *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018). In so holding, the panel allows challenges asserting this prohibition to be brought in advance of any conviction. That holding, however, has nothing to do with the punishment that the City of Boise imposes for those offenses, and thus nothing to do with the text and tradition of the Eighth Amendment.

The panel pays only the barest attention to the Supreme Court's admonition that the application of the Eighth Amendment to substantive criminal law be "sparing[ ]," *Martin*, 902 F.3d at 1047 (quoting *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401), and its holding here is dramatic in scope and completely unfaithful to the proper interpretation of the Cruel and Unusual Punishments Clause.

"The primary purpose of (the Cruel and Unusual Punishments Clause) has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401 (internal quotation marks omitted) (quoting *Powell v. Texas*, 392 U.S. 514, 531–32, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968)). It should, therefore, be the "rare case" where a court invokes the Eighth Amendment's criminalization component. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1146 (9th Cir. 2006) (Rymer, J., dissenting), *vacated*, 505 F.3d 1006 (9th Cir. 2007).[2] And permitting a pre-conviction challenge to a local ordinance, as the panel does here, is flatly inconsistent with the Cruel and Unusual Punishments Clause's core constitutional function: regulating the *methods* of punishment that may be inflicted upon one convicted of an offense. *Harmelin*, 501 U.S. at 977, 979, 111 S.Ct. 2680 (Scalia, J., concurring). As Judge Rymer, dissenting in *Jones*, observed, "the Eighth Amendment's 'protections do not attach until after conviction and sentence.' "[3] 444 F.3d at 1147 (Rymer, J., dis-

2. *Jones,* of course, was vacated and lacks precedential value. 505 F.3d 1006 (9th Cir. 2007). But the panel here resuscitated *Jones*'s errant holding, including, apparently, its application of the Cruel and Unusual Punishments Clause in the absence of a criminal conviction. We should have taken this case en banc to correct this misinterpretation of the Eighth Amendment.

3. We have emphasized the need to proceed cautiously when extending the reach of the Cruel and Unusual Punishments Clause beyond regulation of the methods of punishment that may be inflicted upon conviction for an offense. *See United States v. Ritter,* 752 F.2d 435, 438 (9th Cir. 1985) (repeating *Ingraham*'s direction that "this particular use of the cruel and unusual punishment clause is to be applied sparingly" and noting that *Rob-*

senting) (internal alterations omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 392 n.6, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).[4]

The panel's holding thus permits plaintiffs who have never been convicted of any offense to avail themselves of a constitutional protection that, historically, has been concerned with prohibition of "only certain modes of punishment." *Harmelin*, 501 U.S. at 983, 111 S.Ct. 2680; *see also United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997) (citing *Harmelin* for the proposition that a "plurality of the Supreme Court . . . has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed").

Extending the Cruel and Unusual Punishments Clause to encompass pre-conviction challenges to substantive criminal law stretches the Eighth Amendment past its breaking point. I doubt that the drafters of our Bill of Rights, the legislators of the states that ratified it, or the public at the time would ever have imagined that a ban on "cruel and unusual punishments" would permit a plaintiff to challenge a substantive criminal statute or ordinance that he or she had not even been convicted of violating. We should have taken this case en banc to confirm that an Eighth Amendment challenge does not lie in the absence of a punishment following conviction for an offense.

* * *

At common law and at the founding, a prohibition on "cruel and unusual punishments" was simply that: a limit on the types of punishments that government could inflict following a criminal conviction. The panel strayed far from the text and history of the Cruel and Unusual Punishments Clause in imposing the substantive limits it has on the City of Boise, particularly as to plaintiffs who have not yet even been convicted of an offense. We should have reheard this case en banc, and I respectfully dissent.

BERZON, Circuit Judge:

"The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."

— Anatole France, *The Red Lily*

We consider 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.

The plaintiffs-appellants are six current or former residents of the City of Boise ("the City"), who are homeless or have recently been homeless. Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police for violating one or both of two city ordinances. The first, Boise City Code § 9-10-02 (the "Camping Ordinance"), makes it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." The Camping Ordinance defines "camping" as "the use of public property as a temporary or perma-

inson represents "the rare type of case in which the clause has been used to limit what may be made criminal"); *see also United States v. Ayala*, 35 F.3d 423, 426 (9th Cir. 1994) (limiting application of *Robinson* to crimes lacking an actus reus). The panel's holding here throws that caution to the wind.

4. Judge Friendly also expressed "considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence." *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973).

nent place of dwelling, lodging, or residence." *Id.* The second, Boise City Code § 6-01-05 (the "Disorderly Conduct Ordinance"), bans "[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."

All plaintiffs seek retrospective relief for their previous citations under the ordinances. Two of the plaintiffs, Robert Anderson and Robert Martin, allege that they expect to be cited under the ordinances again in the future and seek declaratory and injunctive relief against future prosecution.

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 this court 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. Two of the plaintiffs, we further hold, may be entitled to retrospective and prospective relief for violation of that Eighth Amendment right.

I. Background

[1] The district court granted summary judgment to the City on all claims. We therefore review the record in the light most favorable to the plaintiffs. *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014).

Boise has a significant and increasing homeless population. According to the Point-in-Time Count ("PIT Count") 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. In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered.[1] The PIT Count likely underestimates the number of homeless individuals in Ada County. It is "widely recognized that a one-night point in time count will undercount the homeless population," as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

1. The United States Department of Housing and Urban Development ("HUD") requires local homeless assistance and prevention networks to conduct an annual count of homeless individuals on one night each January, known as the PIT Count, as a condition of receiving federal funds. State, local, and federal governmental entities, as well as private service providers, rely on the PIT Count as a "critical source of data" on homelessness in the United States. The parties acknowledge that the PIT Count is not always precise. The City's Director of Community Partnerships, Diana Lachiondo, testified that the PIT Count is "not always the ... best resource for numbers," but also stated that "the point-in-time count is our best snapshot" for counting the number of homeless individuals in a particular region, and that she "cannot give ... any other number with any kind of confidence."

There are currently three homeless shelters in the City of Boise offering emergency shelter services, all run by private, nonprofit organizations. As far as the record reveals, these three shelters are the only shelters in Ada County.

One shelter — "Sanctuary" — is operated by Interfaith Sanctuary Housing Services, Inc. The shelter is open to men, women, and children of all faiths, and does not impose any religious requirements on its residents. Sanctuary has 96 beds reserved for individual men and women, with several additional beds reserved for families. The shelter uses floor mats when it reaches capacity with beds.

Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter. In 2010, Sanctuary reached full capacity in the men's area "at least half of every month," and the women's area reached capacity "almost every night of the week." In 2014, the shelter reported that it was full for men, women, or both on 38% of nights. Sanctuary provides beds first to people who spent the previous night at Sanctuary. At 9:00 pm each night, it allots any remaining beds to those who added their names to the shelter's waiting list.

The other two shelters in Boise are both operated by the Boise Rescue Mission ("BRM"), a Christian nonprofit organization. One of those shelters, the River of Life Rescue Mission ("River of Life"), is open exclusively to men; the other, the City Light Home for Women and Children ("City Light"), shelters women and children only.

BRM's facilities provide two primary "programs" for the homeless, the Emergency Services Program and the New Life Discipleship Program.[2] The Emergency Services Program provides temporary shelter, food, and clothing to anyone in need. Christian religious services are offered to those seeking shelter through the Emergency Services Program. The shelters display messages and iconography on the walls, and the intake form for emergency shelter guests includes a religious message.[3]

Homeless individuals may check in to either BRM facility between 4:00 and 5:30 pm. Those who arrive at BRM facilities between 5:30 and 8:00 pm may be denied shelter, depending on the reason for their late arrival; generally, anyone arriving after 8:00 pm is denied shelter.

Except in winter, male guests in the Emergency Services Program may stay at River of Life for up to 17 consecutive nights; women and children in the Emergency Services Program may stay at City Light for up to 30 consecutive nights. After the time limit is reached, homeless individuals who do not join the Discipleship Program may not return to a BRM shelter for at least 30 days.[4] Participants in the Emergency Services Program must return to the shelter every night during the applicable 17-day or 30-day period; if a resident fails to check in to a BRM shelter each night, that resident is prohibited from staying overnight at that shelter for 30

2. The record suggests that BRM provides some limited additional non-emergency shelter programming which, like the Discipleship Program, has overtly religious components.

3. The intake form states in relevant part that "We are a Gospel Rescue Mission. Gospel means 'Good News,' and the Good News is that Jesus saves us from sin past, present, and future. We would like to share the Good News with you. Have you heard of Jesus? . . . Would you like to know more about him?"

4. The parties dispute the extent to which BRM actually enforces the 17- and 30-day limits.

days. BRM's rules on the length of a person's stay in the Emergency Services Program are suspended during the winter.

The Discipleship Program is an "intensive, Christ-based residential recovery program" of which "[r]eligious study is the very essence." The record does not indicate any limit to how long a member of the Discipleship Program may stay at a BRM shelter.

The River of Life shelter contains 148 beds for emergency use, along with 40 floor mats for overflow; 78 additional beds serve those in non-emergency shelter programs such as the Discipleship Program. The City Light shelter has 110 beds for emergency services, as well as 40 floor mats to handle overflow and 38 beds for women in non-emergency shelter programs. All told, Boise's three homeless shelters contain 354 beds and 92 overflow mats for homeless individuals.

A. The Plaintiffs

Plaintiffs Robert Martin, Robert Anderson, Lawrence Lee Smith, Basil E. Humphrey, Pamela S. Hawkes, and Janet F. Bell are all homeless individuals who have lived in or around Boise since at least 2007. Between 2007 and 2009, each plaintiff was convicted at least once of violating the Camping Ordinance, the Disorderly Conduct Ordinance, or both. With one exception, all plaintiffs were sentenced to time served for all convictions; on two occasions, Hawkes was sentenced to one additional day in jail. During the same period, Hawkes was cited, but not convicted, under the Camping Ordinance, and Martin was cited, but not convicted, under the Disorderly Conduct Ordinance.

Plaintiff Robert Anderson currently lives in Boise; he is homeless and has often relied on Boise's shelters for housing. In the summer of 2007, Anderson stayed at River of Life as part of the Emergency Services Program until he reached the shelter's 17-day limit for male guests. Anderson testified that during his 2007 stay at River of Life, he was required to attend chapel services before he was permitted to eat dinner. At the conclusion of his 17-day stay, Anderson declined to enter the Discipleship Program because of his religious beliefs. As Anderson was barred by the shelter's policies from returning to River of Life for 30 days, he slept outside for the next several weeks. On September 1, 2007, Anderson was cited under the Camping Ordinance. He pled guilty to violating the Camping Ordinance and paid a $25 fine; he did not appeal his conviction.

Plaintiff Robert Martin is a former resident of Boise who currently lives in Post Falls, Idaho. Martin returns frequently to Boise to visit his minor son. In March of 2009, Martin was cited under the Camping Ordinance for sleeping outside; he was cited again in 2012 under the same ordinance.

B. Procedural History

The plaintiffs filed this action in the United States District Court for the District of Idaho in October of 2009. All plaintiffs alleged that their previous citations under the Camping Ordinance and the Disorderly Conduct Ordinance violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, and sought damages for those alleged violations under 42 U.S.C. § 1983. *Cf. Jones*, 444 F.3d at 1138. Anderson and Martin also sought prospective declaratory and injunctive relief precluding future enforcement of the ordinances under the same statute and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

After this litigation began, the Boise Police Department promulgated a new

"Special Order," effective as of January 1, 2010, that prohibited enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on public property on any night when no shelter had "an available overnight space." City police implemented the Special Order through a two-step procedure known as the "Shelter Protocol."

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full. Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any person away because of a lack of space, and neither BRM shelter has ever reported that it was full.

If all shelters are full on the same night, police are to refrain from enforcing either ordinance. Presumably because the BRM shelters have not reported full, Boise police continue to issue citations regularly under both ordinances.

In July 2011, the district court granted summary judgment to the City. It held that the plaintiffs' claims for retrospective relief were barred under the *Rooker-Feldman* doctrine and that their claims for prospective relief were mooted by the Special Order and the Shelter Protocol. *Bell v. City of Boise*, 834 F.Supp.2d 1103 (D. Idaho 2011). On appeal, we reversed and remanded. *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013). We held that the district court erred in dismissing the plaintiffs' claims under the *Rooker-Feldman* doctrine. *Id.* at 897. In so holding, we expressly declined to consider whether the favorable-termination requirement from *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), applied to the plaintiffs' claims for retrospective relief. Instead, we left the issue for the district court on remand. *Bell*, 709 F.3d at 897 n.11.

Bell further held that the plaintiffs' claims for prospective relief were not moot. The City had not met its "heavy burden" of demonstrating that the challenged conduct — enforcement of the two ordinances against homeless individuals with no access to shelter — "could not reasonably be expected to recur." *Id.* at 898, 901 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). We emphasized that the Special Order was a statement of administrative policy and so could be amended or reversed at any time by the Boise Chief of Police. *Id.* at 899–900.

Finally, *Bell* rejected the City's argument that the plaintiffs lacked standing to seek prospective relief because they were no longer homeless. *Id.* at 901 & n.12. We noted that, on summary judgment, the plaintiffs "need not establish that they in fact have standing, but only that there is a genuine issue of material fact as to the standing elements." *Id.* (citation omitted).

On remand, the district court again granted summary judgment to the City on the plaintiffs' § 1983 claims. The court observed that *Heck* requires a § 1983 plaintiff seeking damages for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid" to demonstrate that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal ... or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486–87, 114 S.Ct. 2364. According to the district court, "a judgment finding the Ordinances uncon-

stitutional . . . necessarily would imply the invalidity of Plaintiffs' [previous] convictions under those ordinances," and the plaintiffs therefore were required to demonstrate that their convictions or sentences had already been invalidated. As none of the plaintiffs had raised an Eighth Amendment challenge as a defense to criminal prosecution, nor had any plaintiff successfully appealed their conviction, the district court held that all of the plaintiffs' claims for retrospective relief were barred by *Heck*. The district court also rejected as barred by *Heck* the plaintiffs' claim for prospective injunctive relief under § 1983, reasoning that "a ruling in favor of Plaintiffs on even a prospective § 1983 claim would demonstrate the invalidity of any confinement stemming from those convictions."

Finally, the district court determined that, although *Heck* did not bar relief under the Declaratory Judgment Act, Martin and Anderson now lack standing to pursue such relief. The linchpin of this holding was that the Camping Ordinance and the Disorderly Conduct Ordinance were both amended in 2014 to codify the Special Order's mandate that "[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05, 9-10-02. Because the ordinances, as amended, permitted camping or sleeping in a public place when no shelter space was available, the court held that there was no "credible threat" of future prosecution. "If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs . . . ." The court emphasized that the record "suggests there is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity" and that "there has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families."

This appeal followed.

II. Discussion

A. Standing

We first consider whether any of the plaintiffs has standing to pursue prospective relief.[5] We conclude that there are sufficient opposing facts in the record to create a genuine issue of material fact as to whether Martin and Anderson face a credible threat of prosecution under one or both ordinances in the future at a time when they are unable to stay at any Boise homeless shelter.[6]

[2–6] "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (citation omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury

5. Standing to pursue retrospective relief is not in doubt. The only threshold question affecting the availability of a claim for retrospective relief — a question we address in the next section — is whether such relief is barred by the doctrine established in *Heck*.

6. Although the SAC is somewhat ambiguous regarding which of the plaintiffs seeks prospective relief, counsel for the plaintiffs made clear at oral argument that only two of the plaintiffs, Martin and Anderson, seek such relief, and the district court considered the standing question with respect to Martin and Anderson only.

is not too speculative for Article III purposes — that the injury is *certainly* impending." *Id.* (citation omitted). A plaintiff need not, however, await an arrest or prosecution to have standing to challenge the constitutionality of a criminal statute. "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (citation and internal quotation marks omitted). To defeat a motion for summary judgment premised on an alleged lack of standing, plaintiffs " need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

[7] In dismissing Martin and Anderson's claims for declaratory relief for lack of standing, the district court emphasized that Boise's ordinances, as amended in 2014, preclude the City from issuing a citation when there is no available space at a shelter, and there is consequently no risk that either Martin or Anderson will be cited under such circumstances in the future. Viewing the record in the light most favorable to the plaintiffs, we cannot agree.

Although the 2014 amendments preclude the City from enforcing the ordinances when there is no room available at any shelter, the record demonstrates that the City is wholly reliant on the shelters to self-report when they are full. It is undisputed that Sanctuary is full as to men on a substantial percentage of nights, perhaps as high as 50%. The City nevertheless emphasizes that since the adoption of the Shelter Protocol in 2010, the BRM facilities, River of Life and City Light, have never reported that they are full, and BRM states that it will never turn people away due to lack space.

The plaintiffs have pointed to substantial evidence in the record, however, indicating that whether or not the BRM facilities are ever full or turn homeless individuals away *for lack of space*, they *do* refuse to shelter homeless people who exhaust the number of days allotted by the facilities. Specifically, the plaintiffs allege, and the City does not dispute, that it is BRM's policy to limit men to 17 consecutive days in the Emergency Services Program, after which they cannot return to River of Life for 30 days; City Light has a similar 30-day limit for women and children. Anderson testified that BRM has enforced this policy against him in the past, forcing him to sleep outdoors.

[8] The plaintiffs have adduced further evidence indicating that River of Life permits individuals to remain at the shelter after 17 days in the Emergency Services Program only on the condition that they become part of the New Life Discipleship program, which has a mandatory religious focus. For example, there is evidence that participants in the New Life Program are not allowed to spend days at Corpus Christi, a local Catholic program, "because it's ... a different sect." There are also facts in dispute concerning whether the Emergency Services Program itself has a religious component. Although the City argues strenuously that the Emergency Services Program is secular, Anderson testified to the contrary; he stated that he was once required to attend chapel before being permitted to eat dinner at the River of Life shelter. Both Martin and Anderson have objected to the overall religious at-

mosphere of the River of Life shelter, including the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls. A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment. *Inouye v. Kemna*, 504 F.3d 705, 712–13 (9th Cir. 2007). Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.

The 17-day and 30-day limits are not the only BRM policies which functionally limit access to BRM facilities even when space is nominally available. River of Life also turns individuals away if they voluntarily leave the shelter before the 17-day limit and then attempt to return within 30 days. An individual who voluntarily leaves a BRM facility for any reason — perhaps because temporary shelter is available at Sanctuary, or with friends or family, or in a hotel — cannot immediately return to the shelter if circumstances change. Moreover, BRM's facilities may deny shelter to any individual who arrives after 5:30 pm, and generally will deny shelter to anyone arriving after 8:00 pm. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 pm. Thus, by the time a homeless individual on the Sanctuary waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

So, even if we credit the City's evidence that BRM's facilities have never been "full," and that the City has never cited any person under the ordinances who could not obtain shelter "due to a lack of shelter capacity," there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when Sanctuary is full and they have been denied entry to a BRM facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is available. We note that despite the Shelter Protocol and the amendments to both ordinances, the City continues regularly to issue citations for violating both ordinances; during the first three months of 2015, the Boise Police Department issued over 175 such citations.

The City argues that Martin faces little risk of prosecution under either ordinance because he has not lived in Boise since 2013. Martin states, however, that he is still homeless and still visits Boise several times a year to visit his minor son, and that he has continued to seek shelter at Sanctuary and River of Life. Although Martin may no longer spend enough time in Boise to risk running afoul of BRM's 17-day limit, he testified that he has unsuccessfully sought shelter at River of Life after being placed on Sanctuary's waiting list, only to discover later in the evening that Sanctuary had no available beds. Should Martin return to Boise to visit his son, there is a reasonable possibility that he might again seek shelter at Sanctuary, only to discover (after BRM has closed for the night) that Sanctuary has no space for him. Anderson, for his part, continues to live in Boise and states that he remains homeless.

We conclude that both Martin and Anderson have demonstrated a genuine issue of material fact regarding whether they face a credible risk of prosecution under the ordinances in the future on a night when they have been denied access to Boise's homeless shelters; both plaintiffs therefore have standing to seek prospective relief.

B. *Heck v. Humphrey*

We turn next to the impact of *Heck v. Humphrey* and its progeny on this case. With regard to retrospective relief, the plaintiffs maintain that *Heck* should not bar their claims because, with one exception, all of the plaintiffs were sentenced to time served.[7] It would therefore have been impossible for the plaintiffs to obtain federal habeas relief, as any petition for a writ of habeas corpus must be filed while the petitioner is "in custody pursuant to the judgment of a State court." *See* 28 U.S.C. § 2254(a); *Spencer v. Kemna*, 523 U.S. 1, 7, 17–18, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). With regard to prospective relief, the plaintiffs emphasize that they seek only equitable protection against *future* enforcement of an allegedly unconstitutional statute, and not to invalidate any prior conviction under the same statute. We hold that although the *Heck* line of cases precludes most — but not all — of the plaintiffs' requests for retrospective relief, that doctrine has no application to the plaintiffs' request for an injunction enjoining prospective enforcement of the ordinances.

1. The *Heck* Doctrine

A long line of Supreme Court case law, beginning with *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), holds that a prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his or her confinement, but must instead seek federal habeas corpus relief or analogous state relief. *Id.* at 477, 500. *Preiser* considered whether a prison inmate could bring a § 1983 action seeking an injunction to remedy an unconstitutional deprivation of good-time conduct credits. Observing that habeas corpus is the traditional instrument to obtain release from unlawful confinement, *Preiser* recognized an implicit exception from § 1983's broad scope for actions that lie "within the core of habeas corpus" — specifically, challenges to the "fact or duration" of confinement. *Id.* at 487, 500, 93 S.Ct. 1827. The Supreme Court subsequently held, however, that although *Preiser* barred inmates from obtaining an injunction to restore good-time credits via a § 1983 action, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the *prospective* enforcement of invalid prison regulations." *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (emphasis added).

[9] *Heck* addressed a § 1983 action brought by an inmate seeking compensatory and punitive damages. The inmate alleged that state and county officials had engaged in unlawful investigations and knowing destruction of exculpatory evidence. *Heck*, 512 U.S. at 479, 114 S.Ct. 2364. The Court in *Heck* analogized a § 1983 action of this type, which called into question the validity of an underlying conviction, to a cause of action for malicious prosecution, *id.* at 483–84, 114 S.Ct. 2364, and went on to hold that, as with a malicious prosecution claim, a plaintiff in such an action must demonstrate a favorable termination of the criminal proceedings before seeking tort relief, *id.* at 486–87, 114 S.Ct. 2364. "[T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, de-

7. Plaintiff Pamela Hawkes was convicted of violating the Camping Ordinance or Disorderly Conduct Ordinance on twelve occasions; although she was usually sentenced to time served, she was twice sentenced to one additional day in jail.

clared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.*

Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) extended *Heck*'s holding to claims for declaratory relief. *Id.* at 648, 117 S.Ct. 1584. The plaintiff in *Edwards* alleged that he had been deprived of earned good-time credits without due process of law, because the decisionmaker in disciplinary proceedings had concealed exculpatory evidence. Because the plaintiff's claim for declaratory relief was "based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed," *Edwards* held, it was "not cognizable under § 1983." *Id. Edwards* went on to hold, however, that a requested injunction requiring prison officials to date-stamp witness statements was not *Heck*-barred, reasoning that a "prayer for such *prospective* relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983." *Id.* (emphasis added).

[10] Most recently, *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), stated that *Heck* bars § 1983 suits even when the relief sought is prospective injunctive or declaratory relief, "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 81–82, 125 S.Ct. 1242 (emphasis omitted). But *Wilkinson* held that the plaintiffs in that case *could* seek a prospective injunction compelling the state to comply with constitutional requirements in parole proceedings in the future. The Court observed that the prisoners' claims for future relief, "if successful, will not necessarily imply the invalidity of confinement or shorten its duration." *Id.* at 82, 125 S.Ct. 1242.

The Supreme Court did not, in these cases or any other, conclusively determine whether *Heck*'s favorable-termination requirement applies to convicts who have no practical opportunity to challenge their conviction or sentence via a petition for habeas corpus. *See Muhammad v. Close*, 540 U.S. 749, 752 & n.2, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004). But in *Spencer*, five Justices suggested that *Heck* may not apply in such circumstances. *Spencer*, 523 U.S. at 3, 118 S.Ct. 978.

The petitioner in *Spencer* had filed a federal habeas petition seeking to invalidate an order revoking his parole. While the habeas petition was pending, the petitioner's term of imprisonment expired, and his habeas petition was consequently dismissed as moot. Justice Souter wrote a concurring opinion in which three other Justices joined, addressing the petitioner's argument that if his habeas petition were mooted by his release, any § 1983 action would be barred under *Heck*, yet he would no longer have access to a federal habeas forum to challenge the validity of his parole revocation. *Id.* at 18–19, 118 S.Ct. 978 (Souter, J., concurring). Justice Souter stated that in his view "*Heck* has no such effect," and that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21, 118 S.Ct. 978. Justice Stevens, dissenting, stated that he would have held the habeas petition in *Spencer* not moot, but agreed that "[g]iven the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear ... that he may bring an action under 42 U.S.C. § 1983." *Id.* at 25, 118 S.Ct. 978 n.8 (Stevens, J., dissenting).

Relying on the concurring and dissenting opinions in *Spencer*, we have held that the "unavailability of a remedy in habeas corpus because of mootness" permitted a plaintiff released from custody to maintain a § 1983 action for damages, "even though success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits." *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002). But we have limited *Nonnette* in recent years. Most notably, we held in *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), that even where a plaintiff had no practical opportunity to pursue federal habeas relief while detained because of the short duration of his confinement, *Heck* bars a § 1983 action that would imply the invalidity of a prior conviction if the plaintiff could have sought invalidation of the underlying conviction via direct appeal or state post-conviction relief, but did not do so. *Id.* at 1192 & n.12.

2. Retrospective Relief

[11] Here, the majority of the plaintiffs' claims for *retrospective* relief are governed squarely by *Lyall.* It is undisputed that all the plaintiffs not only failed to challenge their convictions on direct appeal but expressly waived the right to do so as a condition of their guilty pleas. The plaintiffs have made no showing that any of their convictions were invalidated via state post-conviction relief. We therefore hold that all but two of the plaintiffs' claims for damages are foreclosed under *Lyall.*

[12] Two of the plaintiffs, however, Robert Martin and Pamela Hawkes, also received citations under the ordinances that were dismissed before the state obtained a conviction. Hawkes was cited for violating the Camping Ordinance on July 8, 2007; that violation was dismissed on August 28, 2007. Martin was cited for violating the Disorderly Conduct Ordinance on April 24, 2009; those charges were dismissed on September 9, 2009. The complaint alleges two injuries stemming from these dismissed citations: (1) the continued inclusion of the citations on plaintiffs' criminal records; and (2) the accumulation of a host of criminal fines and incarceration costs. Plaintiffs seek orders compelling the City to "expunge[ ] . . . the records of any homeless individuals unlawfully cited or arrested and charged under [the Ordinances]" and "reimburse[ ] . . . any criminal fines paid . . . [or] costs of incarceration billed."

With respect to these two incidents, the district court erred in finding that the plaintiffs' Eighth Amendment challenge was barred by *Heck*. Where there is no "conviction or sentence" that may be undermined by a grant of relief to the plaintiffs, the *Heck* doctrine has no application. 512 U.S. at 486–87, 114 S.Ct. 2364; *see also Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).

[13, 14] Relying on *Ingraham v. Wright*, 430 U.S. 651, 664, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), the City argues that the Eighth Amendment, and the Cruel and Unusual Punishments Clause in particular, have no application where there has been no conviction. The City's reliance on *Ingraham* is misplaced. As the Supreme Court observed in *Ingraham*, the Cruel and Unusual Punishments Clause not only limits the types of punishment that may be imposed and prohibits the imposition of punishment grossly disproportionate to the severity of the crime, but also "imposes substantive limits on what can be made criminal and punished as such." *Id.* at 667, 97 S.Ct. 1401. "This [latter] protection governs the criminal law process as a whole, not only the imposition of punishment postconviction." *Jones*, 444 F.3d at 1128.

[15] *Ingraham* concerned only whether "impositions outside the criminal process" — in that case, the paddling of schoolchildren — "constituted cruel and unusual punishment." 430 U.S. at 667, 97 S.Ct. 1401. *Ingraham* did not hold that a plaintiff challenging the state's power to criminalize a particular status or conduct in the first instance, as the plaintiffs in this case do, must first be convicted. If conviction were a prerequisite for such a challenge, "the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the [Cruel and Unusual Punishments Clause] cannot be subject to the criminal process." *Jones*, 444 F.3d at 1129. For those rare Eighth Amendment challenges concerning the state's very power to criminalize particular behavior or status, then, a plaintiff need demonstrate only the initiation of the criminal process against him, not a conviction.

3. Prospective Relief

[16] The district court also erred in concluding that the plaintiffs' requests for prospective injunctive relief were barred by *Heck*. The district court relied entirely on language in *Wilkinson* stating that "a state prisoner's § 1983 action is barred (absent prior invalidation) ... no matter the relief sought (damages or equitable relief) ... *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 81–82, 125 S.Ct. 1242. The district court concluded from this language in *Wilkinson* that a person convicted under an allegedly unconstitutional statute may never challenge the validity or application of that statute after the initial criminal proceeding is complete, even when the relief sought is prospective only and independent of the prior conviction. The logical extension of the district court's interpretation is that an individual who does not successfully invalidate a first conviction under an unconstitutional statute will have no opportunity to challenge that statute prospectively so as to avoid arrest and conviction for violating that same statute in the future.

Neither *Wilkinson* nor any other case in the *Heck* line supports such a result. Rather, *Wolff*, *Edwards*, and *Wilkinson* compel the opposite conclusion.

Wolff held that although *Preiser* barred a § 1983 action seeking restoration of good-time credits absent a successful challenge in federal habeas proceedings, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid ... regulations." *Wolff*, 418 U.S. at 555, 94 S.Ct. 2963. Although *Wolff* was decided before *Heck*, the Court subsequently made clear that *Heck* effected no change in the law in this regard, observing in *Edwards* that "[o]rdinarily, a prayer for ... prospective [injunctive] relief will not 'necessarily imply' the invalidity of a *previous* loss of good-time credits, and so may properly be brought under § 1983." *Edwards*, 520 U.S. at 648, 117 S.Ct. 1584 (emphasis added). Importantly, the Court held in *Edwards* that although the plaintiff could not, consistently with *Heck*, seek a declaratory judgment stating that the procedures employed by state officials that deprived him of good-time credits were unconstitutional, he *could* seek an injunction barring such allegedly unconstitutional procedures in the future. *Id.* Finally, the Court noted in *Wilkinson* that the *Heck* line of cases "has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies *when they seek to invalidate the duration of their confinement*," *Wilkinson*, 544 U.S. at 81, 125 S.Ct. 1242 (emphasis added), allud-

ing to an existing confinement, not one yet to come.

[17, 18] The *Heck* doctrine, in other words, serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge. In context, it is clear that *Wilkinson*'s holding that the *Heck* doctrine bars a § 1983 action "no matter the relief sought (damages or equitable relief) ... if success in that action would necessarily demonstrate the invalidity of confinement or its duration" applies to equitable relief concerning an existing confinement, not to suits seeking to preclude an unconstitutional confinement in the future, arising from incidents occurring after any prior conviction and stemming from a possible later prosecution and conviction. *Id.* at 81–82, 125 S.Ct. 1242 (emphasis added). As *Wilkinson* held, "claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration)" are distant from the "core" of habeas corpus with which the *Heck* line of cases is concerned, and are not precluded by the *Heck* doctrine. *Id.* at 82, 125 S.Ct. 1242.

In sum, we hold that the majority of the plaintiffs' claims for retrospective relief are barred by *Heck*, but both Martin and Hawkes stated claims for damages to which *Heck* has no application. We further hold that *Heck* has no application to the plaintiffs' requests for prospective injunctive relief.

C. The Eighth Amendment

At last, we turn to the merits — does the Cruel and Unusual Punishments Clause of the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter? We hold that it does, for essentially the same reasons articulated in the now-vacated *Jones* opinion.

[19] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401. First, it limits the type of punishment 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.

[20, 21] "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Cases construing substantive limits as to what the government may criminalize are rare, however, and for good reason — the Cruel and Unusual Punishments Clause's third limitation is "one to be applied sparingly." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401.

Robinson, the seminal case in this branch of Eighth Amendment jurisprudence, 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"; 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.

As *Jones* observed, *Robinson* did not explain at length the principles underpinning its holding. *See Jones*, 444 F.3d at 1133. In *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), however, the Court elaborated on the principle first articulated in *Robinson*.

Powell concerned the constitutionality of a Texas law making public drunkenness a criminal offense. Justice Marshall, writing for a plurality of the Court, distinguished the Texas statute from the law at issue in *Robinson* on the ground that the Texas statute made criminal not alcoholism but *conduct* — appearing in public while intoxicated. "[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 appellant's behavior in the privacy of his own home." *Id.* at 532, 88 S.Ct. 2145 (plurality opinion).

[22] The *Powell* plurality opinion went on to interpret *Robinson* as precluding only the criminalization of "status," not of "involuntary" conduct. "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' . . . ." *Id.* at 533, 88 S.Ct. 2145.

Four Justices dissented from the Court's holding in *Powell*; Justice White concurred in the result alone. Notably, 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." *Id.* at 551, 88 S.Ct. 2145 (White, J., concurring in the judgment).

[23] The four dissenting Justices 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, 88 S.Ct. 2145 (Fortas, J., dissenting). Thus, five Justices gleaned from *Robinson* the principle that "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. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017).

[24] This principle compels 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.

Our holding is a narrow one. Like the *Jones* panel, "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.[8]

We are not alone in reaching this conclusion. As one court has 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).[9]

Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a blanket or other basic bedding. The Disorderly

8. Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. 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 sleeping outside at particular times or in particular locations 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.

9. In *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000), the Eleventh Circuit upheld an anti-camping ordinance similar to Boise's against an Eighth Amendment challenge. In *Joel*, however, the defendants presented unrefuted evidence that the homeless shelters in the City of Orlando had never reached capacity and that the plaintiffs had always enjoyed access to shelter space. *Id.* Those unrefuted facts were critical to the court's holding. *Id.* As discussed below, the plaintiffs here have demonstrated a genuine issue of material fact concerning whether they have been denied access to shelter in the past or expect to be so denied in the future. *Joel* therefore does not provide persuasive guidance for this case.

Conduct Ordinance, on its face, criminalizes "[o]ccupying, lodging, or sleeping in *any* building, structure or place, whether public or private" without permission. Boise City Code § 6-01-05. Its scope is just as sweeping as the Los Angeles ordinance at issue in *Jones*, which mandated that "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way." 444 F.3d at 1123.

The Camping Ordinance criminalizes using "any of the streets, sidewalks, parks or public places as a camping place at any time." Boise City Code § 9-10-02. The ordinance defines "camping" broadly:

> The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

Id. It appears from the record that the Camping Ordinance is frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed indicia of "camping" — the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property — are present. For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside "wrapped in a blanket with her sandals off and next to her," for sleeping in a public restroom "with blankets," and for sleeping in a park "on a blanket, wrapped in blankets on the ground." The Camping Ordinance therefore can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements. We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the judgment of the district court as to the plaintiffs' requests for retrospective relief, except as such claims relate to Hawkes's July 2007 citation under the Camping Ordinance and Martin's April 2009 citation under the Disorderly Conduct Ordinance. We **REVERSE** and **REMAND** with respect to the plaintiffs' requests for prospective relief, both declaratory and injunctive, and to the plaintiffs' claims for retrospective relief insofar as they relate to Hawkes' July 2007 citation or Martin's April 2009 citation.[10]

OWENS, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), bars the plaintiffs' 42 U.S.C. § 1983 claims for damages that are based on convictions that have not been challenged on direct appeal or invalidated in state post-conviction relief. *See Lyall v. City of Los Angeles*, 807 F.3d 1178, 1192 n.12 (9th Cir. 2015).

I also agree that *Heck* and its progeny have no application where there is no "con-

10. Costs shall be awarded to the plaintiffs.

viction or sentence" that would be undermined by granting a plaintiff's request for relief under § 1983. *Heck*, 512 U.S. at 486–87, 114 S.Ct. 2364; *see also Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). I therefore concur in the majority's conclusion that *Heck* does not bar plaintiffs Robert Martin and Pamela Hawkes from seeking retrospective relief for the two instances in which they received citations, but not convictions. I also concur in the majority's Eighth Amendment analysis as to those two claims for retrospective relief.

Where I part ways with the majority is in my understanding of *Heck*'s application to the plaintiffs' claims for declaratory and injunctive relief. In *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), the Supreme Court explained where the *Heck* doctrine stands today:

> [A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Id. at 81–82. Here, the majority acknowledges this language in *Wilkinson*, but concludes that *Heck*'s bar on any type of relief that "would necessarily demonstrate the invalidity of confinement" does not preclude the prospective claims at issue. The majority reasons that the purpose of *Heck* is "to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge," and so concludes that the plaintiffs' prospective claims may proceed. I respectfully disagree.

A declaration that the city ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. Indeed, any time an individual challenges the constitutionality of a substantive criminal statute under which he has been convicted, he asks for a judgment that would necessarily demonstrate the invalidity of his conviction. And though neither the Supreme Court nor this court has squarely addressed *Heck*'s application to § 1983 claims challenging the constitutionality of a substantive criminal statute, I believe *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), makes clear that *Heck* prohibits such challenges. In *Edwards*, the Supreme Court explained that although our court had recognized that *Heck* barred § 1983 claims challenging the validity of a prisoner's confinement "as a substantive matter," it improperly distinguished as not *Heck*-barred *all* claims alleging only procedural violations. 520 U.S. at 645, 117 S.Ct. 1584. In holding that *Heck* also barred those procedural claims that would necessarily imply the invalidity of a conviction, the Court did not question our conclusion that claims challenging a conviction "as a substantive matter" are barred by *Heck*. *Id.*; *see also Wilkinson*, 544 U.S. at 82, 125 S.Ct. 1242 (holding that the plaintiffs' claims could proceed because the relief requested would only "render invalid the state *procedures*" and "a favorable judgment [would] not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s]' " (emphasis added) (quoting *Heck*, 512 U.S. at 487, 114 S.Ct. 2364)).

Edwards thus leads me to conclude that an individual who was convicted under a criminal statute, but who did not challenge the constitutionality of the statute at the time of his conviction through direct appeal or post-conviction relief, cannot do so in the first instance by seeking declaratory or injunctive relief under § 1983. *See Abusaid v. Hillsborough Cty. Bd. of Cty.*

Comm'rs, 405 F.3d 1298, 1316 n.9 (11th Cir. 2005) (assuming that a § 1983 claim challenging "the constitutionality of the ordinance under which [the petitioner was convicted]" would be *Heck*-barred). I therefore would hold that *Heck* bars the plaintiffs' claims for declaratory and injunctive relief.

We are not the first court to struggle applying *Heck* to "real life examples," nor will we be the last. *See, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 21, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (Ginsburg, J., concurring) (alterations and internal quotation marks omitted) (explaining that her thoughts on *Heck* had changed since she joined the majority opinion in that case). If the slate were blank, I would agree that the majority's holding as to prospective relief makes good sense. But because I read *Heck* and its progeny differently, I dissent as to that section of the majority's opinion. I otherwise join the majority in full.

Gloria JOHNSON; John Logan, individuals, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

v.

CITY OF GRANTS PASS, Defendant-Appellant.

Nos. 20-35752, 20-35881

United States Court of Appeals, Ninth Circuit.

Argued and Submitted December 6, 2021 San Francisco, California

Filed September 28, 2022

Background: Individuals experiencing homelessness brought putative class action against city, challenging constitutionality of city ordinances which precluded use of a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within city's limits and which provided for civil fines, exclusion orders, and criminal prosecution for trespass. After certifying class, 2019 WL 3717800, the United States District Court for the District of Oregon, Mark D. Clarke, United States Magistrate Judge, 2020 WL 4209227, granted partial summary judgment to individuals and issued permanent injunction prohibiting enforcement of some of the ordinances. City appealed.

Holdings: The Court of Appeals, Silver, District Judge, held that:

(1) city's alleged reduction in enforcement of ordinances did not render action moot;

(2) relief sought was within limits of Article III;

(3) district court acted within its discretion in finding that commonality requirement for class certification was met; and

(4) ordinance precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Cruel and Unusual Punishments Clause as applied to individuals who were involuntarily experiencing homelessness and who had no shelter in which to lawfully sleep.

Affirmed in part, vacated in part, and remanded.

Collins, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⚿3581(1), 3585(2)

Standing and mootness are questions of law that Court of Appeals reviews de novo.

2. Federal Civil Procedure ⚿103.2

Federal Courts ⚿2073

Federal courts must determine that they have jurisdiction before proceeding to merits, and plaintiffs must demonstrate

standing as necessary component of jurisdiction.

3. Federal Civil Procedure ⚿103.2, 103.3

To have Article III standing, plaintiff must show (1) concrete and particularized injury, (2) caused by challenged conduct, (3) that is likely redressable by favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

4. Injunction ⚿1505

For purposes of injunctive relief, abstract injury is not enough to support Article III standing; plaintiff must have sustained or be in immediate danger of sustaining some direct injury as result of challenged law. U.S. Const. art. 3, § 2, cl. 1.

5. Constitutional Law ⚿977

City's alleged reduction in enforcement of ordinances challenged as unconstitutional by individuals experiencing homelessness did not render individuals' challenge moot, in case involving ordinances which provided for civil fines, exclusion orders, and criminal prosecution for trespass, where, even if rate of enforcement of ordinances had decreased, it was undisputed that enforcement continued to some degree.

6. Federal Courts ⚿2109

A claim becomes moot, and no longer justiciable in federal court, if it has been remedied independent of the court.

7. Federal Courts ⚿2114

Voluntary cessation of challenged practices rarely suffices to moot a case.

8. Federal Courts ⚿2114, 2202

To support an argument of mootness based on voluntary cessation of challenged practice, defendant bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.

9. Constitutional Law ⚿2500, 2543

Municipal Corporations ⚿622

Relief sought by individuals experiencing homelessness, in their action challenging constitutionality of city ordinances which included trespass and anti-camping provisions, was within limits of Article III, despite city's argument that any possible relief would inappropriately intrude upon matters of policy best left to executive and legislative discretion; court could grant limited relief enjoining enforcement of a few municipal ordinances at certain times, in certain places, against certain persons. U.S. Const. art. 3, § 2, cl. 1.

10. Constitutional Law ⚿977

Death of one class representative during pendency of city's appeal of district court's issuance of permanent injunctive relief in favor of individuals experiencing homelessness did not moot individuals' class claims as to constitutionality of city's park-exclusion, criminal trespass, and anti-camping ordinances, where surviving class representatives had standing in their own right.

11. Constitutional Law ⚿695, 705

Individual experiencing homelessness had standing for pre-enforcement challenge to constitutionality of city ordinances which provided that a person with multiple violations of anti-camping and anti-sleeping provisions could be excluded from city parks or charged with criminal trespass, even though individual lived in her car, where there was little doubt that her continued camping in parks would lead to a park exclusion order and, eventually, criminal trespass charges. U.S. Const. art. 3, § 2, cl. 1.

12. Constitutional Law ⚿695

Individual experiencing homelessness had standing for pre-enforcement chal-

lenge to constitutionality of city ordinances that included anti-camping and anti-sleeping provisions, even though individual stated he usually slept in his truck just outside of city limits, where individual had previously slept in city and been awoken by police officers and ordered to move, and individual stated that, but for the challenged ordinances, he would sleep in the city. U.S. Const. art. 3, § 2, cl. 1.

13. Federal Civil Procedure ⚿164.5

For a class representative to pursue the live claims of a properly certified class, without the need to remand for substitution of a new representative, even after his own claims become moot, class must be properly certified or representative must be appealing denial of class certification, and class representative must be a member of the class with standing to sue at the time certification is granted or denied, the unnamed class members must still have a live interest in the matter throughout the duration of the litigation, and the court must be satisfied that the named representative will adequately pursue the interests of the class even though their own interest has expired.

14. Federal Courts ⚿3785

Remand was required for determination of whether a substitute class representative was available as to challenge to constitutionality of city ordinance precluding sleeping in certain public places, after death of class representative in action against city by individuals experiencing homelessness, which challenged multiple ordinances, where deceased class representative was the only representative with standing in her own right to challenge that particular ordinance, parties had not moved to substitute a class representative, and Court of Appeals was unsure of its jurisdiction to consider challenge to the ordinance at issue.

15. Federal Courts ⚿3585(3)

Court of Appeals reviews district court's order granting class certification for abuse of discretion, but Court of Appeals gives district court noticeably more deference when reviewing grant of class certification than when reviewing denial. Fed. R. Civ. P. 23.

16. Federal Courts ⚿3585(3)

Factual findings underlying class certification are reviewed for clear error. Fed. R. Civ. P. 23.

17. Federal Civil Procedure ⚿171

Assessing the initial requirements for class certification involves rigorous analysis of the evidence. Fed. R. Civ. P. 23(a).

18. Federal Civil Procedure ⚿163

For purposes of numerosity requirement for class certification, impracticability of joinder of all members does not mean impossibility but only difficulty or inconvenience of joining all members of class. Fed. R. Civ. P. 23(a)(1).

19. Federal Civil Procedure ⚿163

There is no specific number of class members required to satisfy numerosity requirement for class certification; however, proposed classes of less than 15 are too small while classes of more than 60 are sufficiently large. Fed. R. Civ. P. 23(a)(1).

20. Federal Civil Procedure ⚿181

District court acted within its discretion in finding that numerosity requirement for class certification was met, in action against city by individuals experiencing homelessness, challenging constitutionality of city ordinances precluding conduct including camping in public parks, even though city police officer asserted in declaration that there were less than 50 individuals in city who did not have access to any shelter; point-in-time (PIT) counts conducted by non-profit organization indi-

cated there were at least 600 such individuals, and there was general understanding that PIT counts routinely undercounted. Fed. R. Civ. P. 23(a)(1).

21. Federal Civil Procedure ⇐165

Class satisfies commonality requirement for certification if there is at least one question of fact or law common to the class. Fed. R. Civ. P. 23(a)(2).

22. Federal Civil Procedure ⇐165

To satisfy commonality requirement for class certification, class members' claims must depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke. Fed. R. Civ. P. 23(a)(2).

23. Federal Civil Procedure ⇐181

District court acted within its discretion in finding that commonality requirement for class certification was met, in action against city by individuals experiencing homelessness, challenging constitutionality of city ordinances precluding conduct including camping in public parks, where individuals' claims presented at least one question and answer common to the class, which was whether city's custom, pattern, and practice of enforcing anti-camping ordinances, anti-sleeping ordinances, and criminal trespass laws against involuntarily homeless individuals violated the Eighth Amendment. U.S. Const. Amend. 8; Fed. R. Civ. P. 23(a)(2).

24. Federal Civil Procedure ⇐176

A "fail safe class" is one that includes only those individuals who were injured by the allegedly unlawful conduct; such classes are prohibited because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment. Fed. R. Civ. P. 23.

See publication Words and Phrases for other judicial constructions and definitions.

25. Federal Civil Procedure ⇐181

Definition of class as "[a]ll involuntarily homeless individuals living in [city]" did not create an impermissible fail-safe class, in action against city by individuals experiencing homelessness, challenging constitutionality of multiple city ordinances precluding conduct including camping in public parks; class would consist of exactly the same population whether city won or lost on merits, and class population would not change if a court determined that one or more ordinances were unconstitutional but that other ordinances were not. Fed. R. Civ. P. 23.

26. Federal Civil Procedure ⇐164

The typicality requirement for class certification is a permissive standard. Fed. R. Civ. P. 23(a)(3).

27. Federal Civil Procedure ⇐164

Typicality requirement for class certification refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. Fed. R. Civ. P. 23(a)(3).

28. Federal Civil Procedure ⇐181

District court acted within its discretion in finding that typicality requirement for class certification was met, in action against city by individuals experiencing homelessness, challenging constitutionality of city ordinances precluding conduct including camping in public parks, even though some class representatives lived in vehicles while some class members lived on streets or in parks; class representatives asserted that city could not enforce the challenged ordinances against them when they had no shelter, the defenses

that applied to class representatives and class members were identical, and sleeping in vehicle rather than on ground would only result in violation of ordinances in different manner. Fed. R. Civ. P. 23(a)(3).

29. Municipal Corporations ⚿622
Sentencing and Punishment ⚿1453

City's "anti-camping" ordinance allowing citation of individuals for use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public could violate the Cruel and Unusual Punishments Clause even though citation at issue was a civil citation, where, under totality of city ordinances, if an individual violated the anti-camping ordinance twice, she could be issued a park-exclusion order, and if the individual was subsequently found in a park, she could be cited for criminal trespass. U.S. Const. Amend. 8.

30. Municipal Corporations ⚿622
Sentencing and Punishment ⚿1453

City's "anti-camping" ordinance precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Cruel and Unusual Punishments Clause as applied to individuals who were involuntarily experiencing homelessness and who had no shelter in which to lawfully sleep; ordinance prohibited individuals from engaging in activity they could not avoid, given lack of other shelter options and fact that, due to city being cold in winter, use of rudimentary protection from elements was a life-preserving imperative. U.S. Const. Amend. 8.

31. Courts ⚿90(2)

The narrowest position which gained the support of five justices is treated as the holding of the Supreme Court.

32. Sentencing and Punishment ⚿1453

Under the Cruel and Unusual Punishments Clause, it is unconstitutional to punish simply sleeping somewhere in public if one has nowhere else to do so; "sleeping" includes sleeping with rudimentary forms of protection from the elements. U.S. Const. Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the District of Oregon, Mark D. Clarke, Magistrate Judge, Presiding, D.C. No. 1:18-cv-01823-CL

Aaron P. Hisel (argued), Law Offices of Montoya Hisel and Associates, Salem, Oregon; Gerald L. Warren, Law Office of Gerald L. Warren, Salem, Oregon, for Defendant-Appellant.

Edward Johnson (argued) and Walter Fonseca, Oregon Law Center, Portland, Oregon, for Plaintiffs-Appellees.

Eric S. Tars, National Homelessness Law Center, Washington, D.C.; Tamar Ezer, Acting Director; David Berris, Joe Candelaria, and Lily Fontenot, Legal Interns; David Stuzin, Student Fellow; University of Miami School of Law, Human Rights Clinic, Coral Gables, Florida; Leilani Farha, Former United Nations Special Rapporteur on the Right to Adequate Housing and Global Director, The Shift #Right2Housing, Ottawa, Ontario, Canada; for Amici Curiae University of Miami School of Law, Human Rights Clinic and National Homelessness Law Center.

Kelsi B. Corkran and Seth Wayne, Institute for Constitutional Advocacy & Protection, Washington, D.C., for Amicus Curiae Fines and Fees Justice Center.

John He, Leslie Bailey, and Brian Hardingham, Public Justice, Oakland, California; John Thomas H. Do, ACLU Foundation of Northern California, San Francisco, California; for Amici Curiae Public Justice,

ACLU of Northern California, ACLU of Southern California, ACLU of Oregon, Institute for Justice, National Center for Law and Economic Justice, and Rutherford Institute.

Nicolle Jacoby, Dechert LLP, New York, New York; Tristia M. Bauman, National Homelessness Law Center, Washington, D.C.; for Amici Curiae National Homelessness Law Center, Homeless Rights Advocacy Project at the Korematsu Center for Law and Equality at Seattle University School of Law, and National Coalition for the Homeless.

Before: RONALD M. GOULD and DANIEL P. COLLINS, Circuit Judges, and ROSLYN O. SILVER,* District Judge.

Opinion by Judge SILVER;

Dissent by Judge COLLINS

OPINION

SILVER, District Judge:

The City of Grants Pass in southern Oregon has a population of approximately 38,000. At least fifty, and perhaps as many as 600, homeless persons live in the City.[1] And the number of homeless persons outnumber the available shelter beds. In other words, homeless persons have nowhere to shelter and sleep in the City other than on the streets or in parks. Nonetheless, City ordinances preclude homeless persons from using a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within the City's limits. The ordinances result in civil fines up to several hundred dollars per violation and persons found to violate ordinances multiple times can be barred from all City property. And if a homeless person is found on City property after receiving an exclusion order, they are subject to criminal prosecution for trespass.

In September 2018, a three-judge panel issued *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), holding "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." *Id.* at 1048. Approximately six weeks after the initial *Martin* panel opinion, three homeless individuals filed a putative class action complaint against the City arguing a number of City ordinances were unconstitutional. The district court certified a class of "involuntarily homeless" persons and later granted partial summary judgment in favor of the class.[2] After the plaintiffs vol-

* The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

1. During this litigation the parties have used different phrases when referring to this population. For simplicity, we use ''homeless persons'' throughout this opinion.

2. Persons are involuntarily homeless if they do not ''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.'' *See Martin*, 920 F.3d at 617 n.8. However, someone who has the financial means to obtain shelter, or someone who is staying in an emergency shelter is not involuntarily homeless. *See id.* at 617 n.8. Contrary to the City's argument, this definition of involuntary homelessness is not the same as the definition of ''homeless'' found in regulations for the Department of Housing and Urban Development, 24 C.F.R. § 582.5, or the McKinney-Vento Act, 42 U.S.C. § 11434a(2), the federal law regarding the right of homeless children to a public education. For example, the McKinney-Vento Act includes as ''homeless children and youths'' persons who may not qualify as involuntarily homeless under *Martin*, such as children and youths ''living in emergency or transitional shelters.'' 42 U.S.C. § 11434a(2). Though the district court noted in part that Plaintiffs met the definition of homelessness set forth in 24 C.F.R. § 582.5, the district court also relied on the specific definition of unsheltered homeless persons set forth in the

untarily dismissed some claims not resolved at summary judgment, the district court issued a permanent injunction prohibiting enforcement against the class members of some City ordinances, at certain times, in certain places. The City now appeals, arguing this case is moot, the class should not have been certified, the claims fail on the merits, and Plaintiffs did not adequately plead one of their theories. On the material aspects of this case, the district court was right.[3]

I.

This case involves challenges to five provisions of the Grants Pass Municipal Code ("GPMC"). The provisions can be described as an "anti-sleeping" ordinance, two "anti-camping" ordinances, a "park exclusion" ordinance, and a "park exclusion appeals" ordinance. When the district court entered judgment, the various ordinances consisted of the following.

First, the anti-sleeping ordinance stated, in full

> *Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited*
>
> A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.
>
> B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.
>
> C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.

GPMC 5.61.020. A violation of this ordinance resulted in a presumptive $75 fine. If unpaid, that fine escalated to $160. If a violator pled guilty, the fines could be reduced by a state circuit court judge to $35 for a first offense and $50 for a second offense. GPMC 1.36.010(K).

Next, the general anti-camping ordinance prohibited persons from occupying a "campsite" on all public property, such as parks, benches, or rights of way. GPMC 5.61.030. The term "campsite" was 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 purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

GPMC 5.61.010. A second overlapping anti-camping ordinance prohibited camping in public parks, including "[o]vernight parking" of any vehicle. GPMC 6.46.090. A homeless individual would violate this parking prohibition if she parked or left "a vehicle parked for two consecutive hours [in a City park] . . . between the hours of midnight and 6:00 a.m." *Id.* Violations of either anti-camping ordinance resulted in a fine of $295. If unpaid, the fine escalated to

Department of Housing and Urban Development's regulations regarding point-in-time counts: "persons who are living in a place not designed or ordinarily used as a regular sleeping accommodation for humans must be counted as unsheltered homeless persons." 24 C.F.R. § 578.7(c)(2)(i).

3. Our dissenting colleague's strong disagreement with the majority largely arises from his disapproval of *Martin*. *See, e.g.,* Dissent 813–14 ("Even assuming *Martin* remains good law . . ."); Dissent 830 ("... and the gravity of *Martin*'s errors."); Dissent 831 (claiming, without evidence, that "it is hard to deny that *Martin* has 'generate[d] dire practical consequences' ") (modification in original and citation omitted). But *Martin* is controlling law in the Ninth Circuit, to which we are required to adhere.

$537.60. However, if a violator pled guilty, the fine could be reduced to $180 for a first offense and $225 for a second offense. GPMC 1.36.010(J).

Finally, the "park exclusion" ordinance allowed a police officer to bar an individual from all city parks for 30 days if, within one year, the individual was issued two or more citations for violating park regulations. GPMC 6.46.350(A). Pursuant to the "park exclusion appeals" ordinance, exclusion orders could be appealed to the City Council. GPMC 6.46.355. If an individual received a "park exclusion" order, but subsequently was found in a city park, that individual would be prosecuted for criminal trespass.

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.

The year following the Roundtable saw a significant increase in enforcement of the City's anti-sleeping and anti-camping ordinances. From 2013 through 2018, the City issued a steady stream of tickets under the ordinances.[4] On September 4, 2018, a three-judge panel issued its opinion in *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).[5] That case served as the backdrop for this entire litigation.

In *Martin*, six homeless or recently homeless individuals sued the city of Boise, Idaho, seeking relief from criminal prosecution under two city ordinances related to public camping. *Martin*, 920 F.3d 584, 603–04 (9th Cir. 2019). As relevant here, *Martin* held the Cruel and Unusual Punishment Clause of 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." *Id.* at 616. *Martin* made clear, however, that a city is not required to "provide sufficient shelter

4. The City issued the following number of tickets under the anti-sleeping and anti-camping ordinances:

2013: 74 total tickets
2014: 228 total tickets
2015: 80 total tickets
2016: 47 total tickets
2017: 99 total tickets
2018: 46 total tickets

5. Following the opinion, the City of Boise petitioned for rehearing en banc. On April 1, 2019, an amended panel opinion was issued and the petition for rehearing was denied. Judge M. Smith, joined by five other judges, dissented from the denial of rehearing en banc. He argued the three-judge panel had, among other errors, misinterpreted the Supreme Court precedents regarding the criminalization of involuntary conduct. *Martin*, 920 F.3d at 591–92 (M. Smith, J., dissenting from denial of rehearing en banc). Judge Bennett, joined by four judges, also dissented from the denial of rehearing en banc. Judge Bennett argued the three-judge panel's opinion was inconsistent with the original public meaning of the Cruel and Unusual Punishment Clause. *Id.* at 599 (Bennett, J., dissenting from denial of rehearing en banc). The merits of those dissents do not alter the binding nature of the amended *Martin* panel opinion. Unless otherwise indicated, all citations to *Martin* throughout the remainder of this opinion are to the amended panel opinion.

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 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)) (omission in original).

The formula established in *Martin* is that the government cannot prosecute homeless people for sleeping in public if there "is a greater number of homeless individuals in [a jurisdiction] than the number of available" shelter spaces. *Id.* (alteration in original). When assessing the number of shelter spaces, *Martin* held shelters with a "mandatory religious focus" could not be counted as available due to potential violations of the First Amendment's Establishment Clause. *Id.* at 609–10 (citing *Inouye v. Kemna*, 504 F.3d 705, 712–13 (9th Cir. 2007)).

In October 2018, approximately six weeks after the *Martin* opinion, Debra Blake filed her putative class action complaint against the City. The complaint alleged enforcement of the City's anti-sleeping and anti-camping ordinances violated the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment. The complaint was amended to include additional named plaintiffs and to allege a claim that the fines imposed under the ordinances violated the Excessive Fines Clause of the Eighth Amendment. On January 2, 2019, a few months after the initial complaint was filed, and before Plaintiffs filed their class certification motion, the City amended its anti-camping ordinance in an attempt to come into compliance with *Martin*. Prior to this change, the anti-camping ordinance was worded such that " 'sleeping' in parks . . . automatically constitut[ed] 'camping.' " According to the City, "in direct response to *Martin v. Boise*, the City amended [the anti-camping ordinance] to make it clear that the act of 'sleeping' was to be distinguished from the prohibited conduct of 'camping.' " The City meant to "make it clear that those without shelter *could* engage in the involuntary acts of sleeping or resting in the City's parks." Shortly after the City removed "sleeping" from the "camping" definition, Plaintiffs moved to certify a class. Plaintiffs requested certification of a class defined as

> All involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by [the City] as addressed in this lawsuit.

Plaintiffs' class certification motion was accompanied by a declaration from the Chief Operating Officer and Director of Housing and Homeless Services for United Community Action Network ("UCAN"), a nonprofit organization that serves homeless people in Josephine County, the county where the City is located.[6] UCAN had recently conducted a "point-in-time count of homeless individuals in Josephine County."[7] Based on that count, the Chief Oper-

6. The Department of Housing and Urban Development regulations impose obligations on the "continuum of care," which is defined as "the group composed of representatives of relevant organizations . . . that are organized to plan for and provide, as necessary, a system of outreach, engagement, and assessment . . . to address the various needs of homeless persons and persons at risk of homelessness for a specific geographic area." 24 C.F.R. § 576.2.

7. As the "continuum of care" in the City, UCAN was required to conduct point-in-time counts ("PIT counts") of homeless persons within that geographic area. 24 C.F.R. § 578.7(c)(2). PIT counts measure the number of sheltered and unsheltered homeless individuals on a single night. 24 C.F.R.

ating Officer's declaration stated "[h]undreds of [homeless] people live in Grants Pass," and "almost all of the homeless people in Grants Pass are involuntarily homeless. There is simply no place in Grants Pass for them to find affordable housing or shelter. They are not choosing to live on the street or in the woods."

The City opposed class certification, arguing Plaintiffs had not provided sufficient evidence to meet any of the requirements for certifying a class. The district court disagreed and certified the class proposed by Plaintiffs. The parties proceeded with discovery and filed cross-motions for summary judgment.

At the time the parties filed their summary judgment motions, there were only four locations in the City that temporarily housed homeless persons, which proved inadequate. One location was run by the Gospel Rescue Mission, an explicitly religious organization devoted to helping the poor. The Gospel Rescue Mission operated a facility for single men without children, and another facility for women, including women with children. These two facilities required residents to work at the mission six hours a day, six days a week in exchange for a bunk for 30 days. Residents were required to attend an approved place of worship each Sunday and that place of worship had to espouse "traditional Christian teachings such as the Apostles Creed." Disabled persons with chronic medical or mental health issues that prevented them from complying with the Mission's rules were prohibited.[8]

In addition to the Gospel Rescue Mission, the City itself operated a "sobering center" where law enforcement could transport intoxicated or impaired persons. That facility consisted of twelve locked rooms with toilets where intoxicated individuals could sober up. The rooms did not have beds. The City also provided financial support to the Hearts with a Mission Youth Shelter, an 18-bed facility where unaccompanied minors aged 10 to 17 could stay for up to 72 hours, and could stay even longer if they had parental consent.

Finally, on nights when the temperature was below 30 degrees (or below 32 degrees with snow), UCAN operated a "warming center" capable of holding up to 40 individuals. That center did not provide beds. The center reached capacity on every night it operated except the first night it opened, February 3, 2020. Between February 3 and March 19, 2020, the warming center was open for 16 nights. The center did not open at all during the winter of 2020–2021.

Presented with evidence of the number of homeless persons and the shelter spaces available, the district court concluded "[t]he record is undisputed that Grants Pass has far more homeless individuals than it has practically available shelter beds." The court then held that, based on the unavailability of shelter beds, the City's enforcement of its anti-camping and anti-sleeping ordinances violated the Cruel and Unusual Punishment Clause. The fact that *Martin* involved criminal violations while the present case involved initial civil violations that matured into criminal violations made "no difference for Eight

§ 578.7(c)(2). The *Martin* court relied on PIT counts conducted by local non-profits to determine the number of homeless people in the jurisdiction. *See Martin,* 920 F.3d at 604. Courts and experts note that PIT counts routinely undercount homeless persons, but they appear to be the best available source of data on homelessness. *See, e.g., id.*

8. Multiple class members submitted uncontested declarations to the district court stating they did not stay at the Gospel Rescue Mission because they suffer from disqualifying disabilities and/or were unwilling to attend church.

Amendment purposes." Next, the court held the system of fines violated the Eighth Amendment's Excessive Fines Clause.[9] Finally, the court held the appeals process for park exclusions violated procedural due process under the Due Process Clause of the Fourteenth Amendment.

In reaching its decision the district court was careful to point out that, consistent with *Martin*, the scope of its decision was limited. The court's order made clear that the City was not required to provide shelter for homeless persons and the City could still limit camping or sleeping at certain times and in certain places. The district court also noted the City may still "ban the use of tents in public parks," "limi[t] the amount of bedding type materials allowed per individual," and pursue other options "to prevent the erection of encampments that cause public health and safety concerns."[10]

Approximately one month after the summary judgment order, the district court issued a judgment which included a permanent injunction that provided a complicated mix of relief. First, the district court declared the ordinance regarding the appeals of park exclusions failed to provide "adequate procedural due process," but that ordinance was not permanently enjoined. Instead, the district court enjoined only the enforcement of the underlying park exclusion ordinance. Next, the district court declared enforcement of the anti-sleeping and anti-camping ordinances against class members "violates the Eighth Amendment prohibition against cruel and unusual punishment" and "violates the Eighth Amendment prohibition against excessive fines." Without explanation, however, the district court did not enjoin those ordinances in their entirety. Rather, the district court entered no injunctive relief regarding the anti-sleeping ordinance. But the district court permanently enjoined enforcement of the anti-camping ordinances, as well as an ordinance regarding "criminal trespassing on city property related to parks," in all City parks at night except for one park where the parties agreed the injunction need not apply.[11] The district court also permanently enjoined enforcement of the anti-camping ordinances during daytime hours unless an initial warning was given "at least 24 hours before enforcement." Accordingly, under the permanent injunction, the anti-camping ordinances may be enforced under some circumstances during the day, but never at night.

The City appealed and sought initial en banc review to clarify the scope of *Martin*.

9. Part of the City's argument on this issue was that the fines are not mandatory because state court judges retain discretion not to impose fines. This is inconsistent with the text of the ordinances and not supported by the record. The provision of the municipal code defining penalties for ordinance violations clarifies that the fines are mandatory. It provides, the fines "*shall* be $295" and "*shall* be $75." GPMC 1.36.010(J)–(K) (emphasis added). Conversely, it is only discretionary to reduce fines because the relevant ordinance provides that, "[u]pon a plea of guilty . . . the penalty *may* be reduced" to the amount listed for a first or second offense. *Id.* (emphasis added). After a second citation, there is no authority within the municipal code that permits judges to reduce fines, and there is no evidence in the record demonstrating circuit court judges have reduced fines except pursuant to GPMC 1.36.010.

10. The district court denied summary judgment on other claims brought by Plaintiffs. Those claims were subsequently voluntarily dismissed.

11. The City ordinance regarding "criminal trespass" was never at issue in the litigation until the permanent injunction. Plaintiffs explain it was included in the injunction "[b]y agreement of the parties."

The petition for initial hearing en banc was denied.

II.

The core issue involving enforcement of the anti-camping ordinances is governed in large part by *Martin.* While there are some differences between *Martin* and the present case, the City has not identified a persuasive way to differentiate its anti-camping ordinances from the questioned ordinances in *Martin.* Therefore, the district court's ruling that the Cruel and Unusual Punishment Clause bars enforcement of the anti-camping ordinances will be mostly affirmed. We need not address the potential excessiveness of the fines issue or whether Plaintiffs adequately pled their due process challenge.

Our analysis proceeds in five parts. First, we reject the City's argument that the district court lacked jurisdiction.[12] Second, we find no abuse of discretion in the district court's certification of a class of involuntarily homeless persons. Third, we agree with the district court that at least portions of the anti-camping ordinance violate the Cruel and Unusual Punishment clause under *Martin.* Fourth, we conclude there is no need to resolve whether the fines violate the Excessive Fines clause. Fifth, we hold it is unnecessary to decide Plaintiffs' procedural due process claim.

A.

[1–4] Standing and mootness are questions of law that we review de novo. *Hartman v. Summers*, 120 F.3d 157, 159 (9th Cir. 1997); *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). "Federal courts must determine that they have jurisdiction before proceeding to the merits," and plaintiffs must demonstrate standing as a necessary component of jurisdiction. *Lance v. Coffman*, 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007). To have Article III standing, a plaintiff must show (1) a concrete and particularized injury, (2) caused by the challenged conduct, (3) that is likely redressable by a favorable judicial decision. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). For purposes of injunctive relief, "[a]bstract injury is not enough"—the plaintiff must have sustained or be in immediate danger "of sustaining some direct injury as the result of the challenged" law. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (quotation marks and citation omitted).

[5] The City's appellate briefing makes two standing arguments. First, the City argues Plaintiffs' claims are now moot because Plaintiffs no longer face a risk of injury based on the City's changed behavior after *Martin.* Second, the City argues Plaintiffs have not identified any relief that is within a federal court's power to redress. Both arguments are without merit.

[6, 7] A claim becomes moot, and no longer justiciable in federal court, if it has been remedied independent of the court. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013). There is abundant evidence in the record establishing homeless persons were injured by the City's enforcement actions in the past. The City argues, however, that it made changes after *Martin* such that there is no longer a threat of future injury. The problem for the City is that voluntary cessation of challenged practices rarely suffices to moot a

12. However, we vacate summary judgment and remand as to the anti-sleeping ordinance to afford the district court the opportunity to substitute a class representative in place of Debra Blake, who passed away while this matter was on appeal.

case and, in any event, there is evidence the challenged practices have continued after *Martin*.

[8] "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth*, 528 U.S. at 189, 120 S.Ct. 693 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982)). This is so "because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012). Thus, the City "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190, 120 S.Ct. 693. Instead of the City making it "absolutely clear" it has stopped enforcement activities, the record shows ongoing enforcement.

The parties diverge substantially on how to characterize the degree of enforcement after *Martin* was issued in September 2018. The City argued in its briefing and at oral argument that it has largely complied with *Martin*, noting the 2019 amendment to an anti-camping ordinance, that citations were issued "sparingly" in 2019, and in particular it says it issued only two citations during the late evening and early morning since *Martin*. The City supports its petition with a declaration from a City police officer stating "[i]t is the regular practice of every officer I know of on this department to enforce these Ordinances sparingly and in recognition of the different circumstances we encounter." As for Plaintiffs, they offered evidence showing enforcement continued after *Martin* such that class members received citations and exclusion orders for camping or sleeping and were prosecuted for criminal trespass between the point the lawsuit was filed and the close of discovery.

Although the record does show the rate of enforcement of the various ordinances decreased since *Martin*, even accepting the City's position the evidence is undisputed that enforcement continued.[13] It is plainly inaccurate for the City to claim all enforcement ceased. The ongoing enforcement activities establish the City did not meet its "formidable burden" of showing the challenged activities will not recur. *Friends of the Earth*, 528 U.S. at 190, 120 S.Ct. 693. The City's mootness argument fails.[14]

13. The City also argues "there was no evidence that anyone was ever cited for the simple act of sleeping in a City park" after *Martin*. But the citation issued to Dolores Nevin in late December 2019 pursuant to the City's "criminal trespass" ordinance included a narrative explaining, "[d]uring an area check of Riverside Park, Dolores Nevin was found *sleeping* during closed hours. Nevin, who has been warned in the past, was issued a citation for Trespass on City Property." (emphasis added). And on September 11, 2019, Grants Pass Police Officer Jason McGinnis issued citations to Debra Blake and Carla Thomas for being in Riverside Park at approximately 7:30 a.m. with sleeping bags and belongings spread around themselves. Other individuals cited for camping in a city park in 2019 include class members: Gail Laine, William Stroh, Dawn Schmidt, Cristina Trejo, Kellie Parker, Colleen Bannon, Amanda Sirnio, and Michael and Louana Ellis.

14. Mootness was also considered during the *Martin* litigation. *See Bell v. City of Boise*, 709 F.3d 890, 898, 900–01 (9th Cir. 2013). The City of Boise argued that a combination of an amended definition of "camping" in the ordinance and a "Special Order," prohibiting police officers from enforcing the ordinances when a person is on public property and there is no available overnight shelter, mooted the case. *Id.* at 894–95. We rejected the argument that the change to the definition of "camping"

[9] The City's other jurisdictional argument is that Plaintiffs' claims are not redressable. According to the City, any possible relief intrudes inappropriately upon matters of policy best left to executive and legislative discretion. We disagree. Consistent with *Martin*, the district court granted limited relief enjoining enforcement of a few municipal ordinances at certain times, in certain places, against certain persons. None of the cases cited by the City credibly support its argument that the district court injunction overstepped the judiciary's limited authority under the Constitution. Contrary to the City's position, enjoining enforcement of a few municipal ordinances aimed at involuntarily homeless persons cannot credibly be compared to an injunction seeking to require the federal government to "phase out fossil fuel emissions and draw down excess atmospheric CO2." *Juliana v. United States*, 947 F.3d 1159, 1164–65 (9th Cir. 2020). The relief sought by Plaintiffs was redressable within the limits of Article III. *See Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (holding a plaintiff's burden to demonstrate redressability is "relatively modest") (citation omitted).

[10] Finally, we raise *sua sponte* the possibility that the death of class representative Debra Blake while this matter was on the appeal has jurisdictional significance. *Cf. Fort Bend Cty. v. Davis*, —— U.S. ——, 139 S.Ct. 1843, 1849, 204 L.Ed.2d 116 (2019) (holding courts must raise issues of subject matter jurisdiction *sua sponte*). We hold Blake's death does not moot the class's claims as to all challenged ordinances except possibly the anti-sleeping ordinance. As to that ordinance, we remand to allow the district court the opportunity to substitute a class representative in Blake's stead.

[11, 12] With respect to the park exclusion, criminal trespass, and anti-camping ordinances, the surviving class representatives, Gloria Johnson [15] and John Logan,[16]

rendered the case moot because "[m]ere clarification of the Camping Ordinance does not address the central concerns of the Plaintiffs' Eighth Amendment claims"—that the ordinance "effectively criminalized their status as homeless individuals." *Id.* at 898 n.12. And we held the adoption of a "Special Order" did not moot the case because the Special Order was not a legislative enactment, and as such it "could be easily abandoned or altered in the future." *Id.* at 901.

15. The dissent suggests Gloria Johnson does not have standing to challenge the park exclusion and criminal trespass ordinances. Dissent 821–22. The dissent concedes, however, Johnson has standing to challenge the anti-camping ordinances, GPMC 5.61.030, 6.46.090. But the dissent does not provide a meaningful explanation why it draws this distinction between the ordinances that work in concert. It is true Johnson has not received a park exclusion order and has not been charged with criminal trespass in the second degree. However, there is little doubt that her continued camping in parks would lead to a park exclusion order and, eventually, criminal trespass charges. Johnson is positioned to bring a pre-enforcement challenge against the park exclusion and criminal trespass ordinances, because they will be used against her given the undisputed fact that she remains involuntarily homeless in Grants Pass. She established a credible threat of future enforcement under the anti-camping ordinances which creates a credible threat of future enforcement under the park exclusion and criminal trespass ordinances.

16. The dissent claims John Logan has not established standing. Dissent 820–21. During the course of this case, Logan submitted two declarations. At the class certification stage, his declaration stated he "lived out of [his] truck on the streets in Grants Pass for about 4 years." During that time, he was "awakened by City of Grants Pass police officer and told that I cannot sleep in my truck anywhere in the city and ordered to move on." To avoid those encounters, Logan "usually sleep[s] in [his] truck just outside the Grants Pass city limits." However, Logan stated "[i]f there was some place in the city where [he] could legally

have standing in their own right. Although they live in their cars, they risk enforcement under all the same ordinances as Blake and the class (with the exception of the anti-sleeping ordinance, GPMC 5.61.020, which cannot be violated by sleeping in a car) and have standing in their own right as to all ordinances except GPMC 5.61.020.

[13] With respect to the anti-sleeping ordinance, the law is less clear. Debra Blake is the only class representative who had standing in her own right to challenge the anti-sleeping ordinance. Under cases such as *Sosna v. Iowa*, 419 U.S. 393, 401, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), and *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a class representative may pursue the live claims of a properly certified class—without the need to remand for substitution of a new representative [17]—even after his own claims become moot, provided that several requirements are met.[18] *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 987–88 (9th Cir. 2007) (en banc). If Debra Blake's challenge

sleep in [his] truck, [he] would because it would save valuable gas money and avoid . . . having to constantly move.'' Logan also explained he has ''met dozens, if not hundreds, of homeless people in Grants Pass'' over the years who had been ticketed, fined, arrested, and criminally prosecuted ''for living outside.'' At summary judgment, Logan submitted a declaration stating he is ''currently involuntarily homeless in Grants Pass and sleeping in [his] truck at night at a rest stop North of Grants Pass.'' He stated he ''cannot sleep in the City of Grants Pass for fear that [he] will be awakened, ticketed, fined, moved along, trespassed and charged with Criminal Trespass.'' The dissent reads this evidence as indicating Logan failed to ''provide[ ] any facts to establish'' that he is likely to be issued a citation under the challenged ordinances. Dissent 820–21. We do not agree. The undisputed facts establish Logan is involuntarily homeless. When he slept in Grants Pass, he was awoken by police officers and ordered to move. His personal knowledge was that involuntarily homeless individuals in Grants Pass often are cited under the challenged ordinances and Grants Pass continues to enforce the challenged ordinances. And, but for the challenged ordinances, Logan would sleep in the city. Therefore, as the district court found, it is sufficiently likely Logan would be issued a citation that Logan's standing is established. That is especially true given the Supreme Court's instruction that a plaintiff need not wait for ''an actual arrest, prosecution, or other enforcement action'' before ''challenging [a] law.'' *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). Finally, even if Logan had not demonstrated standing, the dissent's analysis regarding Logan is irrelevant because this case could proceed solely based on the standing established by Gloria Johnson and the class. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d at 985 (9th Cir. 2007) (en banc).

17. *See Sosna*, 419 U.S. at 403, 95 S.Ct. 553 (''[W]e believe that the test of Rule 23(a) is met.''); *id.* at 416–17, 95 S.Ct. 553 (White, J., dissenting) (''It is claimed that the certified class supplies the necessary adverse parties for a continuing case or controversy . . . The Court cites no authority for this retrospective decision as to the adequacy of representation which seems to focus on the competence of counsel rather than a party plaintiff who is a representative member of the class. At the very least, the case should be remanded to the District Court.'').

18. The class must be properly certified, *see Franks*, 424 U.S. at 755– 56, 96 S.Ct. 1251, or the representative must be appealing denial of class certification. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). The class representative must be a member of the class with standing to sue at the time certification is granted or denied. *See Sosna*, 419 U.S. at 403, 95 S.Ct. 553. The unnamed class members must still have a live interest in the matter throughout the duration of the litigation. *See Franks*, 424 U.S. at 755, 96 S.Ct. 1251. And the court must be satisfied that the named representative will adequately pursue the interests of the class even though their own interest has expired. *See Sosna*, 419 U.S. at 403, 95 S.Ct. 553.

to the anti-sleeping ordinance became moot before she passed away, she could have continued to pursue the challenge on behalf of the class under the doctrine of *Sosna*. But we have not found any case applying *Sosna* and *Franks* to a situation such as this, in which the death of a representative causes a class to be unrepresented as to part (but not all) of a claim. The parties did not brief this issue and no precedent indicates whether this raises a jurisdictional question, which would deprive us of authority to review the merits of the anti-sleeping ordinance challenge, or a matter of Federal Rule of Civil Procedure 23, which might not.

[14] Because Plaintiffs have not moved to substitute a class representative pursuant to Federal Rule of Appellate Procedure 43(a) or identified a representative who could be substituted, because no party has addressed this question in briefing, and because we are not certain of our jurisdiction to consider the challenge to the anti-sleeping ordinance, we think it appropriate to vacate summary judgment as to the anti-sleeping ordinance and remand to determine whether a substitute representative is available as to that challenge alone. *See Cobell v. Jewell*, 802 F.3d 12, 23–24 (D.C. Cir. 2015) (discussing substitution of a party during appeal). Substitution of a class representative may significantly aid in the resolution of the issues in this case. Remand will not cause significant delay because, as we explain below, remand is otherwise required so that the injunction can be modified. In the absence of briefing or precedent regarding this question, we do not decide whether this limitation is jurisdictional or whether it arises from operation of Rule 23.

We therefore hold the surviving class representatives at a minimum have standing to challenge every ordinance except the anti-sleeping ordinance. As to the anti-sleeping ordinance, we vacate summary judgment and remand for the district court to consider in the first instance whether an adequate class representative, such as class member Dolores Nevin, exists who may be substituted.

B.

[15, 16] The City's next argument is the district court erred in certifying the class. We "review a district court's order granting class certification for abuse of discretion, but give the district court 'noticeably more deference when reviewing a grant of class certification than when reviewing a denial.' " *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1275 (9th Cir. 2019) (internal citation omitted) (quoting *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017)). Factual findings underlying class certification are reviewed for clear error. *Parsons v. Ryan*, 754 F.3d 657, 673 (9th Cir. 2014).

[17] A member of a class may sue as a representative party if the member satisfies Federal Rule of Civil Procedure 23(a)'s four prerequisites: numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). Assessing these requirements involves "rigorous analysis" of the evidence. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

If the initial requirements of Rule 23(a) are met, a putative class representative must also show the class falls into one of three categories under Rule 23(b). Plaintiffs brought this suit under Rule 23(b)(2), seeking injunctive or declaratory relief based on the City having "acted or refused to act on grounds that apply generally to

the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

The district court found the Rule 23(a) requirements satisfied and certified a class under Rule 23(b)(2). The City's arguments against this class certification are obscure. It appears the City's argument is that class certification was an abuse of discretion because the holding of *Martin* can only be applied after an individualized inquiry of each alleged involuntarily homeless person's access to shelter.[19] The City appears to suggest the need for individualized inquiry defeats numerosity, commonality, and typicality. While we acknowledge the *Martin* litigation was not a class action, nothing in that decision precluded class actions.[20] And based on the record in this case, the district court did not err by finding Plaintiffs satisfied the requirements of Rule 23 such that a class could be certified.

[18–20] To satisfy the numerosity requirement a proposed class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). For purposes of this requirement, " 'impracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Ests., Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964) (quotation omitted). There is no specific number of class members required. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). However, proposed classes of less than fifteen are too small while classes of more than sixty are sufficiently large. *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1051–52 (9th Cir. 2003).

When the district court certified the class on August 7, 2019, it found there were at least 600 homeless persons in the City based on the 2018 and 2019 PIT counts conducted by UCAN. The City does not identify how this finding was clearly erroneous. In fact, the City affirmatively indicated to Plaintiffs prior to the class certification order that the number of homeless persons residing in Grants Pass for the past 7 years was "unknown." Further, the only guidance offered by the City regarding a specific number of class members came long after the class was certified. A City police officer claimed in a declaration that he was "aware of less than fifty individuals total who do not have access to any shelter" in the City. The officer admitted, however, it "would be extremely difficult to accurately estimate the population of people who are homeless in Grants Pass regardless of the definition used."

The officer's guess of "less than fifty" homeless persons is inconsistent with the general understanding that PIT counts routinely undercount homeless persons. *See Martin*, 920 F.3d at 604 ("It is widely recognized that a one-night point in time count will undercount the homeless population.") (internal quotation marks omitted). But even accepting the officer's assessment that there were approximately fifty

19. There is no reason to believe the putative class members are voluntarily homeless. To the contrary, at least 13 class members submitted declarations to the district court indicating that they are involuntarily homeless.

20. Other courts have certified similar classes. *See e.g., Lehr v. City of Sacramento,* 259 F.R.D. 479 (E.D. Cal. 2009) (addressing numerosity, commonality, and typicality for homeless persons in Sacramento); *Joyce v. City & Cty. of S.F.,* 1994 WL 443464 (N.D. Cal. Aug. 4, 1994), *dismissed as moot,* 87 F.3d 1320 (9th Cir. 1996) (finding typicality despite some differences among homeless class members); *Pottinger v. City of Miami,* 720 F.Supp. 955, 960 (S.D. Fla. 1989) (certifying a class of homeless persons).

homeless persons in the City, the numerosity requirement is satisfied. Joining approximately fifty persons might be impracticable and especially so under the facts here because homeless persons obviously lack a fixed address and likely have no reliable means of communications.[21] At the very least, the district court did not abuse its discretion in concluding the numerosity requirement was met.

[21–23] A class satisfies Rule 23's commonality requirement if there is at least one question of fact or law common to the class. *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013). The Supreme Court has said the word "question" in Rule 23(a)(2) is a misnomer: "What matters to class certification ... is not the raising of common 'questions'—even in droves—but rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (emphasis and omission in original). "[C]lass members' claims [must] 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke.' " *Mazza*, 666 F.3d at 588 (quoting *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541).

As correctly identified by the district court, Plaintiffs' claims present at least one question and answer common to the class: "whether [the City's] custom, pattern, and practice of enforcing anti-camping ordinances, anti-sleeping ordinances, and criminal trespass laws ... against involuntarily homeless individuals violates the Eighth Amendment of the Constitution." An answer on this question resolved a crucial aspect of the claims shared by all class members.

[24, 25] The City argues the commonality requirement was not met because some class members might have alternative options for housing, or might have the means to acquire their own shelter.[22] But

21. Moreover, there is a well-documented correlation between physical and mental illness and homelessness. *See, e.g.*, Sara K. Rankin, *Punishing Homelessness*, 22 N. Crim. L. Rev. 99, 105 (2019) (''Psychiatric disorders affect at least 30 to 40 percent of all people experiencing homelessness.''); Stefan Gutwinski et al., *The prevalence of mental disorders among homeless people in high-income countries: An updated systematic review and meta-regression analysis*, 18(8) PLoS Med. 1, 14 (Aug. 23, 2021), (''Our third main finding was high prevalence rates for treatable mental illnesses, with 1 in 8 homeless individuals having either major depression (12.6%) or schizophrenia spectrum disorders (12.4%). This represents a high rate of schizophrenia spectrum disorders among homeless people, and a very large excess compared to the 12-month prevalence in the general population, which for schizophrenia is estimated around 0.7% in high-income countries.''); Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 Psychiatric Servs. 170, 170 (2008) (''Homeless individuals may also be more likely to have health conditions ... Severe mental illness is also more prevalent among homeless people than in the general population.''); Ctr. for Disease Control & Prevention, Homelessness as a Public Health Law Issue: Selected Resources (Mar. 2, 2017) (''Homelessness is closely connected to declines in physical and mental health; homeless persons experience high rates of health problems such as HIV infection, alcohol and drug abuse, mental illness, tuberculosis, and other conditions.'').

22. The dissent adapts the City's argument that enforcement of the anti-camping ordinances depends on individual circumstances and is therefore not capable of resolution on a common basis. Dissent 824–25. That misunderstands how the present class was structured. The dissent attempts to reframe the common question as a very general inquiry. It appears the dissent interprets the question whether an

this argument misunderstands the class definition. Pursuant to the class definition, the class includes only *involuntarily* homeless persons.[23] Individuals who have shelter or the means to acquire their own shelter simply are never class members.[24] Because we find there existed at least one question of law or fact common to the class, the district court did not abuse its discretion in concluding commonality was satisfied.

[26–28] Typicality asks whether "the claims or defenses of the representative parties are typical" of the class. Fed. R. Civ. P. 23(a)(3). Typicality is a "permissive standard[ ]." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (citation omitted). It "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Parsons*, 754 F.3d at 685 (citation omitted).

The class representatives' claims and defenses are typical of the class in that they are homeless persons who claim that the City cannot enforce the challenged ordinances against them when they have no shelter. The defenses that apply to class representatives and class members are identical. The claims of class representa-

Eighth Amendment violation must be determined by an individualized inquiry as whether each individual is ''involuntarily homeless.'' To assess that, a court would have to conduct an individualized inquiry and determine if an individual was ''involuntarily homeless.'' But that is not the common question in this case. Rather, the question is whether the City's enforcement of the anti-camping ordinances against all involuntarily homeless individuals violates the Eighth Amendment. This question is capable of common resolution on a prospective class-wide basis, as the record establishes.

23. The dissent argues this created a prohibited ''fail safe'' class. That is erroneous. As noted in a recent en banc decision, ''a 'fail safe' class . . . is defined to include only those individuals who were injured by the allegedly unlawful conduct.'' *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc). Such classes are prohibited ''because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.'' *Id. See also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016) (noting a fail safe class ''is one that is defined so narrowly as to preclude[ ] membership unless the liability of the defendant is established''). No such class is present here. The class was defined, in relevant part, as ''[a]ll involuntarily homeless individuals living in Grants Pass.'' Membership in that class has no connection to the success of the underlying claims. Put differently, the class would have consisted of exactly the same population whether Grants Pass won or lost on the merits. The obvious illustration of this is the class population would not change if a court determined the anti-camping ordinance violated the Eighth Amendment while the anti-sleeping ordinance did not. In that situation, class members would not be ''defined out of the class.'' *Olean*, 31 F.4th at 669 n.14 (citation omitted). Rather, class members would be ''bound by the judgment'' regarding the anti-sleeping ordinance. *Id.* In any event, the dissent's concerns regarding individualized determinations are best made when the City attempts to enforce its ordinances. *Cf. McArdle v. City of Ocala*, 519 F.Supp.3d 1045, 1052 (M.D. Fla. 2021) (requiring that officers inquire into the availability of shelter space before an arrest could be made for violation of the City's ''open lodging'' ordinance). If it is determined at the enforcement stage that a homeless individual has access to shelter, then they do not benefit from the injunction and may be cited or prosecuted under the anti-camping ordinances. Moreover, as we noted above, several classes of homeless individuals have been certified in this past. *See supra* note 18.

24. We do not, as the dissent contends, ''suggest[ ] that the class definition requires only an involuntary lack of access to regular or permanent shelter to qualify as 'involuntarily homeless.' '' Dissent 827. It is unclear where the dissent finds this in the opinion. To be clear: A person with access to temporary shelter is not involuntarily homeless unless and until they no longer have access to shelter.

tives and class members are similar, except that some class representatives live in vehicles while other class members may live on streets or in parks, not vehicles. This does not defeat typicality. The class representatives with vehicles may violate the challenged ordinances in a different manner than some class members—*i.e.*, by sleeping in their vehicle, rather than on the ground. But they challenge the same ordinances under the same constitutional provisions as other class members. *Cf. Staton*, 327 F.3d at 957 ("[R]epresentative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical.") (citation omitted). The district court did not abuse its discretion in finding the typicality requirement met.

The City does not present any other arguments regarding class certification, such as the propriety of certifying the class as an injunctive class under Rule 23(b)(2). We do not make arguments for parties and the arguments raised by the City regarding class certification fail.

C.

[29] Having rejected the City's jurisdictional arguments, as well as its arguments regarding class certification, the merits can be addressed. The City's merits arguments regarding the Cruel and Unusual Punishment Clause take two forms. First, the City argues 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. That is incorrect. Second, the City argues *Martin* does not protect homeless persons from being cited under the City's amended anti-camping ordinance which prohibits use of any bedding or similar protection from the elements. 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." *See* GPMC 5.61.010(B). Again, the City is incorrect. Here, we focus exclusively on the anti-camping ordinances.

According to the City, citing individuals under the anti-camping ordinances cannot violate the Cruel and Unusual Punishment Clause because citations under the ordinances are civil and civil citations are "categorically not 'punishment' under the Eight Amendment."[25] The City explains "the simple act of issuing a civil citation with a court date [has never] been found to be unconstitutional 'punishment' under the Eighth Amendment." While not entirely clear, the City appears to be arguing the Cruel and Unusual Punishment Clause provides no protection from citations categorized as "civil" by a governmental authority.[26]

25. This position is in significant tension with the City's actions taken immediately after *Martin* was issued. As noted earlier, the City amended its anti-camping ordinance "in direct response to *Martin v. Boise*" to allow for "the act of 'sleeping'" in City parks. If the City believed *Martin* has no impact on civil ordinances, it is unclear why the City believed a curative "response" to *Martin* was necessary.

26. The primary support for this contention is *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). In *Ingraham*, the Supreme Court addressed whether the Cruel and Unusual Punishment Clause was implicated by corporal punishment in public schools. The Court stated the Cruel and Unusual Punishment Clause limits "the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the

Plaintiffs' focus on civil citations does involve an extra step from the normal Cruel and Unusual Clause analysis and the analysis of *Martin*. 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. 920 F.3d at 617. Here, the City has adopted a slightly more circuitous approach than simply establishing violation of its ordinances as criminal offenses. Instead, the City issues civil citations under the ordinances. If an individual violates the ordinances twice, she can be issued a park exclusion order. And if the individual is found in a park after issuance of the park exclusion order, she is cited for criminal trespass. *See* O.R.S. 164.245 (criminal trespass in the second degree). Multiple City police officers explained in their depositions this sequence was the standard protocol. The holding in *Martin* cannot be so easily evaded.

Martin held the Cruel and Unusual Punishment clause "prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." 920 F.3d at 616. A local government cannot avoid this ruling by issuing civil citations that, later, become criminal offenses. A recent decision by the en banc Fourth Circuit illustrates how the Cruel and Unusual Punishment Clause looks to the eventual criminal penalty, even if there are preliminary civil steps.

The disputes in *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019) (en banc) arose from a Virginia law which allowed a state court to issue a civil order identifying an individual as a "habitual drunkard." *Id.* at 268. Once labeled a "habitual drunkard," the individual was "subject to incarceration for the mere possession of or attempt to possess alcohol, or for being drunk in public." *Id.* at 269. A group of homeless alcoholics filed suit claiming, among other theories, the "habitual drunkard" scheme violated the Cruel and Unusual Punishment Clause. In the plaintiffs' view, the scheme resulted in criminal prosecutions based on their "status," *i.e.* alcoholism. *See id.* at 281.

Using reasoning very similar to that in *Martin*, the Fourth Circuit found the statutory scheme unconstitutional because it provided punishment based on the plaintiffs' status. 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

severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such.'' *Id.* at 667, 97 S.Ct. 1401. The Court interpreted the challenge to corporal punishment as, in effect, asserting arguments under only the first or second limitation. That is, the challenge was whether ''the paddling of schoolchildren'' was a permissible amount or type of punishment. *Id.* at 668, 97 S.Ct. 1401. The *Ingraham* decision involved no analysis or discussion of the third limitation, *i.e.* the ''substantive limits on what can be made criminal.'' *Id.* at 667, 97 S.Ct. 1401. Thus, it was in the context of evaluating the amount or type of punishment that *Ingraham* stated ''Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'' *Id.* at 671, 97 S.Ct. 1401 n.40. When, as here, plaintiffs are raising challenges to the ''substantive limits on what can be made criminal,'' *Ingraham* does not prohibit a challenge before a criminal conviction. *See Martin*, 920 F.3d at 614 (''*Ingraham* did not hold that a plaintiff challenging the state's power to criminalize a particular status or conduct in the first instance, as the plaintiffs in this case do, must first be convicted.'').

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.*

[30] The same reasoning 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.

The City offers a second way to evade the holding in *Martin.* According to the City, it revised its anti-camping ordinances to allow homeless persons to sleep in City parks. However, the City's argument regarding the revised anti-camping ordinance is an illusion. 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.[27]

The discrepancy between sleeping without bedding materials, which is permitted under the anti-camping ordinances, and sleeping with bedding, which is not, is 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.

In its order granting summary judgment, the district court correctly concluded the anti-camping ordinances violated the Cruel and Unusual Punishment Clause to the extent they prohibited homeless persons from "taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available." 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 "en-

27. The Grants Pass ordinance does not specifically define "bedding" but courts give the words of a statute or ordinance their "ordinary, contemporary, common meaning" absent an indication to the contrary from the legislature. *See Williams v. Taylor,* 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (citation omitted). The Oxford English Dictionary defines "bedding" as "[a] collective term for the articles which compose a bed." OXFORD ENGLISH DICTIONARY. And "bed" is defined as "a place for sleeping." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 108 (11th ed.). The City's effort to dissociate the use of bedding from the act of sleeping or protection from the elements is nonsensical.

forced 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.[28] The City's position that it is entitled to enforce a complete prohibition on "bedding, sleeping bag, or other material used for bedding purposes" is incorrect.

The dissent claims we have misread *Martin* by "completely disregard[ing] the *Powell* opinions on which *Martin* relied, which make unmistakably clear that an individualized showing of involuntariness is required." Dissent 826. The dissent concedes that pursuant to *Martin*, the City cannot impose criminal penalties on involuntarily homeless individuals for sitting, sleeping, or lying outside on public property. Dissent 816–17. Thus, our purported "complete disregard[ ]" for *Martin* is not regarding the central holding that local governments may not criminalize involuntary conduct. Rather, the dissent believes, based on its interpretation of the Supreme Court opinions underlying *Martin*, that the Eighth Amendment provides only "a case-specific affirmative defense" that can never be litigated on a class basis. Dissent 824. To reach this counterintuitive conclusion, the dissent reads limitations into *Robinson*, *Powell*, and *Martin* that are nonexistent.

In *Robinson*, the Supreme Court struck down, under the Eighth Amendment, a California law that made "it a criminal offense for a person to 'be addicted to the use of narcotics.' " *Robinson*, 370 U.S. at 666, 82 S.Ct. 1417. The law was unconstitutional, the Court explained, because it rendered the defendant "continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State." *Id.*

Six years later, in *Powell*, the Court divided 4-1-4 over whether Texas violated the Eighth Amendment under *Robinson* by prosecuting an alcoholic for public drunkenness. In a plurality opinion, Justice Marshall upheld the conviction of Leroy Powell on the ground that he was not punished on the basis of his status as an alcoholic, but rather for the *actus reus* of being drunk in public. *Powell*, 392 U.S. at 535, 88 S.Ct. 2145. Four justices dissented, in an opinion by Justice Fortas, on the ground that the findings made by the trial judge—that Powell was a chronic alcoholic who could not resist the impulse to drink—compelled the conclusion that Powell's prosecution violated the Eighth Amendment because Powell could not avoid breaking the law. *Id.* at 569–70, 88 S.Ct. 2145 (Fortas, J., dissenting). Justice White concurred in the judgment. He stressed, "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion." *Id.* at 549, 88 S.Ct. 2145 (White, J., concurring). However, the reason for Justice White's concurrence was that he felt *Powell* failed to prove his status as an alcoholic compelled him to violate the law by appearing in public. *Id.* at 553, 88 S.Ct. 2145 (White, J., concurring).

[31] Pursuant to *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51

28. Grants Pass is cold in the winter. The evidence in the record establishes that homeless persons in Grants Pass have struggled against frostbite. Faced with spending every minute of the day and night outdoors, the choice to use rudimentary protection of bedding to protect against snow, frost, or rain is not volitional; it is a life-preserving imperative.

L.Ed.2d 260 (1977), the narrowest position which gained the support of five justices is treated as the holding of the Court. In identifying that position, *Martin* held: "five Justices [in *Powell*] gleaned from *Robinson* the principle that '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.' " *Martin*, 920 F.3d at 616 (quoting *Jones*, 444 F.3d at 1135). *Martin* did not—as the dissent alleges—hold that *Powell*'s "controlling opinion was Justice White's concurrence." Dissent 816. *See id.*, 920 F.3d at 616–17. It would have violated the rule of *Marks* to adopt portions of Justice White's concurrence that did not receive the support of five justices. The dissent claims Justice White's concurrence requires that the individual claiming a status must prove the status compels the individual to violate the law—here, that each homeless individual must prove their status as an involuntarily homeless person to avoid prosecution.[29] Dissent 815–17. The dissent claims this renders class action litigation inappropriate. But no opinion in either *Powell* or *Martin* discussed the propriety of litigating the constitutionality of such criminal statutes by way of a class action.[30]

The law that the dissent purports to unearth in Justice White's concurrence is not the "narrowest ground" which received the support of five justices. *No* opinion in *Powell* or *Martin* supports the dissent's assertion that *Powell* offers exclusively an "affirmative 'defense' " that cannot be liti-

29. The dissent's attempt to create a governing holding out of Justice White's concurrence is erroneous. By citing a word or two out of context in the *Powell* dissenting opinion (*e.g.*, ''constitutional defense'') our dissenting colleague argues both Justice White and the dissenting justices in *Powell* agreed any person subject to prosecution has, at most, ''a case-specific affirmative 'defense.' '' Dissent 815, 824. We disagree. Though status was litigated as a defense in the context of Leroy Powell's prosecution, no opinion in *Powell* held status may be raised only as a defense. The *Powell* plurality noted trial court evidence that Leroy Powell was an alcoholic, but that opinion contains no indication ''status'' may only be invoked as ''a case-specific affirmative 'defense.' '' As for Justice White, the opening paragraph of his concurrence indicates he was primarily concerned not with how a status must be invoked but with the fact that certain statuses should be beyond the reach of the criminal law:

> If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless Robinson is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell, 392 U.S. at 548–49, 88 S.Ct. 2145 (White, J., concurring) (internal citation omitted). Finally, neither the remainder of Justice White's concurrence nor the dissenting opinion explicitly indicates one's status may only be invoked as a defense. Rather, Justice White and the dissenters simply agreed that, if Powell's status made his public intoxication involuntary, he could not be prosecuted. There is no conceivable way to interpret *Martin* as adopting our dissenting colleague's position that one's status must be invoked as a defense. But even assuming the burden must be placed on the party wishing to invoke a status, the class representatives established there is no genuine dispute of material fact they have the relevant status of being involuntarily homeless.

30. Federal courts have certified classes of homeless plaintiffs in the past, *see supra* note 18, which counsels against the City's and the dissent's position that such classes are impermissible under Rule 23.

gated in a class action.[31] Dissent 815, 824. Although the dissent might prefer that these principles find support in the controlling law, they do not. We thus do not misread *Martin* by failing to apply the principles found solely in Justice White's concurrence. Rather, we adhere to the narrow holding of *Martin* adopting the narrowest ground shared by five justices in *Powell*: a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status.

In addition to erecting an absolute bar to class litigation of this sort, the dissent would also impose artificial limitations on claims brought pursuant to *Martin.* The dissent concedes Gloria Johnson has standing to bring individual challenges to most of the City's ordinances. But the dissent then speculates that Gloria Johnson may, in fact, not be involuntarily homeless in the City. The dissent would insist that Gloria Johnson, for example, leave the City to camp illegally on federal or state lands, provide the court an accounting of her finances and employment history, and indicate with specificity where she lived before she lost her job and her home. Dissent 827–29. There, of course, exists no law or rule requiring a homeless person to do any of these things. Gloria Johnson has adequately demonstrated that there is no available shelter in Grants Pass and that she is involuntarily homeless.

The undisputed evidence establishes Gloria Johnson is involuntarily homeless and there is undisputed evidence showing many other individuals in similar situations. It is undisputed that there are at least around 50 involuntarily homeless persons in Grants Pass, and PIT counts, which *Martin* relied on to establish the number of homeless persons in Boise, revealed more than 600. *See Martin*, 920 F.3d at 604. It is undisputed that there is no secular shelter space available to adults. Many class members, including the class representatives, have sworn they are homeless and the City has not contested those declarations. The dissent claims this showing is not enough, implying that Plaintiffs must meet an extremely high standard to show they are involuntarily homeless. Even viewed in the light most favorable to the City, there is no dispute of material fact that the City is home to many involuntarily homeless individuals, including the class representatives. In fact, neither the City nor the dissent has demonstrated there is even one *voluntarily* homeless individual living in the City.[32] In

31. As noted above, *Martin* did not hold homeless persons bear the burden of demonstrating they are involuntarily homeless. *See supra* note 29. Because the record plainly demonstrates Plaintiffs are involuntarily homeless, there similarly is no reason for us to determine what showing would be required. We note, however, that some district courts have addressed circumstances in which the question of burden was somewhat relevant. *See, e.g., McArdle,* 519 F.Supp.3d at 1052 (requiring, based in part on *Martin,* that officers inquire into the availability of shelter space before making an arrest for violation of the City's "open lodging" ordinance); *Butcher v. City of Marysville,* 2019 WL 918203, at *7 (E.D. Cal. Feb. 25, 2019) (holding plaintiffs failed to make the "threshold showing" of pleading that there was no shelter capacity and that they had no other housing at the time of enforcement).

32. The dissent claims we have "shifted the burden to the City to establish the voluntariness of the behavior targeted by the ordinances." Dissent 828–29 n.13 (emphasis omitted). To the contrary, as we have explained, we do not decide who would bear such a burden because undisputed evidence demonstrates Plaintiffs are involuntarily homeless. Rather, without deciding who would bear such a burden if involuntariness were subject to serious dispute, we note Plaintiffs have demonstrated involuntariness and there is no evidence in the record showing any class member has adequate alternative shelter.

light of the undisputed facts in the record underlying the district court's summary judgment ruling that show Plaintiffs are involuntarily homeless, and the complete absence of evidence that Plaintiffs are voluntarily homeless, we agree with the district court that Plaintiffs such as Gloria Johnson are not voluntarily homeless and that the anti-camping ordinances are unconstitutional as applied to them unless there is some place, such as shelter, they can lawfully sleep.[33]

Our holding that the City's interpretation of the anti-camping ordinances is counter to *Martin* is not to be interpreted to hold that the anti-camping ordinances were properly enjoined in their entirety. Beyond prohibiting bedding, the ordinances also prohibit the use of stoves or fires, as well as the erection of any structures. The record has not established the fire, stove, and structure prohibitions deprive homeless persons of sleep or "the most rudimentary precautions" against the elements.[34] Moreover, the record does not explain the City's interest in these prohibitions.[35] 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.[36]

33. Following *Martin,* several district courts have held that the government may evict or punish sleeping in public in some locations, provided there are other lawful places within the jurisdiction for involuntarily homeless individuals to sleep. *See, e.g., Shipp v. Schaaf,* 379 F.Supp.3d 1033, 1037 (N.D. Cal. 2019) (''However, even assuming (as Plaintiffs do) that [eviction from a homeless encampment by citation or arrest] might occur, remaining at a particular encampment on public property is not conduct protected by *Martin,* especially where the closure is temporary in nature.''); *Aitken v. City of Aberdeen,* 393 F.Supp.3d 1075, 1082 (W.D. Wash. 2019) (''*Martin* does not limit the City's ability to evict homeless individuals from particular public places.''); *Gomes v. Cty. of Kauai,* 481 F.Supp.3d 1104, 1109 (D. Haw. 2020) (holding the County of Kauai could prohibit sleeping in a public park because it had not prohibited sleeping on other public lands); *Miralle v. City of Oakland,* 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018) (holding the City could clear out a specific homeless encampment because ''*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option''); *Le Van Hung v. Schaaf,* 2019 WL 1779584, at *5 (N.D. Cal. Apr. 23, 2019) (holding *Martin* does not ''create a right for homeless residents to occupy indefinitely any public space of their choosing''). Because the City has not established any realistically available place within the jurisdiction for involuntarily homeless individuals to sleep we need not decide whether alternate outdoor space would be sufficient under *Martin.* The district court may consider this issue on remand, if it is germane to do so.

34. The dissent claims we establish ''the right to use (at least) a tent.'' Dissent 830 n.15. This assertion is obviously false. The district court's holding that the City may still ''ban the use of tents in public parks'' remains undisturbed by our opinion.

35. The dissent asserts, ''it is hard to deny that *Martin* has 'generate[d] dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein.' '' Dissent 831 (quoting *Martin,* 920 F.3d at 594 (M. Smith, J., dissenting from denial of rehearing en banc)) (modification in original). There are no facts in the record to establish that *Martin* has generated ''dire'' consequences for the City. Our review of this case is governed only by the evidence contained in the record.

36. The district court enjoined the park exclusion ordinance in its entirety. The parties do not address this in their appellate briefing but, on remand, the district court should consider narrowing this portion as well because the park exclusion ordinance presumably may be enforced against Plaintiffs who engage in prohibited activity unrelated to their status as homeless persons.

D.

The district court concluded the fines imposed under the anti-sleeping and anti-camping ordinances violated the Eighth Amendment's prohibition on excessive fines. A central portion of the district court's analysis regarding these fines was that they were based on conduct "beyond what the City may constitutionally punish." With this in mind, the district court noted "[a]ny fine [would be] excessive" for the conduct at issue.

The City presents no meaningful argument on appeal regarding the excessive fines issue. As for Plaintiffs, they argue the fines at issue were properly deemed excessive because they were imposed for "engaging in involuntary, unavoidable life sustaining acts." The permanent injunction will result in no class member being fined for engaging in such protected activity. Because no fines will be imposed for protected activity, there is no need for us to address whether hypothetical fines would be excessive.

E.

The final issue is whether Plaintiffs properly pled their challenge to the park exclusion appeals ordinance. GPMC 6.46.355. That ordinance provided a mechanism whereby an individual who received an exclusion order could appeal to the City Council. Subsequent to the district court's order, the City amended its park exclusion appeals ordinance. Therefore, the district court's determination the previous ordinance violated Plaintiffs' procedural due process rights has no prospective relevance. Because of this, we need not decide if Plaintiffs adequately pled their challenge to the previous ordinance.

III.

We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go. On remand, however, the district court must narrow its injunction to enjoin only those portions of the anti-camping ordinances that prohibit conduct protected by *Martin* and this opinion. In particular, the district court should narrow its injunction to the anti-camping ordinances and enjoin enforcement of those ordinances only against involuntarily homeless person for engaging in conduct necessary to protect themselves from the elements when there is no shelter space available. Finally, the district court on remand should consider whether there is an adequate representative who may be substituted for Debra Blake.

[32] We are careful to note that, as in *Martin*, our decision is narrow. As in *Martin*, we hold simply that it is "unconstitutional to [punish] simply sleeping *somewhere* in public if one has nowhere else to do so." *Martin*, 920 F.3d at 590 (Berzon, J., concurring in denial of rehearing en banc). Our decision reaches beyond *Martin* slightly. We hold, where *Martin* did not, that class certification is not categorically impermissible in cases such as this, that "sleeping" in the context of *Martin* includes sleeping with rudimentary forms of protection from the elements, and that *Martin* applies to civil citations where, as here, the civil and criminal punishments are closely intertwined. 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.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

COLLINS, Circuit Judge, dissenting:

In *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), we held that "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." *Id.* at 603. Even assuming that *Martin* remains good law, today's decision—which both misreads and greatly expands *Martin*'s holding—is egregiously wrong. To make things worse, the majority opinion then combines its gross misreading of *Martin* with a flagrant disregard of settled class-certification principles. The end result of this amalgamation of error is that the majority validates the core aspects of the district court's extraordinary injunction in this case, which effectively requires the City of Grants Pass to allow all but one of its public parks to be used as homeless encampments.[1] I respectfully dissent.

I

Because our opinion in *Martin* frames the issues here, I begin with a detailed overview of that decision before turning to the facts of the case before us.

A

In *Martin*, six individuals sued the City of Boise, Idaho, under 42 U.S.C. § 1983, alleging that the City had violated their Eighth Amendment rights in enforcing two ordinances that respectively barred, *inter alia*, (1) camping in public spaces and (2) sleeping in public places without permission. 920 F.3d at 603–04, 606. All six plaintiffs had been convicted of violating at least one of the ordinances, *id.* at 606, but we held that claims for retrospective relief based on those convictions were barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). *See Martin*, 920 F.3d at 611–12 (noting that, under *Heck*, a § 1983 action may not be maintained if success in the suit would necessarily show the invalidity of the plaintiff's criminal conviction, unless that conviction has already been set aside or invalidated). What remained, after application of the *Heck* bar, were the claims for retrospective relief asserted by two plaintiffs (Robert Martin and Pamela Hawkes) in connection with citations they had received that did *not* result in convictions, and the claims for prospective injunctive and declaratory relief asserted by Martin and one additional plaintiff (Robert Anderson). *Id.* at 604, 610, 613–15; *see also id.* at 618–20 (Owens, J., dissenting in part) (dissenting from the majority's holding that the prospective relief claims survived *Heck*). On the merits of those three plaintiffs' Eighth Amendment claims, the *Martin* panel held that the district court had erred in granting summary judgment for the City. *Id.* at 615–18.

Although the text of the Eighth Amendment's Cruel and Unusual Punishments Clause states only that "cruel and unusual *punishments*" shall not be "inflicted," U.S. CONST., amend. VIII (emphasis added), the *Martin* panel nonetheless held that the Clause "places substantive limits" on the government's ability to *criminalize* "sitting, sleeping, or lying outside on public property," 920 F.3d at 615–16. In reaching this conclusion, the *Martin* panel placed dispositive reliance on the Supreme Court's decisions in *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), and *Powell v. Texas*, 392 U.S.

1. The majority's decision is all the more troubling because, in truth, the foundation on which it is built is deeply flawed: *Martin* seriously misconstrued the Eighth Amendment and the Supreme Court's caselaw construing it. *See infra* at 830–31. But I am bound by *Martin*, and—unlike the majority—I faithfully apply it here.

514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). I therefore briefly review those two decisions before returning to *Martin*.

Robinson held that a California law that made "it a criminal offense for a person to 'be addicted to the use of narcotics,' " 370 U.S. at 660, 82 S.Ct. 1417 (quoting CAL. HEALTH & SAFETY CODE § 11721 (1957 ed.)), and that did so "even though [the person] has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment," *id.* at 667, 82 S.Ct. 1417. The California statute, the Court emphasized, made the " '*status*' of narcotic addiction a criminal offense," regardless of whether the defendant had "ever *used or possessed* any narcotics within the State" or had "been guilty of any antisocial *behavior* there." *Id.* at 666, 82 S.Ct. 1417 (emphasis added).

In *Powell*, a fractured Supreme Court rejected Powell's challenge to his conviction, under a Texas statute, for being "found in a state of intoxication in any public place." 392 U.S. at 517, 88 S.Ct. 2145 (quoting TEX. PENAL CODE art. 477 (1952)). A four-Justice plurality distinguished *Robinson* on the ground that, because Powell "was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion," Texas had "not sought to punish a mere status, as California did in *Robinson*." *Id.* at 532, 88 S.Ct. 2145 (plurality). The plurality held that *Robinson* did not address, much less establish, that "certain *conduct* cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.* at 533, 88 S.Ct. 2145 (emphasis added).

Justice White concurred in the judgment on the narrower ground that Powell had failed to establish the "prerequisites to the possible invocation of the Eighth Amendment," which would have required him to "satisfactorily show[ ] that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue." *Id.* at 552, 88 S.Ct. 2145 (White, J., concurring). And because, in Justice White's view, the Eighth Amendment at most provided a case-specific affirmative "defense" to application of the statute, *id.* at 552, 88 S.Ct. 2145 n.4, he agreed that the Texas statute was "constitutional insofar as it authorizes a police officer to *arrest* any seriously intoxicated person when he is encountered in a public place," *id.* at 554, 88 S.Ct. 2145 n.5 (emphasis added). Emphasizing that Powell himself "did not show that *his* conviction offended the Constitution" and that Powell had "made no showing that *he* was unable to stay off the streets on the night in question," Justice White concurred in the majority's affirmance of Powell's conviction. *Id.* at 554, 88 S.Ct. 2145 (emphasis added).

The four dissenting Justices in *Powell* agreed that the Texas statute "differ[ed] from that in *Robinson*" inasmuch as it "covers more than a mere status." 392 U.S. at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). There was, as the dissenters noted, "no challenge here to the validity of public intoxication statutes in general or to the Texas public intoxication statute in particular." *Id.* at 558, 88 S.Ct. 2145. Indeed, the dissenters agreed that, in the ordinary case "when the State proves such [public] presence in a state of intoxication, this will be sufficient for conviction, and the punishment prescribed by the State may, of course, be validly imposed." *Id.* at 569, 88 S.Ct. 2145. Instead, the dissenters concluded that the application of the statute to Powell was unconstitutional "*on the occasion in question*" in light of the Texas trial court's findings about Powell's inability to

control his condition. *Id.* at 568, 88 S.Ct. 2145 n.31 (emphasis added). Those findings concerning Powell's "constitutional defense," the dissenters concluded, established that Powell "was powerless to avoid drinking" and "that, once intoxicated, he could not prevent himself from appearing in public places." *Id.* at 558, 568, 88 S.Ct. 2145; *see also id.* at 525, 88 S.Ct. 2145 (plurality) (describing the elements of the "*constitutional defense*" that Powell sought to have the Court recognize).

While acknowledging that the plurality in *Powell* had "interpret[ed] *Robinson* as precluding only the criminalization of 'status,' not of 'involuntary' conduct," the *Martin* panel held that the controlling opinion was Justice White's concurrence. 920 F.3d at 616. As I have noted, Justice White concluded that the Texas statute against public drunkenness could constitutionally be applied, even to an alcoholic, if the defendant failed to "satisfactorily show[ ] that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue." *Powell*, 392 U.S. at 552, 88 S.Ct. 2145 (White, J., concurring).[2] Under *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), this narrower reasoning given by Justice White for joining the *Powell* majority's judgment *upholding* the conviction constitutes the Court's holding in that case. *See id.* at 193, 97 S.Ct. 990 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " (citation omitted)); *see also United States v. Moore*, 486 F.2d 1139, 1151 (D.C. Cir. 1973) (en banc) (Wilkey, J., concurring) (concluding that the judgment in *Powell* rested on the overlap in the views of "four members of the Court" who held that Powell's acts of public drunkenness "were punishable without question" and the view of Justice White that Powell's acts "were punishable so long as the acts had not been proved to be the product of an established irresistible compulsion").

The *Martin* panel quoted dicta in Justice White's concurrence suggesting that, if the defendant could make the requisite "showing" that "resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible," then the Texas statute "[a]s applied" to such persons might violate "the Eighth Amendment." 920 F.3d at 616 (quoting *Powell*, 392 U.S. at 551, 88 S.Ct. 2145 (White, J., concurring)). These dicta, *Martin* noted, overlapped with similar statements in the dissenting opinion in *Powell*, and from those two opinions, the *Martin* panel derived the proposition that "five Justices" had endorsed the view 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." *Id.* (citation omitted). Applying that principle, *Martin* held 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." *Id.* Because "human beings are biologically compelled to rest, whether by sitting, lying, or sleeping," *Martin* held

2. Justice White, however, did not resolve the further question of whether, if such a showing *had* been made, the Eighth Amendment would have been violated. He stated that the Eighth Amendment "*might* bar conviction" in such circumstances, but he found it "unnecessary" to decide whether that "novel construction of that Amendment" was ultimately correct. 392 U.S. at 552–53 & n.4, 88 S.Ct. 2145 (emphasis added).

that prohibitions on such activities in public cannot be applied to those who simply have "no option of sleeping indoors." *Id.* at 617.

The *Martin* panel emphasized that its "holding is a narrow one." *Id. Martin* recognized that, if there are sufficient available shelter beds for all homeless persons within a jurisdiction, then of course there can be no Eighth Amendment impediment to enforcing laws against sleeping and camping in public, because those persons engaging in such activities cannot be said to have "no option of sleeping indoors." *Id.* But "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.* (simplified) (emphasis added). Consistent with Justice White's concurrence, the *Martin* panel emphasized that, in determining whether the defendant was being punished for conduct that was "involuntary and inseparable from status," *id.* (citation omitted), the specific individual circumstances of the defendant must be considered. Thus, *Martin* explained, the panel's "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." *Id.* at 617 n.8. But *Martin* held that, where it is shown that homeless persons "do not have a single place where they can lawfully be," an ordinance against sleeping or camping in public, "as applied to them, effectively punish[es] them for something for which they may not be convicted under the Eighth Amendment." *Id.* at 617 (simplified). Concluding that the remaining plaintiffs had "demonstrated a genuine issue of material fact" as to their lack of any access to indoor shelter, *Martin* reversed the district court's grant of summary judgment to the City. *Id.* at 617 n.9; *see also id.* at 617–18.

B

With that backdrop in place, I turn to the specific facts of this case.

In the operative Third Amended Complaint, named Plaintiffs Debra Blake, Gloria Johnson, and John Logan sought to represent a putative class of "all involuntarily homeless people living in Grants Pass, Oregon" in pursuing a variety of claims under 42 U.S.C. § 1983 against the City of Grants Pass. In particular, they asserted that the following three sections of the Grants Pass Municipal Code ("GPMC"), which generally prohibited sleeping and camping in public, violated the Eighth Amendment's Cruel and Unusual Punishments Clause and its Excessive Fines Clause:

> **5.61.020 Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited**
>
> A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.
>
> B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.
>
> C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.
>
> **5.61.030 Camping Prohibited**
>
> No person may occupy a campsite in or upon any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property

or under any bridge or viaduct, [subject to specified exceptions].[3]

6.46.090 Camping in Parks

A. It is unlawful for any person to camp, as defined in GPMC Title 5, within the boundaries of the City parks.

B. Overnight parking of vehicles shall be unlawful. For the purposes of this section, anyone who parks or leaves a vehicle parked for two consecutive hours or who remains within one of the parks as herein defined for purposes of camping as defined in this section for two consecutive hours, without permission from the City Council, between the hours of midnight and 6:00 a.m. shall be considered in violation of this Chapter.

Plaintiffs' complaint also challenged the following "park exclusion" ordinance as a violation of their "Eighth and Fourteenth Amendment rights":

6.46.350 Temporary Exclusion from City Park Properties

An individual may be issued a written exclusion order by a police officer of the Public Safety Department barring said individual from all City Park properties for a period of 30 days, if within a one-year period the individual:

A. Is issued 2 or more citations for violating regulations related to City park properties, or

B. Is issued one or more citations for violating any state law(s) while on City park property.[4]

In an August 2019 order, the district court certified a class seeking declaratory and injunctive relief with respect to Plaintiffs' Eighth Amendment claims, pursuant to Federal Rule of Civil Procedure 23(b)(2).[5] As defined in the court's order, the class consists of "[a]ll involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by Defendant as addressed in this lawsuit."

After the parties filed cross-motions for summary judgment, the district court in July 2020 granted Plaintiffs' motion in relevant part and denied the City's motion. The district court held that, under *Martin*, the City's enforcement of the above-described ordinances violated the Cruel and Unusual Punishments Clause. The court further held that, for similar reasons, the ordinances imposed excessive fines in violation of the Eighth Amendment's Excessive Fines Clause.

After Plaintiffs voluntarily dismissed those claims as to which summary judg-

3. The definition of ''campsite'' for purposes of GPMC 5.61.030 includes using a ''vehicle'' as a temporary place to live. *See* GPMC 5.61.010(B).

4. This latter ordinance was amended in September 2020 to read as follows:

> An individual may be issued a written exclusion order by a police officer of the Public Safety Department barring said individual from a City park for a period of 30 days, if within a one-year period the individual:
>
> A. Is issued two or more citations in the same City park for violating regulations related to City park properties, or
>
> B. Is issued one or more citations for violating any state law(s) while on City park property.
>
> The foregoing exclusion order shall only apply to the particular City park in which the offending conduct under 6.46.350(A) or 6.46.350(B) occurred.

5. At the time that the district court certified the class, the operative complaint was the Second Amended Complaint. That complaint was materially comparable to the Third Amended Complaint, with the exception that it did not mention the park-exclusion ordinance or seek injunctive relief with respect to it.

ment had been denied to both sides, the district court entered final judgment declaring that the City's enforcement of the anti-camping and anti-sleeping ordinances (GPMC §§ 5.61.020, 5.61.030, 6.46.090) violates "the Eighth Amendment prohibition against cruel and unusual punishment" and its "prohibition against excessive fines." Nonetheless, the court's final injunctive relief did not prohibit all enforcement of these provisions. Enforcement of § 5.61.020 (the anti-sleeping ordinance) was not enjoined at all. The City was enjoined from enforcing the anti-camping ordinances (GPMC §§ 6.46.030 and 6.46.090) "without first giving a person a warning of at least 24 hours before enforcement." It was further enjoined from enforcing those ordinances, and a related ordinance against criminal trespass on city property, in all but one City park during specified evening and overnight hours, which varied depending upon the time of year. Finally, the City was enjoined from enforcing the park-exclusion ordinance.[6]

The City timely appealed from that judgment and from the district court's subsequent award of attorneys' fees.

II

Before turning to the merits, I first address the question of our jurisdiction under Article III of the Constitution. *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008) (holding that courts "bear an independent obligation to assure [them]selves that jurisdiction is proper before proceeding to the merits").

"In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). "The doctrine of standing is one of several doctrines that reflect this fundamental limitation," and in the context of a request for prospective injunctive or declaratory relief, that doctrine requires a plaintiff to "show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Id.* at 493, 129 S.Ct. 1142. The requirement to show an actual threat of *imminent* injury-in-fact in order to obtain prospective relief is a demanding one: the Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (simplified).

As "an indispensable part of the plaintiff's case," each of these elements of Article III standing "must be supported in the

6. The district court's summary judgment order and judgment also declared that a separate ordinance (GPMC § 6.46.355), which addressed the procedures for appealing park-exclusion orders under § 6.46.350, failed to provide sufficient procedural due process. The parties dispute whether this claim was adequately raised and reached below, but as the majority notes, this claim for purely prospective relief has been mooted by the City's subsequent amendment of § 6.46.355 in a way that removes the features that had led to its invalidation. *See* Opin. at 813. Accordingly, this aspect of the district court's judgment should be vacated and remanded with instructions to dismiss as moot Plaintiffs' challenge to § 6.46.355.

same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Because, as in *Lujan*, this case arises from a grant of summary judgment, the question is whether, in seeking summary judgment, Plaintiffs " 'set forth' by affidavit or other evidence 'specific facts' " in support of each element of standing. *Id.* (citation omitted). Moreover, "standing is not dispensed in gross," and therefore "a plaintiff must demonstrate standing for *each* claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352–53, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (emphasis added) (citation omitted).

Plaintiffs' operative complaint named three individual plaintiffs as class representatives (John Logan, Gloria Johnson, and Debra Blake), and we have jurisdiction to address the merits of a particular claim if any one of them sufficiently established Article III standing as to that claim. *See Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other [plaintiffs], whose position here is identical to the State's."); *see also Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements."). Accordingly, I address the showing made by each named Plaintiff in support of summary judgment.

In my view, Plaintiff John Logan failed to establish that he has standing to challenge any of the ordinances in question. In support of his motion for summary judgment, Logan submitted a half-page declaration stating, in conclusory fashion, that he is "involuntarily homeless in Grants Pass," but that he is "sleeping in [his] truck at night at a rest stop North of Grants Pass." He asserted that he "cannot sleep in the City of Grants Pass for fear that [he] will be awakened, ticketed, fined, moved along, trespassed[,] and charged with Criminal Trespass." Logan also previously submitted two declarations in support of his class certification motion. In them, Logan stated that he has been homeless in Grants Pass for nearly seven of the last 10 years; that there have been occasions in the past in which police in Grants Pass have awakened him in his car and instructed him to move on; and that he now generally sleeps in his truck outside of Grants Pass. Logan has made no showing that, over the seven years that he has been homeless, he has ever been issued a citation for violating the challenged ordinances, nor has he provided any facts to establish either that the threat of such a citation is "certainly impending" or that "there is a substantial risk" that he may be issued a citation. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (citation and internal quotation marks omitted). At best, his declarations suggest that he would *prefer* to sleep in his truck within the City limits rather than outside them, and that he is subjectively deterred from doing so due to the City's ordinances. But such "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13–14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). Nor has Logan provided any facts that would show that he has any actual intention or plans to stay overnight in the City. *See Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010) ("[W]e have concluded that pre-enforcement plaintiffs who failed to allege a concrete intent to

violate the challenged law could not establish a credible threat of enforcement."). Even if his declarations could be generously construed as asserting an intention to stay in the City at some future point, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that [the Court's] cases require." *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130; *cf. Driehaus*, 573 U.S. at 161, 134 S.Ct. 2334 (permitting pre-enforcement challenge against ordinance regulating election-related speech where plaintiffs' allegations identified "specific statements they intend[ed] to make in future election cycles"). And, contrary to what the majority suggests, *see* Opin. at 800–01 n.16, Logan's vaguely described knowledge about what has happened to *other* people cannot establish his standing. Accordingly, Logan failed to carry his burden to establish standing for the prospective relief he seeks.

By contrast, Plaintiff Gloria Johnson made a sufficient showing that she has standing to challenge the general anti-camping ordinance, GPMC § 5.61.030, and the parks anti-camping ordinance, GPMC § 6.46.090. Although Johnson's earlier declaration in support of class certification stated that she "often" sleeps in her van outside the City limits, she also stated that she "*continue[s]* to live without shelter in Grants Pass" and that, consequently, "[a]t any time, I could be arrested, ticketed, fined, and prosecuted for sleeping outside in my van or for covering myself with a blanket to stay warm" (emphasis added). Her declaration also recounts "dozens of occasions" in which the anti-camping ordinances have been enforced against her, either by instructions to "move along" or, in one instance, by issuance of a citation for violating the parks anti-camping ordinance, GPMC § 6.46.090. Because Johnson presented facts showing that she continues to violate the anti-camping ordinances and that, in light of past enforcement, she faces a credible threat of future enforcement, she has standing to challenge those ordinances. *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130. Johnson, however, presented no facts that would establish standing to challenge either the anti-sleeping ordinance (which, unlike the anti-camping ordinances, does not apply to sleeping in a vehicle), the park-exclusion ordinance, or the criminal trespass ordinance.[7]

Debra Blake sufficiently established her standing, both in connection with the class

7. The majority concludes that Johnson's standing to challenge the anti-camping ordinances necessarily establishes her standing to challenge the park-exclusion and criminal-trespass ordinances. *See* Opin. at 800 n.15. But as the district court explained, the undisputed evidence concerning Grants Pass's enforcement policies established that "Grants Pass first issues fines for violations and *then* either issues a trespass order or excludes persons from all parks *before* a person is charged with misdemeanor criminal trespass" (emphasis added). Although Johnson's continued intention to sleep in her vehicle in Grants Pass gives her standing to challenge the anti-camping ordinances, Johnson has wholly failed to plead any facts to show, *inter alia*, that she intends to engage in the *further* conduct that might expose her to a "credible threat" of prosecution under the park-exclusion or criminal trespass ordinances. *Driehaus*, 573 U.S. at 159, 134 S.Ct. 2334 (citation omitted). Johnson's declaration states that she has been homeless in Grants Pass for three years, but it does not contend that she has ever been issued, or threatened with issuance of, a trespass order, a park-exclusion order, or a criminal trespass charge or that she has "an intention to engage in a course of conduct" that would lead to such an order or charge. *Id.* (citation omitted). Because "standing is not dispensed in gross," *see DaimlerChrysler*, 547 U.S. at 353, 126 S.Ct. 1854 (citation omitted), Johnson must separately establish her standing with respect to each ordinance, and she has failed to do so with respect to the park-exclusion and criminal-trespass ordinances.

certification motion and the summary judgment motion. Although she was actually living in temporary housing at the time she submitted her declarations in support of class certification in March and June 2019, she explained that that temporary housing would soon expire; that she would become homeless in Grants Pass again; and that she would therefore again be subject to being "arrested, ticketed and prosecuted for sleeping outside or for covering myself with a blanket to stay warm." And, as her declaration at summary judgment showed, that is exactly what happened: in September 2019, she was cited for sleeping in the park in violation of GPMC § 6.46.090, convicted, and fined. Her declarations also confirmed that Blake's persistence in sleeping and camping in a variety of places in Grants Pass had also resulted in a park-exclusion order (which she successfully appealed), and in citations for violation of the anti-sleeping ordinance, GPMC § 5.61.020 (for sleeping in an alley), and for criminal trespass on City property. Based on this showing, I conclude that Blake established standing to challenge each of the ordinances at issue in the district court's judgment.

However, Blake subsequently passed away during this litigation, as her counsel noted in a letter to this court submitted under Federal Rule of Appellate Procedure 43(a). Because the only relief she sought was prospective declaratory and injunctive relief, Blake's death moots her claims. *King v. County of Los Angeles*, 885 F.3d 548, 553, 559 (9th Cir. 2018). And because, as explained earlier, Blake was the only named Plaintiff who established standing with respect to the anti-sleeping, park-exclusion, and criminal trespass ordinances that are the subject of the district court's classwide judgment, her death raises the question whether we consequently lack jurisdiction over those additional claims. Under *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), the answer to that question would appear to be no. Blake established her standing at the time that the class was certified and, as a result, "[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [Blake]." *Id.* at 399, 95 S.Ct. 553. "Although the controversy is no longer alive as to [Blake], it remains very much alive for the class of persons she [had] been certified to represent." *Id.* at 401, 95 S.Ct. 553; *see also Nielsen v. Preap*, —— U.S. ——, 139 S. Ct. 954, 963, 203 L.Ed.2d 333 (2019) (finding no mootness where "there was at least one named plaintiff with a live claim when the class was certified"); *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 987–88 (9th Cir. 2007) (en banc).

There is, however, presently no class representative who meets the requirements for representing the certified class with respect to the anti-sleeping, park-exclusion, and criminal trespass ordinances.[8] Although that would normally re-

8. Because—in contrast to the named representative in *Sosna,* who had Article III standing at the time of certification—Johnson and Logan *never* had standing to represent the class with respect to the anti-sleeping ordinance, they may not represent the class as to such claims. *See Sosna,* 419 U.S. at 403, 95 S.Ct. 553 (holding that a *previously proper* class representative whose claims had become moot on appeal could continue to represent the class for purposes of that appeal); *see also Bates,* 511 F.3d at 987 (emphasizing that the named plaintiff "had standing at the time of certification"); *B.K. ex rel. Tinsley v. Snyder,* 922 F.3d 957, 966 (9th Cir. 2019) (stating that "class representatives must have Article III standing"); *cf. NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. SW., Inc.,* 926 F.3d 528, 533 (9th Cir. 2019) (holding that, where the named plaintiffs never had stand-

quire a remand to permit the possible substitution of a new class member, *see Kuahulu v. Employers Ins. of Wausau*, 557 F.2d 1334, 1336–37 (9th Cir. 1977), I see no need to do so here, and that remains true even if one assumes that the failure to substitute a new class representative might otherwise present a potential jurisdictional defect. As noted earlier, we have jurisdiction to address all claims concerning the two anti-camping ordinances, as to which Johnson has sufficient standing to represent the certified class. And, as I shall explain, the class as to those claims should be decertified, and the reasons for that decertification rest on cross-cutting grounds that apply equally to all claims. As a result, I conclude that we have jurisdiction to order the complete decertification of the class as to all claims, without the need for a remand to substitute a new class representative as to the anti-sleeping, park-exclusion, and criminal trespass ordinances. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (holding that, where "a merits issue [is] dispositively resolved in a companion case," that merits ruling could be applied to the other companion case without the need for a remand to resolve a potential jurisdictional issue).

III

I therefore turn to whether the district court properly certified the class under Rule 23 of the Federal Rules of Civil Procedure. In my view, the district court relied on erroneous legal premises in certifying the class, and it therefore abused its discretion in doing so. *B.K.*, 922 F.3d at 965.

A

"To obtain certification of a plaintiff class under Federal Rule of Civil Procedure 23, a plaintiff must satisfy both the four requirements of Rule 23(a)—'numerosity, commonality, typicality, and adequate representation'—and 'one of the three requirements listed in Rule 23(b).'" *A.B. v. Hawaii State Dep't of Educ.*, 30 F.4th 828, 834 (9th Cir. 2022) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 349, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)). Commonality, which is contested here, requires a showing that the class members' claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541. In finding that commonality was satisfied with respect to the Eighth Amendment claims, the district court relied solely on the premise that whether the City's conduct "violates the Eighth Amendment" was a common question that could be resolved on a classwide basis. And in finding that Rule 23(b) was satisfied here, the district court relied solely on Rule 23(b)(2), which provides that a "class action may be maintained" if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). That requirement was satisfied, the district court concluded, because (for reasons similar to those that

ing, the class "must be decertified"). The majority correctly concedes this point. *See* Opin. at 801–02. Nonetheless, the majority wrongly allows Johnson and Logan to represent the class as to the park-exclusion and criminal-trespass ordinances, based on its erroneous conclusion that they established standing to challenge those ordinances. *See supra* at 820–22 & n.7.

underlay its commonality analysis) the City's challenged enforcement of the ordinances "applies equally to all class members." The district court's commonality and Rule 23(b)(2) analyses are both flawed because they are based on an incorrect understanding of our decision in *Martin.*

As the earlier discussion of *Martin* makes clear, the Eighth Amendment theory adopted in that case requires an individualized inquiry in order to assess whether any individuals to whom the challenged ordinances are being applied "*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." 920 F.3d at 617 n.8. *See supra* at 816–17. Only when persons "do not have a *single place* where they can lawfully be," can it be said that an ordinance against sleeping or camping in public, "*as applied to them*, effectively punish[es] them for something for which they may not be convicted under the Eighth Amendment." *Id.* at 617 (simplified) (emphasis added).

Of course, such an individualized inquiry is not required—and no Eighth Amendment violation occurs under *Martin*—when the defendant can show that there is adequate shelter space to house all homeless persons in the jurisdiction. *Id.* But the converse is not true—the mere fact that a city's shelters are full does *not* by itself establish, without more, that any particular person who is sleeping in public does "not have a single place where [he or she] can lawfully be." *Id.* The logic of *Martin*, and of the opinions in *Powell* on which it is based, requires an assessment of a person's individual situation before it can be said that the Eighth Amendment would be violated by applying a particular provision against that person. Indeed, the opinions in *Powell* on which *Martin* relied—Justice White's concurring opinion and the opinion of the dissenting Justices—all agreed that, at most, the Eighth Amendment provided a case-specific affirmative defense that would require the defendant to provide a "satisfactor[y] showing that it was not feasible for him to have made arrangements" to avoid the conduct at issue. *Powell*, 392 U.S. at 552, 88 S.Ct. 2145 (White, J., concurring); *id.* at 568, 88 S.Ct. 2145 n.31 (Fortas, J., dissenting) (agreeing with Justice White that the issue is whether the defendant "on the occasion in question" had shown that avoiding the conduct was "impossible"); *see also supra* at 815.[9]

In light of this understanding of *Martin*, the district court clearly erred in finding that the requirement of commonality

9. The majority incorrectly contends that the dissenters in *Powell* did not endorse Justice White's conclusion that the *defendant* bears the burden to establish that his or her conduct was involuntary. *See* Opin. at 809–11. On the contrary, the *Powell* dissenters' entire argument rested on the affirmative ''constitutional defense'' presented at the trial in that case and on the findings made by the trial court in connection with that defense. *See* 392 U.S. at 558, 88 S.Ct. 2145 (Fortas, J., dissenting). The majority's suggestion that I have taken that explicit reference to Powell's defense ''out of context,'' *see* Opin. at 810 n.29, is demonstrably wrong—the context of the case was precisely the extensive affirmative defense that Powell presented at trial, including the testimony of an expert. *See id.* at 517–26, 88 S.Ct. 2145 (plurality) (summarizing the testimony). And, of course, in *Martin,* the issue was raised in the context of a § 1983 action in which the plaintiffs challenging the laws bore the burden to prove the involuntariness of their relevant conduct. The majority points to nothing that would plausibly support the view that *Powell* and *Martin* might require the *government* to carry the burden to establish *voluntariness*. *See* Opin. at 811 n.31 (leaving this issue open). The majority claims that it can sidestep this issue here, but that is also wrong: the burden issue is critical both to the class-certification analysis and to the issue of summary judgment on the merits. *See infra* at 824–30.

was met here. "What matters to class certification is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541 (simplified). Under *Martin*, the answer to the question whether the City's enforcement of each of the anti-camping ordinances violates the Eighth Amendment turns on the individual circumstances of each person to whom the ordinance is being applied on a given occasion. That question is simply not one that can be resolved, on a common basis, "in one stroke." *Id.* That requires decertification.

For similar reasons, the district court also erred in concluding that the requirements of Rule 23(b)(2) were met. By its terms, Rule 23(b)(2) is satisfied only if (1) the defendant has acted (or refused to act) on grounds that are generally applicable to the class as whole and (2) as a result, final classwide or injunctive relief is appropriate. As the Supreme Court has observed, "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' " *Wal-Mart*, 564 U.S. at 360, 131 S.Ct. 2541. It follows that, when the *wrongfulness* of the challenged conduct with respect to any particular class member depends critically upon the individual circumstances of that class member, a class action under Rule 23(b)(2) is not appropriate. In such a case, in which (for example) the challenged enforcement of a particular law may be lawful as to some persons and not as to others, depending upon their individual circumstances, the all-or-nothing determination of wrongfulness that is the foundation of a (b)(2) class is absent: in such a case, it is simply not true that the defendant's "conduct is such that it can be enjoined or declared unlawful *only* as to *all* of the class members or as to *none* of them.' " *Id.* (emphasis added).

Because *Martin* requires an assessment of each person's individual circumstances in order to determine whether application of the challenged ordinances violates the Eighth Amendment, these standards for the application of Rule 23(b)(2) were plainly not met in this case. That is, because the applicable law governing Plaintiffs' claims would entail "a process through which highly individualized determinations of liability and remedy are made," certification of a class under Rule 23(b)(2) is improper. *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 499 (7th Cir. 2012). Moreover, the mere fact that the district court's final judgment imposes sweeping across-the-board injunctive relief that disregards individual differences in determining the defendant's liability does *not* mean that Rule 23(b)(2) has been satisfied. The rule requires that any such classwide relief be rooted in a determination of *classwide liability*—the defendant must have acted, or be acting, unlawfully "on grounds that apply generally to the class, *so that* final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2) (emphasis added). That requirement was not established here, and the class must be decertified.[10]

10. The majority wrongly concludes that the City has forfeited any argument concerning Rule 23(b)(2) because it did not specifically mention that subdivision of the rule in its opening brief. Opin. at 805–06. This "Simon Says" approach to reading briefs is wrong.

B

The majority provides two responses to this analysis, but both of them are wrong.

First, the majority contends that *Martin* established a bright-line rule that "the government cannot prosecute homeless people for sleeping in public"—or, presumably, for camping—"if there 'is a greater number of homeless individuals in [a jurisdiction] than the number of available' shelter spaces." *See* Opin. at 795 (quoting *Martin*, 920 F.3d at 617). Because, according to the majority, *Martin* establishes a simple "formula" for determining when all enforcement of anti-camping and anti-sleeping ordinances must cease, it presents a common question that may be resolved on a classwide basis. *See* Opin. at 795; *see also* Opin. at 802–03, 804. As the above analysis makes clear, the majority's premise is incorrect. *Martin* states that, if there are insufficient available beds at shelters, then a jurisdiction "cannot prosecute homeless individuals for '*involuntarily* sitting, lying, and sleeping in public.' " 920 F.3d at 617 (emphasis added). The lack of adequate shelter beds thus merely eliminates a *safe-harbor* that might otherwise have allowed a jurisdiction to prosecute violations of such ordinances *without* regard to individual circumstances, with the result that the jurisdiction's enforcement power will instead depend upon whether the conduct of the individual on a particular occasion was "involuntar[y]." *Id. Martin* confirms that the resulting inquiry turns on whether the persons in question "*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." *Id.* at 617 n.8; *see also id.* at 617 (stating that enforcement is barred only if the persons in question "do not have a single place where they can lawfully be" (citation omitted)). And the majority's misreading of *Martin* completely disregards the *Powell* opinions on which *Martin* relied, which make unmistakably clear that an individualized showing of involuntariness is required.

Second, the majority states that, to the extent that *Martin* requires such an individualized showing to establish an Eighth Amendment violation, any such individualized issue here has been eliminated by the fact that "[p]ursuant to the class definition, the class includes only *involuntarily* homeless persons." *See* Opin. at 805. As the majority acknowledges, "[p]ersons are involuntarily homeless" under *Martin* only "if they do not 'have access to adequate temporary shelter,' " such as, for example, when they lack " 'the means to pay for it' " and it is otherwise not " 'realistically available to them for free.' " Opin. at 792 n.2 (quoting *Martin*, 920 F.3d at 617 n.8). Because that individualized issue has been shifted into the class definition, the majority holds, the City's enforcement of the challenged ordinances against *that* class can in that sense be understood to present a "common question" that can be resolved in one stroke. According to the majority, because the class definition requires that, at the time the ordinances are applied against them, the class members must be "involuntarily homeless" in the sense that *Martin* requires, there is a common question as to whether "the City's enforcement of the anti-camping ordinances against all

The *substance* of the argument is contained in the opening brief, in which the City explicitly contended that *Martin* requires "a more individualized analysis" than the district court applied and that, as a result, "neither FED. R. CIV. P. 23 nor *Martin* provide plaintiffs the ability to establish the type of sweeping classwide claims advanced in this case." Indeed, Plaintiffs themselves responded to this argument, in their answering brief, by explaining why they believe that the requirements of Rule 23(b)(2) were met.

involuntarily homeless individuals violates the Eighth Amendment." *See* Opin. at 804 & n.22.

The majority cites no authority for this audacious bootstrap argument. If a person's individual circumstances are such that he or she has *no* "access to adequate temporary shelter"—which necessarily subsumes (among other things) the determination that there are no shelter beds available—then the *entire* (highly individualized) question of the City's liability to that person under *Martin*'s standards has been shifted into the class definition. That is wholly improper. *See Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651, 670 n.14 (9th Cir. 2022) (en banc) ("A court may not ... create a 'fail safe' class that is defined to include only those individuals who were injured by the allegedly unlawful conduct."); *see also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016) (stating that it would be improper to define a class in such a way "as to preclude membership unless the liability of the defendant is established" (simplified)).

The majority nonetheless insists that "[m]embership in the class" here "has no connection to the success of the underlying claims." *See* Opin. at 805 n.23. That is obviously false. As I have explained, *Martin*'s understanding of when a person "involuntarily" lacks "access to adequate temporary shelter" or to "a single place where [he or she] can lawfully be," *see* 920 F.3d at 617 & n.8 (citations omitted), requires an individualized inquiry into a given person's circumstances at a particular moment. By insisting that a common question exists here *because Martin*'s involuntariness standard has been folded into the class definition, the majority is unavoidably relying on a fail-safe class definition that improperly subsumes this crucial individualized merits issue into the class definition. The majority's artifice renders the limitations of Rule 23 largely illusory.[11]

To the extent that the majority instead suggests that the class definition requires only an involuntary lack of access to regular or permanent shelter to qualify as "involuntarily homeless," its argument collapses for a different reason. Because *Martin*'s Eighth Amendment holding applies only to those who involuntarily lack "access to adequate temporary shelter" on a given occasion, *see* 920 F.3d at 617 n.8, such an understanding of the class definition would *not* be sufficient to eliminate the highly individualized inquiry into whether a particular person lacked such access at a given moment, and the class would then have to be decertified for the reasons I have discussed earlier. *See supra* at 823–26. Put simply, the majority cannot have it both ways: either the class definition is co-extensive with *Martin*'s involuntariness concept (in which case the class is

11. The majority contends that, despite the presence of a liability-determining individualized issue in the class definition, there is no fail-safe class here because one or more of the claims might still conceivably fail on the merits for *other* reasons. *See* Opin. at 805 n.23. But the majority does not identify any such other reasons and, of course, under the majority's view of the substantive law, there are none. But more importantly, the majority is simply wrong in positing that the *only* type of class that would qualify as an impermissible fail-safe class is one in which *every* conceivable merits issue in the litigation has been folded into the class definition. What matters is whether the class definition folds within it *any* bootstrapping merits issue (such as the "injur[y]" issue mentioned in *Olean*) as to which "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Olean*, 31 F.4th at 670 n.14. To the extent that the central individualized merits issue in this case has been folded into the class definition, that defect is present here.

an improper fail-safe class) or the class definition differs from the *Martin* standard (in which case *Martin*'s individualized inquiry requires decertification).

IV

Given these conclusions as to standing and class certification, all that remains are the individual claims of Johnson for prospective relief against enforcement of the two anti-camping ordinances. In my view, these claims fail as a matter of law.

Johnson's sole basis for challenging these ordinances is that they prohibit her from sleeping in her van within the City. In her declaration in support of class certification, however, Johnson specifically stated that she has "often" been able to sleep in her van by parking *outside* the City limits. In a supplemental declaration in support of summary judgment, she affirmed that these facts "remain true," but she added that there had also been occasions in which, outside the City limits, county officers had told her to "move on" when she "was parked on county roads" and that, when she parked "on BLM land"—*i.e.*, land managed by the federal Bureau of Land Management—she was told that she "could only stay on BLM for a few days."

As an initial matter, Johnson's declaration provides no non-conclusory basis for finding that she lacks *any* option other than sleeping in her van. Although her declaration notes that she worked as a nurse "for decades" and that she now collects social security benefits, the declaration simply states, without saying anything further about her present economic situation, that she "cannot afford housing." Her declaration also says nothing about where she lived before she began living "on the street" a few years ago, and it says nothing about whether she has any friends or family, in Grants Pass or elsewhere, who might be able to provide assistance.[12] And even assuming that this factual showing would be sufficient to permit a trier of fact to find that Johnson lacks any realistic option other than sleeping in her van, we cannot affirm the district court's summary judgment in Johnson's favor without holding that her showing was so overwhelming that she should prevail as a matter of law. Because a reasonable trier of fact could find, in light of these evidentiary gaps, that Johnson failed to carry her burden of proof on this preliminary point, summary judgment in her favor was improper.[13]

12. The majority dismisses these questions about the sufficiency of Johnson's evidentiary showing as "artificial limitations" on claims under *Martin*, *see* Opin. at 810–11, but the standard for establishing an Eighth Amendment violation under *Martin* and the *Powell* opinions on which it relies is a demanding and individualized one, and we are obligated to follow it. Indeed, in upholding Powell's conviction for public drunkenness, the controlling opinion of Justice White probed the details of the record as to whether, in light of the fact that Powell "had a home and wife," he could have "made plans while sober to prevent ending up in a public place," and whether, despite his chronic alcoholism, he "retained the power to stay off or leave the streets, and simply preferred to be there rather than elsewhere." 392 U.S. at 553, 88 S.Ct. 2145.

13. The majority errs by instead counting all gaps in the evidentiary record against the City, faulting it for what the majority thinks the City has failed to "demonstrate[ ]," *See* Opin. at 811–12 & n.32. That is contrary to well-settled law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (holding that a movant's summary judgment motion should be granted "against a [nonmovant] who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). The majority's analysis also belies its implausible claim that it has not shifted the burden to the City to establish the *volun-*

But even assuming that Johnson had established that she truly has no option other than sleeping in her van, her showing is still insufficient to establish an Eighth Amendment violation. As noted, Johnson's *sole* complaint in this case is that, by enforcing the anti-camping ordinances, the City will not let her sleep in her van. But the sparse facts she has presented fail to establish that she lacks any alternative place where she could park her van and sleep in it. On the contrary, her factual showing establishes that the BLM will let her do so on BLM land for a "few days" at a time and that she also has "often" been able to do so on county land. Given that Johnson has failed to present sufficient evidence to show that she lacks alternatives that would allow her to avoid violating the City's anti-camping ordinances, she has not established that the conduct for which the City would punish her is involuntary such that, under *Martin* and the *Powell* opinions on which *Martin* relies, it would violate the Eighth Amendment to enforce that prohibition against her.

In nonetheless finding that the anti-camping ordinances' prohibition on sleeping in vehicles violates the Eighth Amendment, the majority apparently relies on the premise that the question of whether an individual has options for avoiding violations of the challenged law must be limited to alternatives that are *within the City limits.* Under this view, if a large homeless shelter with 1,000 vacant beds were opened a block outside the City's limits, the City would *still* be required by the Eighth Amendment to allow hundreds of people to sleep in their vans in the City and, presumably, in the City's public parks as well. Nothing in law or logic supports such a conclusion. *Martin* says that anti-sleeping ordinances may be enforced, consistent with the Eighth Amendment, so long as there is a "*single place* where [the person] can lawfully be," 920 F.2d at 617 (emphasis added) (citation omitted), and Justice White's concurrence in *Powell* confirms that the Eighth Amendment does not bar enforcement of a law when the defendant has failed to show that avoiding the violative conduct is "*impossible*," 392 U.S. at 551, 88 S.Ct. 2145 (emphasis added).[14] Nothing in the rationale of this Eighth Amendment theory suggests that the inquiry into whether it is "impossible" for the defendant to avoid violating the law must be artificially constrained to only those particular options that suit the defendant's geographic or other preferences. To be sure, Johnson states that having to drive outside the City limits costs her money for gas, but that does not provide any basis for concluding that the option is infeasible or that she has thereby suffered "cruel and unusual punishment."

Finally, because the district court's reliance on the Excessive Fines Clause was predicated on the comparable view that the challenged ordinances punish "status and not conduct" in violation of *Robinson*, that ruling was flawed for the same reasons. And because Johnson provides no other basis for finding an Excessive Fines violation here, her claims under that clause also fail as a matter of law.

V

Accordingly, I would remand this case with instructions (1) to dismiss as moot the claims of Debra Blake as well as Plaintiffs' claims with respect to GPMC § 6.46.355;

tariness of the behavior targeted by the ordinances. *See supra* at 824 n.9.

14. The majority complains that this standard is too high, *see* Opin. at 811–12, but it is the standard applied in *Martin* and in the *Powell* opinions on which *Martin* relied.

(2) to dismiss the claims of John Logan for lack of Article III standing; (3) to dismiss the remaining claims of Gloria Johnson for lack of Article III standing, except to the extent that she challenges the two anti-camping ordinances (GPMC §§ 5.61.030, 6.46.090); (4) to decertify the class; and (5) to grant summary judgment to the City, and against Johnson, with respect to her challenges to the City's anti-camping ordinances under the Eighth Amendment's Cruel and Unusual Punishments Clause and Excessive Fines Clause. That disposes of all claims at issue, and I therefore need not reach any of the many additional issues discussed and decided by the majority's opinion or raised by the parties.[15]

VI

Up to this point, I have faithfully adhered to *Martin* and its understanding of *Powell*, as I am obligated to do. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). But given the importance of the issues at stake, and the gravity of *Martin*'s errors, I think it appropriate to conclude by noting my general agreement with many of the points made by my colleagues who dissented from our failure to rehear *Martin* en banc.

In particular, I agree that, by combining *dicta* in a concurring opinion with a *dissent*, the panel in *Martin* plainly misapplied *Marks*' rule that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken *by those Members who concurred in the judgments* on the narrowest grounds.' " 430 U.S. at 193, 97 S.Ct. 990 (emphasis added) (citation omitted). Under a correct application of *Marks*, the holding of *Powell* is that there is no constitutional obstacle to punishing conduct that has *not* been shown to be involuntary, and the converse question of what rule applies when the conduct *has* been shown to be involuntary was left open. *See Martin*, 920 F.3d at 590–93 (M. Smith, J., dissenting from denial of rehearing en banc) (explaining that, under a proper application of *Marks*, " 'there is definitely no Supreme Court holding' pro-

15. Two of the majority's expansions of *Martin* nonetheless warrant special mention. First, the majority's decision goes well beyond *Martin* by holding that the Eighth Amendment precludes enforcement of anti-camping ordinances against those who involuntarily lack access to temporary shelter, if those ordinances deny such persons the use of whatever materials they need "to keep themselves warm and dry." *See* Opin. at 808. It seems unavoidable that this newly declared right to the necessary "materials to keep warm and dry" while sleeping in public parks must include the right to use (at least) a tent; it is hard to see how else one would keep "warm and dry" in a downpour. And the majority also raises, and leaves open, the possibility that the City's prohibition on the use of other "items necessary to facilitate sleeping outdoors"—such as "stoves," "fires," and makeshift "structures"—"may or may not be permissible." *See* Opin. at 807–08, 812. Second, the majority indirectly extends *Martin*'s holding from the strictly criminal context at issue in that case to civil citations and fines. *See* Opin. at 806–07. As the district court noted below, the parties vigorously debated the extent to which a "violation" qualifies as a crime under Oregon law. The majority, however, sidesteps that issue by instead treating it as irrelevant. The majority's theory is that, even assuming *arguendo* that violations of the anti-camping ordinances are only civil in nature, they are covered by *Martin* because such violations *later* could lead (after more conduct by the defendant) to criminal fines, *see* Opin. at 807–08. But the majority does not follow the logic of its own theory, because it has not limited its holding or remedy to the enforcement of the ultimate criminal provisions; on the contrary, the majority has enjoined *any* relevant enforcement of the underlying ordinances that contravenes the majority's understanding of *Martin*. *See* Opin. at 813.

hibiting the criminalization of involuntary conduct" (citation omitted)).

Moreover, the correct answer to the question left open in *Powell* was the one provided in Justice Marshall's plurality opinion in that case: there is no federal "constitutional doctrine of criminal responsibility." 392 U.S. at 534, 88 S.Ct. 2145. In light of the "centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds," including the "doctrines of *actus reus, mens rea*, insanity, mistake, justification, and duress," the "process of adjustment" of "the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man" is a matter that the Constitution leaves within "the province of the States" or of Congress. *Id.* at 535–36, 88 S.Ct. 2145. "There is simply no indication in the history of the Eighth Amendment that the Cruel and Unusual Punishments Clause was intended to reach the substantive authority of Congress to criminalize acts or status, and certainly not before conviction," and the later incorporation of that clause's protections vis-à-vis the States in the Fourteenth Amendment "worked no change in its meaning." *Martin*, 920 F.3d at 602 (Bennett, J., dissenting from denial of rehearing en banc); *see also id.* at 599 (explaining that *Martin*'s novel holding was inconsistent with the "text, tradition, and original public meaning[ ] [of] the Cruel and Unusual Punishments Clause of the Eighth Amendment"). Consequently, so long as "the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*," the Eighth Amendment principles applied in *Robinson* have been satisfied. *Powell*, 392 U.S. at 533, 88 S.Ct. 2145 (plurality). The Eighth Amendment does not preclude punishing such an act merely "because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.*; *see also Martin*, 920 F.3d at 592 n.3 (M. Smith, J., dissenting from denial of rehearing en banc) ("*Powell* does not prohibit the criminalization of involuntary conduct.").

Further, it is hard to deny that *Martin* has "generate[d] dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein." *Id.* at 594 (M. Smith, J., dissenting from denial of rehearing en banc). Those harms, of course, will be greatly magnified by the egregiously flawed reconceptualization and extension of *Martin*'s holding in today's decision, and by the majority's equally troubling reworking of settled class-action principles. With no sense of irony, the majority declares that no such harms are demonstrated by the record in this case, even as the majority largely endorses an injunction effectively requiring Grants Pass to allow the use of its public parks as homeless encampments. Other cities in this circuit can be expected to suffer a similar fate.

In view of all of the foregoing, both *Martin* and today's decision should be overturned or overruled at the earliest opportunity, either by this court sitting en banc or by the U.S. Supreme Court.

* * *

I respectfully but emphatically dissent.

both.' " *United States v. Robertson*, 103 F.4th 1, 8 (CADC 2023) (approving jury instructions for (c)(2)). On another, a defendant acts "corruptly" if he "act[s] 'with an intent to procure an unlawful benefit either for himself or for some other person.' " 64 F.4th at 352 (Walker, J., concurring in part and concurring in judgment) (quoting *Marinello*, 584 U.S., at 21, 138 S.Ct. 1101; alterations omitted). Under either, the "corruptly" element should screen out innocent activists and lobbyists who engage in lawful activity. And if not, those defendants can bring as-applied First Amendment challenges.

The Court also emphasizes (c)(2)'s 20-year maximum penalty. *Ante*, at 2188 – 2189. But it simultaneously "glosses over the absence of any prescribed minimum." *Yates*, 574 U.S., at 569, 135 S.Ct. 1074 (KAGAN, J., dissenting). "Congress presumably enacts laws with high maximums and no minimums when it thinks the prohibited conduct may run the gamut from major to minor." *Ibid.* Indeed, given the breadth of its terms, (c)(2) naturally encompasses actions that range in severity. Congress presumably trusted District Courts to impose sentences commensurate with the defendant's particular conduct.

* * *

There is no getting around it: Section 1512(c)(2) is an expansive statute. Yet Congress, not this Court, weighs the "pros and cons of whether a statute should sweep broadly or narrowly." *United States v. Rodgers*, 466 U.S. 475, 484, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984). Once Congress has set the outer bounds of liability, the Executive Branch has the discretion to select particular cases to prosecute within those boundaries. By atextually narrowing § 1512(c)(2), the Court has failed to respect the prerogatives of the political branches. Cf. *ante*, at 2189. I respectfully dissent.

CITY OF GRANTS PASS, OREGON, Petitioner

v.

Gloria JOHNSON, et al., on behalf of themselves and all others similarly situated

No. 23-175

Supreme Court of the United States.

Argued April 22, 2024

Decided June 28, 2024

Background: Individuals experiencing homelessness brought putative class action against city, challenging constitutionality of city ordinances which prohibited sleeping or camping on public property and which provided progressive consequences in form of civil fines, exclusion orders, and criminal prosecution for trespass. The United States District Court for the District of Oregon, Mark D. Clarke, United States Magistrate Judge, 2019 WL 3717800, certified class and, 2020 WL 4209227, granted partial summary judgment to individuals and issued permanent injunction prohibiting enforcement of some of the ordinances. City appealed. The United States Court of Appeals for the Ninth Circuit, Roslyn O. Silver, District Judge, sitting by designation, 72 F.4th 868, affirmed in part, vacated in part, and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Gorsuch, held that ordinances did not constitute cruel and unusual punishment when

applied to individuals experiencing homelessness, even if homelessness was involuntary; abrogating *Martin v. Boise*, 920 F.3d 584; *Coalition on Homelessness v. San Francisco*, 647 F. Supp. 3d 806; *Fund for Empowerment v. Phoenix*, 646 F. Supp. 3d 1117; *Boyd v. San Rafael*, 2023 WL 7283885; *Warren v. Chico*, 2021 WL 2894648; *LA Alliance for Human Rights v. Los Angeles*, 2020 WL 2512811.

Reversed and remanded.

Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, and Barrett joined.

Justice Thomas filed concurring opinion.

Justice Sotomayor filed dissenting opinion, in which Justices Kagan and Jackson joined.

1. Constitutional Law ⚿1414, 1430, 1435, 1800, 2070

The First Amendment prohibits governments from using their criminal laws to abridge the rights to speak, worship, assemble, petition, and exercise the freedom of the press. U.S. Const. Amend. 1.

2. Constitutional Law ⚿3043

The Equal Protection Clause of the Fourteenth Amendment prevents governments from adopting laws that invidiously discriminate between persons. U.S. Const. Amend. 14.

3. Constitutional Law ⚿4501

The Due Process Clauses of the Fifth and Fourteenth Amendments ensure that officials may not displace certain rules associated with criminal liability that are so old and venerable, so rooted in the traditions and conscience of the people, as to be ranked as fundamental. U.S. Const. Amends. 5, 14.

4. Criminal Law ⚿662.1
Jury ⚿21.1

The Fifth and Sixth Amendments require prosecutors and courts to observe various procedures before denying any person of his liberty, promising, for example, that every person enjoys the right to confront his accusers and have serious criminal charges resolved by a jury of his peers. U.S. Const. Amends. 5, 6.

5. Sentencing and Punishment ⚿1519

The Eighth Amendment's prohibition against cruel and unusual punishment focuses on what method or kind of punishment a government may impose after a criminal conviction, not on whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense. U.S. Const. Amend. 8.

6. Municipal Corporations ⚿622
Sentencing and Punishment ⚿1453, 1560
Vagrancy ⚿6

City ordinances which prohibited sleeping or camping on public property and which provided for progressive consequences in form of civil fines, exclusion orders, and criminal prosecution for trespass did not constitute cruel and unusual punishment when applied to individuals experiencing homelessness, even if homelessness was involuntary; sanctions were not designed to superadd terror, pain, or disgrace, sanctions were similar to usual modes for punishing offenses throughout the country, ordinances did not criminalize mere status, as ordinances could apply, for example, to backpacker passing through on vacation or a student who abandoned their dorm room to camp out in protest on lawn of municipal building, and Eighth Amendment protections did not apply to any claim of selective enforcement; abrogating *Martin v. Boise*, 920 F.3d 584; *Co-*

alition on Homelessness v. San Francisco, 647 F. Supp. 3d 806; *Fund for Empowerment v. Phoenix*, 646 F. Supp. 3d 1117; *Boyd v. San Rafael*, 2023 WL 7283885; *Warren v. Chico*, 2021 WL 2894648; *LA Alliance for Human Rights v. Los Angeles*, 2020 WL 2512811. U.S. Const. Amend. 8.

7. Criminal Law ⇨37.10(1)

The Constitution provides limits on state prosecutorial power, promising fair notice of the laws and equal treatment under them, forbidding selective prosecutions, and much more.

Syllabus *

Grants Pass, Oregon, is home to roughly 38,000 people, about 600 of whom are estimated to experience homelessness on a given day. Like many local governments across the Nation, Grants Pass has public-camping laws that restrict encampments on public property. The Grants Pass Municipal Code prohibits activities such as camping on public property or parking overnight in the city's parks. See §§ 5.61.030, 6.46.090(A)–(B). Initial violations can trigger a fine, while multiple violations can result in imprisonment. In a prior decision, *Martin* v. *Boise*, the Ninth Circuit held that the Eighth Amendment's Cruel and Unusual Punishments Clause bars cities from enforcing public-camping ordinances like these against homeless individuals whenever the number of homeless individuals in a jurisdiction exceeds the number of "practically available" shelter beds. 920 F.3d 584, 617. After *Martin*, suits against Western cities like Grants Pass proliferated.

Plaintiffs (respondents here) filed a putative class action on behalf of homeless people living in Grants Pass, claiming that the city's ordinances against public camping violated the Eighth Amendment. The district court certified the class and entered a *Martin* injunction prohibiting Grants Pass from enforcing its laws against homeless individuals in the city. App. to Pet. for Cert. 182a–183a. Applying *Martin*'s reasoning, the district court found everyone without shelter in Grants Pass was "involuntarily homeless" because the city's total homeless population outnumbered its "practically available" shelter beds. App. to Pet. for Cert. 179a, 216a. The beds at Grants 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. App. to Pet. for Cert. 179a–180a. A divided panel of the Ninth Circuit affirmed the district court's *Martin* injunction in relevant part. 72 F.4th 868, 874–896. Grants Pass filed a petition for certiorari. Many States, cities, and counties from across the Ninth Circuit urged the Court to grant review to assess *Martin*.

Held: The enforcement of generally applicable laws regulating camping on public property does not constitute "cruel and unusual punishment" prohibited by the Eighth Amendment. Pp. 2215 – 2226.

(a) The Eighth Amendment's Cruel and Unusual Punishments Clause "has always been considered, and properly so, to be directed at the method or kind of punishment" a government may "impos[e] for the violation of criminal statutes." *Powell v. Texas*, 392 U.S. 514, 531–532, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (plurality opinion). It was adopted to ensure that the new Nation would never resort to certain "formerly tolerated" punishments considered

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

"cruel" because they were calculated to "'superad[d]'" "'terror, pain, or disgrace,'" and considered "unusual" because, by the time of the Amendment's adoption, they had "long fallen out of use." *Bucklew v. Precythe*, 587 U.S 119, 130, 139 S.Ct. 1112, 203 L.Ed.2d 521. All that would seem to make the Eighth Amendment a poor foundation on which to rest the kind of decree the plaintiffs seek in this case and the Ninth Circuit has endorsed since *Martin*. The Cruel and Unusual Punishments Clause focuses on the question 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. *Powell*, 392 U.S., at 531–532, 88 S.Ct. 2145.

The Court cannot say that the punishments Grants Pass imposes here qualify as cruel and unusual. The city imposes only limited fines for first-time offenders, an order temporarily barring an individual from camping in a public park for repeat offenders, and a maximum sentence of 30 days in jail for those who later violate an order. See Ore. Rev. Stat. §§ 164.245, 161.615(3). Such punishments do not qualify as cruel because they are not designed to "superad[d]" "terror, pain, or disgrace." *Bucklew*, 587 U.S., at 130, 139 S.Ct. 1112 (internal quotation marks omitted). Nor are they unusual, because similarly limited fines and jail terms have been and remain among "the usual mode[s]" for punishing criminal offenses throughout the country. *Pervear v. Commonwealth*, 5 Wall. 475, 480, 18 L.Ed. 608. Indeed, cities and States across the country have long employed similar punishments for similar offenses. Pp. 2215 – 2217.

(b) Plaintiffs do not meaningfully dispute that, on its face, the Cruel and Unusual Punishments Clause does not speak to questions like what a State may criminalize or how it may go about securing a conviction. Like the Ninth Circuit in *Martin*, plaintiffs point to *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758, as a notable exception. In *Robinson*, the Court held that under the Cruel and Unusual Punishments Clause, California could not enforce a law providing that "'[n]o person shall . . . be addicted to the use of narcotics.'" *Id.*, at 660, n. 1, 82 S.Ct. 1417. While California could not make "the 'status' of narcotic addiction a criminal offense," *id.*, at 666, 82 S.Ct. 1417, the Court emphasized that it did not mean to cast doubt on the States' "broad power" to prohibit behavior even by those, like the defendant, who suffer from addiction. *Id.*, at 664, 667–668, 82 S.Ct. 1417. The problem, as the Court saw it, was that California's law made the status of being an addict a crime. *Id.*, at 666–667, 82 S.Ct. 1417 The Court read the Cruel and Unusual Punishments Clause (in a way unprecedented in 1962) to impose a limit on what a State may criminalize. In dissent, Justice White lamented that the majority had embraced an "application of 'cruel and unusual punishment' so novel that" it could not possibly be "ascribe[d] to the Framers of the Constitution." 370 U.S., at 689, 82 S.Ct. 1417. The Court has not applied *Robinson* in that way since.

Whatever its persuasive force as an interpretation of the Eighth Amendment, *Robinson* cannot sustain the Ninth Circuit's *Martin* project. *Robinson* expressly recognized the "broad power" States enjoy over the substance of their criminal laws, stressing that they may criminalize knowing or intentional drug use even by those suffering from addiction. 370 U.S., at 664, 666, 82 S.Ct. 1417. The Court held that California's statute offended the Eighth Amendment only because it criminalized addiction as a status. *Ibid.*

Grants Pass's public-camping ordinances do not criminalize status. The pub-

lic-camping laws prohibit actions undertaken by any person, regardless of status. It makes no difference whether the charged defendant is currently a person experiencing homelessness, a backpacker on vacation, or a student who abandons his dorm room to camp out in protest on the lawn of a municipal building. See Tr. of Oral Arg. 159. Because the public-camping laws in this case do not criminalize status, *Robinson* is not implicated. Pp. 2216 – 2219.

(c) Plaintiffs insist the Court should extend *Robinson* to prohibit the 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. See Brief for Respondents 24–25, 29, 32. The Ninth Circuit pursued this line of thinking below and in *Martin*, but this Court already rejected it in *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254. In *Powell*, 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 any public place.' " *Id.*, at 517, 88 S.Ct. 2145 (plurality opinion). Like the plaintiffs here, Powell argued that his drunkenness was an " 'involuntary' " byproduct of his status as an alcoholic. *Id.*, at 533, 88 S.Ct. 2145. The Court did not agree that Texas's law effectively criminalized Powell's status as an alcoholic. Writing for a plurality, Justice Marshall observed that *Robinson*'s "very small" intrusion "into the substantive criminal law" prevents States only from enforcing laws that criminalize "a mere status." *Id.*, at 532–533, 88 S.Ct. 2145. It does nothing to curtail a State's authority to secure a conviction when "the accused has committed some act . . . society has an interest in preventing." *Id.*, at 533, 88 S.Ct. 2145. That remains true, Justice Marshall continued, even if the defendant's conduct might, "in some sense" be described as " 'involuntary' or 'occasioned by' " a particular status. *Ibid.*

This case is no different. Just as in *Powell*, plaintiffs here seek to extend *Robinson*'s rule beyond laws addressing "mere status" to laws addressing actions that, even if undertaken with the requisite *mens rea*, might "in some sense" qualify as " 'involuntary.' " And as in *Powell*, the Court can find nothing in the Eighth Amendment permitting that course. Instead, a variety of other legal doctrines and constitutional provisions work to protect those in the criminal justice system from a conviction. Pp. 2218 – 2221.

(d) *Powell* not only declined to extend *Robinson* to "involuntary" acts but also stressed the dangers of doing so. Extending *Robinson* to cover involuntary acts would, Justice Marshall observed, effectively "impe[l]" this Court "into defining" something akin to a new "insanity test in constitutional terms." *Powell*, 392 U.S., at 536, 88 S.Ct. 2145. That is because an individual like the defendant in *Powell* does not dispute that he has committed an otherwise criminal act with the requisite *mens rea*, yet he seeks to be excused from "moral accountability" because of his " 'condition. ' " *Id.*, at 535–536, 88 S.Ct. 2145. Instead, Justice Marshall reasoned, such matters should be left for resolution through the democratic process, and not by "freez[ing]" any particular, judicially preferred approach "into a rigid constitutional mold." *Id.*, at 537, 88 S.Ct. 2145. The Court echoed that last point in *Kahler v. Kansas*, 589 U.S. 271, 140 S.Ct. 1021, 206 L.Ed.2d 312, in which the Court stressed that questions about whether an individual who committed a proscribed act with the requisite mental state should be "reliev[ed of] responsibility," *id.*, at 283, 140 S.Ct. 1021, due to a lack of "moral culpability," *id.*, at 286, 140 S.Ct. 1021, are generally best resolved by the people and their elected representatives.

Though doubtless well intended, the Ninth Circuit's *Martin* experiment defied these lessons. Answers to questions such as what constitutes "involuntarily" homelessness or when a shelter is "practically available" cannot be found in the Cruel and Unusual Punishments Clause. Nor do federal judges enjoy any special competence to provide them. Cities across the West report that the Ninth Circuit's involuntariness test has created intolerable uncertainty for them. By extending *Robinson* beyond the narrow class of pure status crimes, the Ninth Circuit has created a right that has proven "impossible" for judges to delineate except "by fiat." *Powell*, 392 U.S., at 534, 88 S.Ct. 2145. As Justice Marshall anticipated in *Powell*, the Ninth Circuit's rules have produced confusion and they have interfered with "essential considerations of federalism," by taking from the people and their elected leaders difficult questions traditionally "thought to be the[ir] province." *Id.*, at 535–536, 88 S.Ct. 2145. Pp. 2220 – 2226.

(e) Homelessness is complex. Its causes are many. So may be the public policy responses required to address it. The question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes and devising those responses. A handful of federal judges cannot begin to "match" the collective wisdom the American people possess in deciding "how best to handle" a pressing social question like homelessness. *Robinson*, 370 U.S., at 689, 82 S.Ct. 1417 (White, J., dissenting). The Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation's homelessness policy. P. 2226.

72 F.4th 868, reversed and remanded.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN and JACKSON, JJ., joined.

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For U.S. Supreme Court briefs, see:

2024 WL 1657077 (Reply.Brief)

2024 WL 1420950 (Resp.Brief)

2024 WL 891258 (Pet.Brief)

Justice GORSUCH delivered the opinion of the Court.

Many cities across the American West face a homelessness crisis. The causes are varied and complex, the appropriate public

policy responses perhaps no less so. Like many local governments, the city of Grants Pass, Oregon, has pursued a multifaceted approach. Recently, it adopted various policies aimed at "protecting the rights, dignity[,] and private property of the homeless." App. 152. It appointed a "homeless community liaison" officer charged with ensuring the homeless receive information about "assistance programs and other resources" available to them through the city and its local shelter. *Id.*, at 152–153; Brief for Grants Pass Gospel Rescue Mission as *Amicus Curiae* 2–3. And it adopted certain restrictions against encampments on public property. App. 155–156. The Ninth Circuit, however, held that the Eighth Amendment's Cruel and Unusual Punishments Clause barred that last measure. With support from States and cities across the country, Grants Pass urged this Court to review the Ninth Circuit's decision. We take up that task now.

I

A

Some suggest that homelessness may be the "defining public health and safety crisis in the western United States" today. 72 F.4th 868, 934 (CA9 2023) (Smith, J., dissenting from denial of rehearing en banc). According to the federal government, homelessness in this country has reached its highest levels since the government began reporting data on the subject in 2007. Dept. of Housing and Urban Development, Office of Community Planning & Development, T. de Sousa et al., The 2023 Annual Homeless Assessment Report (AHAR) to Congress 2–3 (2023). California alone is home to around half of those in this Nation living without shelter on a given night. *Id.*, at 30. And each of the five States with the highest rates of unsheltered homelessness in the country—California, Oregon, Hawaii, Arizona, and Nevada—lies in the American West. *Id.*, at 17.

Those experiencing homelessness may be as diverse as the Nation itself—they are young and old and belong to all races and creeds. People become homeless for a variety of reasons, too, many beyond their control. Some have been affected by economic conditions, rising housing costs, or natural disasters. *Id.*, at 37; see Brief for United States as *Amicus Curiae* 2–3. Some have been forced from their homes to escape domestic violence and other forms of exploitation. *Ibid.* And still others struggle with drug addiction and mental illness. By one estimate, perhaps 78 percent of the unsheltered suffer from mental-health issues, while 75 percent struggle with substance abuse. See J. Rountree, N. Hess, & A. Lyke, Health Conditions Among Unsheltered Adults in the U. S., Calif. Policy Lab, Policy Brief 5 (2019).

Those living without shelter often live together. L. Dunton et al., Dept. of Housing and Urban Development, Office of Policy Development & Research, Exploring Homelessness Among People Living in Encampments and Associated Cost 1 (2020) (2020 HUD Report). As the number of homeless individuals has grown, the number of homeless encampments across the country has increased as well, "in numbers not seen in almost a century." *Ibid.* The unsheltered may coalesce in these encampments for a range of reasons. Some value the "freedom" encampment living provides compared with submitting to the rules shelters impose. Dept. of Housing and Urban Development, Office of Policy Development and Research, R. Cohen, W. Yetvin, & J. Khadduri, Understanding Encampments of People Experiencing Homelessness and Community Responses 5 (2019). Others report that encampments offer a "sense of community." *Id.*, at 7. And still others may seek them out for

"dependable access to illegal drugs." *Ibid.* In brief, the reasons why someone will go without shelter on a given night vary widely by the person and by the day. See *ibid.*

As the number and size of these encampments have grown, so have the challenges they can pose for the homeless and others. We are told, for example, that the "exponential increase in . . . encampments in recent years has resulted in an increase in crimes both against the homeless and by the homeless." Brief for California State Sheriffs' Associations et al. as *Amici Curiae* 21 (California Sheriffs Brief). California's Governor reports that encampment inhabitants face heightened risks of "sexual assault" and "subjugation to sex work." Brief for California Governor G. Newsom as *Amicus Curiae* 11 (California Governor Brief). And by one estimate, more than 40 percent of the shootings in Seattle in early 2022 were linked to homeless encampments. Brief for Washington State Association of Sheriffs and Police Chiefs as *Amicus Curiae* on Pet. for Cert. 10 (Washington Sheriffs Brief).

Other challenges have arisen as well. Some city officials indicate that encampments facilitate the distribution of drugs like heroin and fentanyl, which have claimed the lives of so many Americans in recent years. Brief for Office of the San Diego County District Attorney as *Amicus Curiae* 17–19. Without running water or proper sanitation facilities, too, diseases can sometimes spread in encampments and beyond them. Various States say that they have seen typhus, shigella, trench fever, and other diseases reemerge on their city streets. California Governor Brief 12; Brief for Idaho et al. as *Amici Curiae* 7 (States Brief).

Nor do problems like these affect everyone equally. Often, encampments are found in a city's "poorest and most vulnerable neighborhoods." Brief for City and County of San Francisco et al. as *Amici Curiae* on Pet. for Cert. 5 (San Francisco Cert. Brief); see also 2020 HUD Report 9. With encampments dotting neighborhood sidewalks, adults and children in these communities are sometimes forced to navigate around used needles, human waste, and other hazards to make their way to school, the grocery store, or work. San Francisco Cert. Brief 5; States Brief 8; California Governor Brief 11–12. Those with physical disabilities report this can pose a special challenge for them, as they may lack the mobility to maneuver safely around the encampments. San Francisco Cert. Brief 5; see also Brief for Tiana Tozer et al. as *Amici Curiae* 1–6 (Tozer Brief).

Communities of all sizes are grappling with how best to address challenges like these. As they have throughout the Nation's history, charitable organizations "serve as the backbone of the emergency shelter system in this country," accounting for roughly 40 percent of the country's shelter beds for single adults on a given night. See National Alliance To End Homelessness, Faith-Based Organizations: Fundamental Partners in Ending Homelessness 1 (2017). Many private organizations, city officials, and States have worked, as well, to increase the availability of affordable housing in order to provide more permanent shelter for those in need. See Brief for Local Government Legal Center et al. as *Amici Curiae* 4, 32 (Cities Brief). But many, too, have come to the conclusion that, as they put it, "[j]ust building more shelter beds and public housing options is almost certainly not the answer by itself." *Id.*, at 11.

As many cities see it, even as they have expanded shelter capacity and other public services, their unsheltered populations have continued to grow. *Id.*, at 9–11. The city of Seattle, for example, reports that

roughly 60 percent of its offers of shelter have been rejected in a recent year. See *id.*, at 28, and n. 26. Officials in Portland, Oregon, indicate that, between April 2022 and January 2024, over 70 percent of their approximately 3,500 offers of shelter beds to homeless individuals were declined. Brief for League of Oregon Cities et al. as *Amici Curiae* 5 (Oregon Cities Brief). Other cities tell us that "the vast majority of their homeless populations are not actively seeking shelter and refuse all services." Brief for Thirteen California Cities as *Amici Curiae* 3. Surveys cited by the Department of Justice suggest that only "25–41 percent" of "homeless encampment residents" "willingly" accept offers of shelter beds. See Dept. of Justice, Office of Community Oriented Policing Services, S. Chamard, Homeless Encampments 36 (2010).

The reasons why the unsheltered sometimes reject offers of assistance may themselves be many and complex. Some may reject shelter because accepting it would take them further from family and local ties. See Brief for 57 Social Scientists as *Amici Curiae* 20. Some may decline offers of assistance because of concerns for their safety or the rules some shelters impose regarding curfews, drug use, or religious practices. *Id.*, at 22; see Cities Brief 29. Other factors may also be at play. But whatever the causes, local governments say, this dynamic significantly complicates their efforts to address the challenges of homelessness. See *id.*, at 11.

Rather than focus on a single policy to meet the challenges associated with homelessness, many States and cities have pursued a range of policies and programs. See 2020 HUD Report 14–20. Beyond expanding shelter and affordable housing opportunities, some have reinvested in mental-health and substance-abuse treatment programs. See Brief for California State Association of Counties et al. as *Amici Curiae* 20, 25; see also 2020 HUD Report 23. Some have trained their employees in outreach tactics designed to improve relations between governments and the homeless they serve. *Ibid.* And still others have chosen to pair these efforts with the enforcement of laws that restrict camping in public places, like parks, streets, and sidewalks. Cities Brief 11.

Laws like those are commonplace. By one count, "a majority of cities have laws restricting camping in public spaces," and nearly forty percent "have one or more laws prohibiting camping citywide." See Brief for Western Regional Advocacy Project as *Amicus Curiae* 7, n. 15 (emphasis deleted). Some have argued that the enforcement of these laws can create a "revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back." U. S. Interagency Council on Homelessness, Searching Out Solutions 6 (2012). But many cities take a different view. According to the National League of Cities (a group that represents more than 19,000 American cities and towns), the National Association of Counties (which represents the Nation's 3,069 counties) and others across the American West, these public-camping regulations are not usually deployed as a front-line response "to criminalize homelessness." Cities Brief 11. Instead, they are used to provide city employees with the legal authority to address "encampments that pose significant health and safety risks" and to encourage their inhabitants to accept other alternatives like shelters, drug treatment programs, and mental-health facilities. *Ibid.*

Cities are not alone in pursuing this approach. The federal government also restricts "the storage of . . . sleeping bags," as well as other "sleeping activities," on park lands. 36 C.F.R. §§ 7.96(i), (j)(1) (2023). And it, too, has exercised that au-

thority to clear certain "dangerous" encampments. National Park Service, Record of Determination for Clearing the Unsheltered Encampment at McPherson Square and Temporary Park Closure for Rehabilitation (Feb. 13, 2023).

Different governments may use these laws in different ways and to varying degrees. See Cities Brief 11. But many broadly agree that "policymakers need access to the full panoply of tools in the policy toolbox" to "tackle the complicated issues of housing and homelessness." California Governor Brief 16; accord, Cities Brief 11; Oregon Cities Brief 17.

B

Five years ago, the U. S. Court of Appeals for the Ninth Circuit took one of those tools off the table. In *Martin v. Boise*, 920 F.3d 584 (2019), that court considered a public-camping ordinance in Boise, Idaho, that made it a misdemeanor to use "streets, sidewalks, parks, or public places" for "camping." *Id.*, at 603 (internal quotation marks omitted). According to the Ninth Circuit, the Eighth Amendment's Cruel and Unusual Punishments Clause barred Boise from enforcing its public-camping ordinance against homeless individuals who lacked "access to alternative shelter." *Id.*, at 615. That "access" was lacking, the court said, whenever " 'there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters.' " *Id.*, at 617 (alterations omitted). According to the Ninth Circuit, nearly three quarters of Boise's shelter beds were not "practically available" because the city's charitable shelters had a "religious atmosphere." *Id.*, at 609–610, 618. Boise was thus enjoined from enforcing its camping laws against the plaintiffs. *Ibid.*

No other circuit has followed *Martin*'s lead with respect to public-camping laws. Nor did the decision go unremarked within the Ninth Circuit. When the full court denied rehearing en banc, several judges wrote separately to note their dissent. In one statement, Judge Bennett argued that *Martin* was inconsistent with the Cruel and Unusual Punishments Clause. That provision, Judge Bennett contended, prohibits certain methods of punishment a government may impose after a criminal conviction, but it does not "impose [any] substantive limits on what conduct a state may criminalize." 920 F.3d, at 599–602. In another statement, Judge Smith lamented that *Martin* had "shackle[d] the hands of public officials trying to redress the serious societal concern of homelessness." *Id.*, at 590. He predicted the decision would "wrea[k] havoc on local governments, residents, and businesses" across the American West. *Ibid.*

After *Martin*, similar suits proliferated against Western cities within the Ninth Circuit. As Judge Smith put it, "[i]f one picks up a map of the western United States and points to a city that appears on it, there is a good chance that city has already faced" a judicial injunction based on *Martin* or the threat of one "in the few short years since [the Ninth Circuit] initiated its *Martin* experiment." 72 F.4th, at 940; see, *e.g.*, *Boyd v. San Rafael*, 2023 WL 7283885, *1–*2 (ND Cal., Nov. 2, 2023); *Fund for Empowerment v. Phoenix*, 646 F.Supp.3d 1117, 1132 (D Ariz. 2022); *Warren v. Chico*, 2021 WL 2894648, *3 (ED Cal., July 8, 2021).

Consider San Francisco, where each night thousands sleep "in tents and other makeshift structures." Brief for City and County of San Francisco et al. as *Amici Curiae* 8 (San Francisco Brief). Applying *Martin*, a district court entered an injunction barring the city from enforcing "laws and ordinances to prohibit involuntarily homeless individuals from sitting, lying, or

sleeping on public property." *Coalition on Homelessness v. San Francisco*, 647 F.Supp.3d 806, 841 (ND Cal. 2022). That "misapplication of this Court's Eighth Amendment precedents," the Mayor tells us, has "severely constrained San Francisco's ability to address the homelessness crisis." San Francisco Brief 7. The city "uses enforcement of its laws prohibiting camping" not to criminalize homelessness, but "as one important tool among others to encourage individuals experiencing homelessness to accept services and to help ensure safe and accessible sidewalks and public spaces." *Id.*, at 7–8. Judicial intervention restricting the use of that tool, the Mayor continues, "has led to painful results on the streets and in neighborhoods." *Id.*, at 8. "San Francisco has seen over half of its offers of shelter and services rejected by unhoused individuals, who often cite" the *Martin* order against the city "as their justification to permanently occupy and block public sidewalks." *Id.*, at 8–9.

An exceptionally large number of cities and States have filed briefs in this Court reporting experiences like San Francisco's. In the judgment of many of them, the Ninth Circuit has inappropriately "limit[ed] the tools available to local governments for tackling [what is a] complex and difficult human issue." Oregon Cities Brief 2. The threat of *Martin* injunctions, they say, has "paralyze[d]" even commonsense and good-faith efforts at addressing homelessness. Brief for City of Phoenix et al. as *Amici Curiae* 36 (Phoenix Brief). The Ninth Circuit's intervention, they insist, has prevented local governments from pursuing "effective solutions to this humanitarian crisis while simultaneously protecting the remaining community's right to safely enjoy public spaces." Brief for International Municipal Lawyers Association et al. as *Amici Curiae* on Pet. for Cert. 27 (Cities Cert. Brief); States Brief 11 ("State and local governments in the Ninth Circuit have attempted a variety of solutions to address the problems that public encampments inflict on their communities," only to have those "efforts ... shut down by federal courts").

Many cities further report that, rather than help alleviate the homelessness crisis, *Martin* injunctions have inadvertently contributed to it. The numbers of "[u]nsheltered homelessness," they represent, have "increased dramatically in the Ninth Circuit since *Martin*." Brief for League of Oregon Cities et al. as *Amici Curiae* on Pet. for Cert. 7 (boldface and capitalization deleted). And, they say, *Martin* injunctions have contributed to this trend by "weaken[ing]" the ability of public officials "to persuade persons experiencing homelessness to accept shelter beds and [other] services." Brief for Ten California Cities as *Amici Curiae* on Pet. for Cert. 2. In Portland, for example, residents report some unsheltered persons "often return within days" of an encampment's clearing, on the understanding that "*Martin* ... and its progeny prohibit the [c]ity from implementing more efficacious strategies." Tozer Brief 5; Washington Sheriffs Brief 14 (*Martin* divests officers of the "ability to compel [unsheltered] persons to leave encampments and obtain necessary services"). In short, they say, *Martin* "make[s] solving this crisis harder." Cities Cert. Brief 3.

All acknowledge "[h]omelessness is a complex and serious social issue that cries out for effective ... responses." *Ibid.* But many States and cities believe "it is crucial" for local governments to "have the latitude" to experiment and find effective responses. *Id.*, at 27; States Brief 13–17. "Injunctions and the threat of federal litigation," they insist, "impede this democratic process," undermine local governments, and do not well serve the homeless

or others who live in the Ninth Circuit. Cities Cert. Brief 27–28.

C

The case before us arises from a *Martin* injunction issued against the city of Grants Pass. Located on the banks of the Rogue River in southwestern Oregon, the city is home to roughly 38,000 people. Among them are an estimated 600 individuals who experience homelessness on a given day. 72 F.4th, at 874; App. to Pet. for Cert. 167a–168a; 212a–213a.

Like many American cities, Grants Pass has laws restricting camping in public spaces. Three are relevant here. The first prohibits sleeping "on public sidewalks, streets, or alleyways." Grants Pass Municipal Code § 5.61.020(A) (2023); App. to Pet. for Cert. 221a. The second prohibits "[c]amping" on public property. § 5.61.030; App. to Pet. for Cert. 222a (boldface deleted). Camping is defined as "set[ting] up . . . or remain[ing] in or at a campsite," and a "[c]ampsite" is defined as "any place where bedding, sleeping bag[s], or other material used for bedding purposes, or any stove or fire is placed . . . for the purpose of maintaining a temporary place to live." §§ 5.61.010(A)–(B); App. to Pet. for Cert. 221a. The third prohibits "[c]amping" and "[o]vernight parking" in the city's parks. §§ 6.46.090(A)–(B); 72 F.4th, at 876. Penalties for violating these ordinances escalate stepwise. An initial violation may trigger a fine. §§ 1.36.010(I)–(J). Those who receive multiple citations may be subject to an order barring them from city parks for 30 days. § 6.46.350; App. to Pet. for Cert. 174a. And, in turn, violations of those orders can constitute criminal trespass, punishable by a maximum of 30 days in prison and a $1,250 fine. Ore. Rev. Stat. §§ 164.245, 161.615(3), 161.635(1)(c) (2023).

Neither of the named plaintiffs before us has been subjected to an order barring them from city property or to criminal trespass charges. Perhaps that is because the city has traditionally taken a light-touch approach to enforcement. The city's officers are directed "to provide law enforcement services to all members of the community while protecting the rights, dignity[,] and private property of the homeless." App. 152, Grants Pass Dept. of Public Safety Policy Manual ¶428.1.1 (Dec. 17, 2018). Officers are instructed that "[h]omelessness is not a crime." *Ibid.* And they are "encouraged" to render "aid" and "support" to the homeless whenever possible. *Id.*, at 153, ¶428.3.[1]

Still, shortly after the panel decision in *Martin*, two homeless individuals, Gloria Johnson and John Logan, filed suit challenging the city's public-camping laws. App. 37, Third Amended Complaint ¶¶6–7. They claimed, among other things, that the city's ordinances violated the Eighth Amendment's Cruel and Unusual Punishments Clause. *Id.*, at 51, ¶66. And they

1. The dissent cites minutes from a community roundtable meeting to suggest that officials in Grants Pass harbored only punitive motives when adopting their camping ban. *Post,* at 2234 – 2235 (opinion of SOTOMAYOR, J.). But the dissent tells at best half the story about that meeting. In his opening remarks, the Mayor stressed that the city's goal was to "find a balance between providing the help [homeless] people need and not enabling . . . aggressive negative behavior" some community members had experienced. App. 112. And, by all accounts, the "purpose" of the meeting was to "develo[p] strategies to . . . connect [homeless] people to services." *Ibid.* The city manager and others explained that the city was dealing with problems of "harassment" and "defecation in public places" by those who seemingly "do not want to receive services." *Id.,* at 113, 118–120. At the same time, they celebrated "the strong commitment" from "faith-based entities" and a "huge number of people" in the city, who have "come together for projects" to support the homeless, including by securing "funding for a sobering center." *Id.,* at 115, 123.

sought to pursue their claim on behalf of a class encompassing "all involuntarily homeless people living in Grants Pass." *Id.*, at 48, ¶52.[2]

The district court certified the class action and enjoined the city from enforcing its public-camping laws against the homeless. While Ms. Johnson and Mr. Logan generally sleep in their vehicles, the court held, they could adequately represent the class, for sleeping in a vehicle can sometimes count as unlawful " 'camping' " under the relevant ordinances. App. to Pet. for Cert. 219a (quoting Grants Pass Municipal Code § 5.61.010). And, the court found, everyone without shelter in Grants Pass was "involuntarily homeless" because the city's total homeless population outnumbered its " 'practically available' " shelter beds. App. to Pet. for Cert. 179a, 216a. In fact, the court ruled, none of the beds at Grants Pass's charity-run shelter qualified as "available." They did not, the court said, both because that shelter offers something closer to transitional housing than "temporary emergency shelter," and because the shelter has rules requiring residents to abstain from smoking and attend religious services. *Id.*, at 179a–180a. The Eighth Amendment, the district court thus concluded, prohibited Grants Pass from enforcing its laws against homeless individuals in the city. *Id.*, at 182a–183a.

A divided panel of the Ninth Circuit affirmed in relevant part. 72 F.4th, at 874–896. The majority agreed with the district court that all unsheltered individuals in Grants Pass qualify as "involuntarily homeless" because the city's homeless population exceeds "available" shelter beds. *Id.*, at 894. And the majority further agreed that, under *Martin*, the homeless there cannot be punished for camping with "rudimentary forms of protection from the elements." 72 F.4th, at 896. In dissent, Judge Collins questioned *Martin*'s consistency with the Eighth Amendment and lamented its "dire practical consequences" for the city and others like it. 72 F.4th, at 914 (internal quotation marks omitted).

The city sought rehearing en banc, which the court denied over the objection of 17 judges who joined five separate opinions. *Id.*, at 869, 924–945. Judge O'Scannlain, joined by 14 judges, criticized *Martin*'s "jurisprudential experiment" as "egregiously flawed and deeply damaging—at war with the constitutional text, history, and tradition." 72 F.4th, at 925, 926, n. 2. Judge Bress, joined by 11 judges, contended that *Martin* has "add[ed] enormous and unjustified complication to an already extremely complicated set of circumstances." 72 F.4th, at 945. And Judge Smith, joined by several others, described in painstaking detail the ways in which, in his view, *Martin* had thwarted good-faith attempts by cities across the West, from Phoenix to Sacramento, to address homelessness. 72 F.4th, at 934, 940–943.

Grants Pass filed a petition for certiorari. A large number of States, cities, and counties from across the Ninth Circuit and the country joined Grants Pass in urging the Court to grant review to assess the *Martin* experiment. See Part I–B, *supra*. We agreed to do so. 601 U. S. ——, 144 S.Ct. 679, 217 L.Ed.2d 341 (2024).[3]

2. Another named plaintiff, Debra Blake, passed away while this case was pending in the Ninth Circuit, and her claims are not before us. 72 F.4th 868, 880, n. 12 (2023). Before us, the city does not dispute that the remaining named plaintiffs face a credible threat of sanctions under its ordinances.

3. Supporters of Grants Pass's petition for certiorari included: The cities of Albuquerque, Anchorage, Chico, Chino, Colorado Springs, Fillmore, Garden Grove, Glendora, Henderson, Honolulu, Huntington Beach, Las Vegas, Los Angeles, Milwaukee, Murrieta, Newport Beach, Orange, Phoenix, Placentia,

II

A

[1–4] The Constitution and its Amendments impose a number of limits on what governments in this country may declare to be criminal behavior and how they may go about enforcing their criminal laws. Familiarly, the First Amendment prohibits governments from using their criminal laws to abridge the rights to speak, worship, assemble, petition, and exercise the freedom of the press. The Equal Protection Clause of the Fourteenth Amendment prevents governments from adopting laws that invidiously discriminate between persons. The Due Process Clauses of the Fifth and Fourteenth Amendments ensure that officials may not displace certain rules associated with criminal liability that are "so old and venerable," " 'so rooted in the traditions and conscience of our people[,] as to be ranked as fundamental.' " *Kahler v. Kansas*, 589 U.S. 271, 279, 140 S.Ct. 1021, 206 L.Ed.2d 312 (2020) (quoting *Leland v. Oregon*, 343 U.S. 790, 798, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952)). The Fifth and Sixth Amendments require prosecutors and courts to observe various procedures before denying any person of his liberty, promising for example that every person enjoys the right to confront his accusers and have serious criminal charges resolved by a jury of his peers. One could go on.

But if many other constitutional provisions address what a government may criminalize and how it may go about securing a conviction, the Eighth Amendment's prohibition against "cruel and unusual punishments" focuses on what happens next. That Clause "has always been considered, and properly so, to be directed at the method or kind of punishment" a government may "impos[e] for the violation of criminal statutes." *Powell v. Texas*, 392 U.S. 514, 531–532, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (plurality opinion).

We have previously discussed the Clause's origins and meaning. In the 18th century, English law still "formally tolerated" certain barbaric punishments like "disemboweling, quartering, public dissection, and burning alive," even though those practices had by then "fallen into disuse." *Bucklew v. Precythe*, 587 U.S. 119, 130, 139 S.Ct. 1112, 203 L.Ed.2d 521 (2019) (citing 4 W. Blackstone, Commentaries on the Laws

Portland, Providence, Redondo Beach, Roseville, Saint Paul, San Clemente, San Diego, San Francisco, San Juan Capistrano, Seattle, Spokane, Tacoma, and Westminster; the National League of Cities, representing more than 19,000 American cities and towns; the League of California Cities, representing 477 California cities; the League of Oregon Cities, representing Oregon's 241 cities; the Association of Idaho Cities, representing Idaho's 199 cities; the League of Arizona Cities and Towns, representing all 91 incorporated Arizona municipalities; the North Dakota League of Cities, comprising 355 cities; the Counties of Honolulu, San Bernardino, San Francisco, and Orange; the National Association of Counties, which represents the Nation's 3,069 counties; the California State Association of Counties, representing California's 58 counties; the Special Districts Association of Oregon, representing all of Oregon's special districts; the Washington State Association of Municipal Attorneys, a nonprofit corporation comprising attorneys representing Washington's 281 cities and towns; the International Municipal Lawyers Association, the largest association of attorneys representing municipalities, counties, and special districts across the country; the District Attorneys of Sacramento and San Diego Counties, the California State Sheriffs' Association, the California Police Chiefs Association, and the Washington State Association of Sheriffs and Police Chiefs; California Governor Gavin Newsom and San Francisco Mayor London Breed; and a group of 20 States: Alabama, Alaska, Arkansas, Florida, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and West Virginia.

of England 370 (1769) (Blackstone)). The Cruel and Unusual Punishments Clause was adopted to ensure that the new Nation would never resort to any of those punishments or others like them. Punishments like those were "cruel" because they were calculated to " 'superad[d]' " " 'terror, pain, or disgrace.' " 587 U.S., at 130, 139 S.Ct. 1112 (quoting 4 Blackstone 370). And they were "unusual" because, by the time of the Amendment's adoption, they had "long fallen out of use." 587 U.S., at 130, 139 S.Ct. 1112. Perhaps some of those who framed our Constitution thought, as Justice Story did, that a guarantee against those kinds of "atrocious" punishments would prove "unnecessary" because no "free government" would ever employ anything like them. 3 J. Story, Commentaries on the Constitution of the United States § 1896, p. 750 (1833). But in adopting the Eighth Amendment, the framers took no chances.

[5] All that would seem to make the Eighth Amendment a poor foundation on which to rest the kind of decree the plaintiffs seek in this case and the Ninth Circuit has endorsed since *Martin*. The Cruel and Unusual Punishments Clause focuses on the question 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, 88 S.Ct. 2145. To the extent the Constitution speaks to those other matters, it does so, as we have seen, in other provisions.

[6] Nor, focusing on the criminal punishments Grant Pass imposes, can we say they qualify as cruel and unusual. Recall that, under the city's ordinances, an initial offense may trigger a civil fine. Repeat offenses may trigger an order temporarily barring an individual from camping in a public park. Only those who later violate an order like that may face a criminal punishment of up to 30 days in jail and a larger fine. See Part I–C, *supra*. None of the city's sanctions qualifies as cruel because none is designed to "superad[d]" "terror, pain, or disgrace." *Bucklew*, 587 U.S., at 130, 139 S.Ct. 1112 (internal quotation marks omitted). Nor are the city's sanctions unusual, because similar punishments have been and remain among "the usual mode[s]" for punishing offenses throughout the country. *Pervear v. Commonwealth*, 5 Wall. 475, 480, 18 L.Ed. 608 (1867); see 4 Blackstone 371–372; *Timbs v. Indiana*, 586 U.S. 146, 165, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019) (Thomas J., concurring in judgment) (describing fines as " 'the drudge-horse of criminal justice, probably the most common form of punishment' " (some internal quotation marks omitted)). In fact, large numbers of cities and States across the country have long employed, and today employ, similar punishments for similar offenses. See Part I–A, *supra*; Brief for Professor John F. Stinneford as *Amicus Curiae* 7–13 (collecting historical and contemporary examples). Notably, neither the plaintiffs nor the dissent meaningfully contests any of this. See Brief for Respondents 40.[4]

B

Instead, the plaintiffs and the dissent pursue an entirely different theory. They do not question that, by its terms, the Cruel and Unusual Punishments Clause

4. This Court has never held that the Cruel and Unusual Punishments Clause extends beyond criminal punishments to civil fines and orders, see *Ingraham v. Wright*, 430 U.S. 651, 666–668, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), nor does this case present any occasion to do so for none of the city's sanctions defy the Clause.

speaks to the question what punishments may follow a criminal conviction, not to antecedent questions like what a State may criminalize or how it may go about securing a conviction. Yet, echoing the Ninth Circuit in *Martin*, they insist one notable exception exists.

In *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), the plaintiffs and the dissent observe, this Court addressed a challenge to a criminal conviction under a California statute providing that " '[n]o person shall . . . be addicted to the use of narcotics.' " *Ibid.*, n. 1. In response to that challenge, the Court invoked the Cruel and Unusual Punishments Clause to hold that California could not enforce its law making "the 'status' of narcotic addiction a criminal offense." *Id.*, at 666, 82 S.Ct. 1417. The Court recognized that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Id.*, at 667, 82 S.Ct. 1417. But, the Court reasoned, when punishing " 'status,' " "[e]ven one day in prison would be . . . cruel and unusual." *Id.*, at 666–667, 82 S.Ct. 1417.

In doing so, the Court stressed the limits of its decision. It would have ruled differently, the Court said, if California had sought to convict the defendant for, say, the knowing or intentional "use of narcotics, for their purchase, sale, or possession, or for antisocial or disorderly behavior resulting from their administration." *Id.*, at 666, 82 S.Ct. 1417. In fact, the Court took pains to emphasize that it did not mean to cast doubt on the States' "broad power" to prohibit behavior like that, even by those, like the defendant, who suffered from addiction. *Id.*, at 664, 667–668, 82 S.Ct. 1417. The only problem, as the Court saw it, was that California's law did not operate that way. Instead, it made the mere status of being an addict a crime. *Id.*, at 666–667, 82 S.Ct. 1417. And it was that feature of the law, the Court held, that went too far.

Reaching that conclusion under the banner of the Eighth Amendment may have come as a surprise to the litigants. Mr. Robinson challenged his conviction principally on the ground that it offended the Fourteenth Amendment's guarantee of due process of law. As he saw it, California's law violated due process because it purported to make unlawful a "status" rather than the commission of any "volitional act." See Brief for Appellant in *Robinson* v. *California*, O. T. 1961, No. 61–554, p. 13 (Robinson Brief).

That framing may have made some sense. Our due process jurisprudence has long taken guidance from the "settled usage[s] . . . in England and in this country." *Hurtado v. California*, 110 U.S. 516, 528, 4 S.Ct. 292, 28 L.Ed. 232 (1884); see also *Kahler*, 589 U.S., at 279, 140 S.Ct. 1021. And, historically, crimes in England and this country have usually required proof of some act (or *actus reus*) undertaken with some measure of volition (*mens rea*). At common law, "a complete crime" generally required "both a will and an act." 4 Blackstone 21. This view "took deep and early root in American soil" where, to this day, a crime ordinarily arises "only from concurrence of an evil-meaning mind with an evil-doing hand." *Morissette v. United States*, 342 U.S. 246, 251–252, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Measured against these standards, California's law was an anomaly, as it required proof of neither of those things.

Mr. Robinson's resort to the Eighth Amendment was comparatively brief. He referenced it only in passing, and only for the proposition that forcing a drug addict like himself to go " 'cold turkey' " in a jail cell after conviction entailed such "intense mental and physical torment" that it was akin to "the burning of witches at the

stake." Robinson Brief 30. The State responded to that argument with barely a paragraph of analysis, Brief for Appellee in *Robinson* v. *California*, O. T. 1961, No. 61–554, pp. 22–23, and it received virtually no attention at oral argument. By almost every indication, then, *Robinson* was set to be a case about the scope of the Due Process Clause, or perhaps an Eighth Amendment case about whether forcing an addict to withdraw from drugs after conviction qualified as cruel and unusual punishment.

Of course, the case turned out differently. Bypassing Mr. Robinson's primary Due Process Clause argument, the Court charted its own course, reading the Cruel and Unusual Punishments Clause to impose a limit not just on what punishments may follow a criminal conviction but what a State may criminalize to begin with. It was a view unprecedented in the history of the Court before 1962. In dissent, Justice White lamented that the majority had embraced an "application of 'cruel and unusual punishment' so novel that" it could not possibly be "ascribe[d] to the Framers of the Constitution." 370 U.S., at 689, 82 S.Ct. 1417. Nor, in the 62 years since *Robinson*, has this Court once invoked it as authority to decline the enforcement of any criminal law, leaving the Eighth Amendment instead to perform its traditional function of addressing the punishments that follow a criminal conviction.

Still, no one has asked us to reconsider *Robinson*. Nor do we see any need to do so today. Whatever its persuasive force as an interpretation of the Eighth Amendment, it cannot sustain the Ninth Circuit's course since *Martin*. In *Robinson*, the Court expressly recognized the "broad power" States enjoy over the substance of their criminal laws, stressing that they may criminalize knowing or intentional drug use even by those suffering from addiction. 370 U.S., at 664, 666, 82 S.Ct. 1417. The Court held only that a State may not criminalize the " 'status' " of being an addict. *Id.*, at 666, 82 S.Ct. 1417. In criminalizing a mere status, *Robinson* stressed, California had taken a historically anomalous approach toward criminal liability. One, in fact, this Court has not encountered since *Robinson* itself.

Public camping ordinances like those before us are nothing like the law at issue in *Robinson*. Rather than criminalize mere status, Grants Pass forbids actions like "occupy[ing] a campsite" on public property "for the purpose of maintaining a temporary place to live." Grants Pass Municipal Code §§ 5.61.030, 5.61.010; App. to Pet. for Cert. 221a–222a. 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. See Part I–C, *supra*; *Blake* v. *Grants Pass*, No. 1:18–cv–01823 (D Ore.), ECF Doc. 63–4, pp. 2, 16; Tr. of Oral Arg. 159. In that respect, the city's laws parallel those found in countless jurisdictions across the country. See Part I–A, *supra*. And because laws like these do not criminalize mere status, *Robinson* is not implicated.[5]

5. At times, the dissent seems to suggest, mistakenly, that laws like Grants Pass's apply only to the homeless. See *post*, at 2234 – 2235. That view finds no support in the laws before us. Perhaps the dissent means to suggest that some cities selectively "enforce" their public-camping laws only against homeless persons. See *post*, at 2236 – 2238. But if that's the dissent's theory, it is not one that arises under the Eighth Amendment's Cruel and Unusual Punishments Clause. Instead, if anything, it may implicate due process and our precedents regarding selective prosecution. See, *e.g.*, *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). No claim like that is before us in this case.

C

If *Robinson* does not control this case, the plaintiffs and the dissent argue, we should extend it so that it does. Perhaps a person does not violate ordinances like Grants Pass's simply by being homeless but only by engaging in certain acts (*actus rei*) with certain mental states (*mentes reae*). Still, the plaintiffs and the dissent insist, laws like these seek to regulate actions that are in some sense "involuntary," for some homeless persons cannot help but do what the law forbids. See Brief for Respondents 24–25, 29, 32; *post*, at 2236 – 2237 (opinion of SOTOMAYOR, J.). And, the plaintiffs and the dissent continue, we should extend *Robinson* to prohibit the enforcement of laws that operate this way—laws that don't proscribe status as such but that proscribe acts, even acts undertaken with some required mental state, the defendant cannot help but undertake. *Post*, at 2236 – 2237. To rule otherwise, the argument goes, would " 'effectively' " allow cities to punish a person because of his status. *Post*, at 2241. The Ninth Circuit pursued just this line of thinking below and in *Martin*.

The problem is, this Court has already rejected that view. In *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), 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 any public place.' " *Id.*, at 517, 88 S.Ct. 2145 (plurality opinion). Like the plaintiffs here, Mr. Powell argued that his drunkenness was an " 'involuntary' " byproduct of his status as an alcoholic. *Id.*, at 533, 88 S.Ct. 2145. Yes, the statute required proof of an act (becoming drunk or intoxicated and then proceeding into public), and perhaps some associated mental state (for presumably the defendant knew he was drinking and maybe even knew he made his way to a public place). Still, Mr. Powell contended, Texas's law effectively criminalized his status as an alcoholic because he could not help but doing as he did. *Ibid.* Justice Fortas embraced that view, but only in dissent: He would have extended *Robinson* to cover conduct that flows from any "condition [the defendant] is powerless to change." 392 U.S., at 567, 88 S.Ct. 2145 (Fortas, J., dissenting).

The Court did not agree. Writing for a plurality, Justice Marshall observed that *Robinson* had authorized "a very small" intrusion by courts "into the substantive criminal law" "under the aegis of the Cruel and Unusual Punishment[s] Clause." 392 U.S., at 533, 88 S.Ct. 2145. That small intrusion, Justice Marshall said, prevents States only from enforcing laws that criminalize "a mere status." *Id.*, at 532, 88 S.Ct. 2145. It does nothing to curtail a State's authority to secure a conviction when "the accused has committed some act . . . society has an interest in preventing." *Id.*, at 533, 88 S.Ct. 2145. That remains true, Justice Marshall continued, regardless whether the defendant's act "in some sense" might be described as " '*involuntary*' *or* '*occasioned by*' " a particular status. *Ibid.* (emphasis added). In this, Justice Marshall echoed *Robinson* itself, where the Court emphasized that California remained free to criminalize intentional or knowing drug use even by addicts whose conduct, too, in some sense could be considered involuntary. See *Robinson*, 370 U.S., at 664, 666, 82 S.Ct. 1417. Based on all this, Justice Marshall concluded, because the defendant before the Court had not been convicted "for being" an "alcoholic, but for [engaging in the act of] being in public while drunk on a particular occasion," *Robinson* did not apply. *Powell*, 392 U.S., at 532, 88 S.Ct.

2145.[6]

This case is no different from *Powell.* Just as there, the plaintiffs here seek to expand *Robinson*'s "small" intrusion "into the substantive criminal law." Just as there, the plaintiffs here seek to extend its rule beyond laws addressing "mere status" to laws addressing actions that, even if undertaken with the requisite *mens rea*, might "in some sense" qualify as " 'involuntary.' " And just as *Powell* could find nothing in the Eighth Amendment permitting that course, neither can we. As we have seen, *Robinson* already sits uneasily with the Amendment's terms, original meaning, and our precedents. Its holding is restricted to laws that criminalize "mere status." Nothing in the decision called into question the "broad power" of States to regulate acts undertaken with some *mens rea*. And, just as in *Powell*, we discern nothing in the Eighth Amendment that might provide us with lawful authority to extend *Robinson* beyond its narrow holding.

[7] To be sure, and once more, a variety of other legal doctrines and constitutional provisions work to protect those in our criminal justice system from a conviction. Like some other jurisdictions, Oregon recognizes a "necessity" defense to certain criminal charges. It may be that defense extends to charges for illegal camping when it comes to those with nowhere else to go. See *State v. Barrett*, 302 Ore.App. 23, 28, 460 P.3d 93, 96 (2020) (citing Ore. Rev. Stat. § 161.200). Insanity, diminished-capacity, and duress defenses also may be available in many jurisdictions. See *Powell*, 392 U.S., at 536, 88 S.Ct. 2145. States and cities are free as well to add additional substantive protections. Since this litigation began, for example, Oregon itself has adopted a law specifically addressing how far its municipalities may go in regulating public camping. See, *e.g.*, Ore. Rev. Stat. § 195.530(2) (2023). For that matter, nothing in today's decision prevents States, cities, and counties from going a step further and declining to criminalize public camping altogether. For its part, the Constitution provides many additional limits on state prosecutorial power, promising fair notice of the laws and equal treatment under them, forbidding selective prosecutions, and much more besides. See Part II–A, *supra*; and n. 5, *supra*. All this represents only a small sample of the legion protections our society affords a presumptively free individual from a criminal conviction. But aside from *Robinson*, a case directed to a highly unusual law that condemned status alone, this Court has never invoked the Eighth Amendment's Cruel and Unusual Punishments Clause to perform that function.

D

Not only did *Powell* decline to extend *Robinson* to "involuntary" acts, it stressed

6. Justice White, who cast the fifth vote upholding the conviction, concurred in the result. Writing only for himself, Justice White expressed some sympathy for Justice Fortas's theory, but ultimately deemed that "novel construction" of the Eighth Amendment "unnecessary to pursue" because the defendant hadn't proven that his alcoholism made him "unable to stay off the streets on the night in question." 392 U.S., at 552, n. 4, 553–554, 88 S.Ct. 2145 (White, J., concurring in result). In *Martin*, the Ninth Circuit suggested Justice White's solo concurrence somehow rendered the *Powell* dissent controlling and the plurality a dissent. See *Martin v. Boise*, 920 F.3d 584, 616–617 (2019). Before us, neither the plaintiffs nor the dissent defend that theory, and for good reason: In the years since *Powell*, this Court has repeatedly relied on Justice Marshall's opinion, as we do today. See, *e.g.*, *Kahler v. Kansas*, 589 U.S. 271, 280, 140 S.Ct. 1021, 206 L.Ed.2d 312 (2020); *Clark v. Arizona*, 548 U.S. 735, 768, n. 38, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006); *Jones v. United States*, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983).

the dangers that would likely attend any attempt to do so. Were the Court to pursue that path in the name of the Eighth Amendment, Justice Marshall warned, "it is difficult to see any limiting principle that would serve to prevent this Court from becoming . . . the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." *Powell*, 392 U.S., at 533, 88 S.Ct. 2145. After all, nothing in the Amendment's text or history exists to "confine" or guide our review. *Id.*, at 534, 88 S.Ct. 2145. Unaided by those sources, we would be left "to write into the Constitution" our own "formulas," many of which would likely prove unworkable in practice. *Id.*, at 537, 88 S.Ct. 2145. Along the way, we would interfere with "essential considerations of federalism" that reserve to the States primary responsibility for drafting their own criminal laws. *Id.*, at 535, 88 S.Ct. 2145.

In particular, Justice Marshall observed, extending *Robinson* to cover involuntary acts would effectively "impe[l]" this Court "into defining" something akin to a new "insanity test in constitutional terms." 392 U.S., at 536, 88 S.Ct. 2145. It would because an individual like the defendant in *Powell* does not dispute that he has committed an otherwise criminal act with the requisite *mens rea*, yet he seeks to be excused from "moral accountability" because of his " 'condition.' " *Id.*, at 535–536, 88 S.Ct. 2145. And "[n]othing," Justice Marshall said, "could be less fruitful than for this Court" to try to resolve for the Nation profound questions like that under a provision of the Constitution that does not speak to them. *Id.*, at 536, 88 S.Ct. 2145. Instead, Justice Marshall reasoned, such matters are generally left to be resolved through "productive" democratic "dialogue" and "experimentation," not by "freez[ing]" any particular, judicially preferred approach "into a rigid constitutional mold." *Id.*, at 537, 88 S.Ct. 2145.

We recently reemphasized that last point in *Kahler* v. *Kansas* in the context of a Due Process Clause challenge. Drawing on Justice Marshall's opinion in *Powell*, we acknowledged that "a state rule about criminal liability" may violate due process if it departs from a rule "so rooted in the traditions" of this Nation that it might be said to "ran[k] as fundamental." 589 U.S., at 279, 140 S.Ct. 1021 (internal quotation marks omitted). But, we stressed, questions about whether an individual who has committed a proscribed act with the requisite mental state should be "reliev[ed of] responsibility," *id.*, at 283, 140 S.Ct. 1021, due to a lack of "moral culpability," *id.*, at 286, 140 S.Ct. 1021, are generally best resolved by the people and their elected representatives. Those are questions, we said, "of recurrent controversy" to which history supplies few "entrenched" answers, and on which the Constitution generally commands "no one view." *Id.*, at 296, 140 S.Ct. 1021.

The Ninth Circuit's *Martin* experiment defied these lessons. Under *Martin*, judges take from elected representatives the questions whether and when someone who has committed a proscribed act with a requisite mental state should be "relieved of responsibility" for lack of "moral culpability." 598 U.S., at 283, 286, 143 S.Ct. 940. And *Martin* exemplifies much of what can go wrong when courts try to resolve matters like those unmoored from any secure guidance in the Constitution.

Start with this problem. Under *Martin*, cities must allow public camping by those who are "involuntarily" homeless. 72 F.4th, at 877 (citing *Martin*, 920 F.3d, at 617, n. 8). But how are city officials and law enforcement officers to know what it means to be "involuntarily" homeless, or whether any particular person meets that stan-

dard? 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. See Part I–A, *supra*. 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?

If there are answers to those questions, they cannot be found in the Cruel and Unusual Punishments Clause. Nor do federal judges enjoy any special competence to provide them. Cities across the West report that the Ninth Circuit's ill-defined involuntariness test has proven "unworkable." Oregon Cities Brief 3; see Phoenix Brief 11. The test, they say, has left them "with little or no direction as to the scope of their authority in th[eir] day-to-day policing contacts," California Sheriffs Brief 6, and under "threat of federal litigation . . . at all times and in all circumstances," Oregon Cities Brief 6–7.

To be sure, *Martin* attempted to head off these complexities through some back-of-the-envelope arithmetic. The Ninth Circuit said a city needs to consider individuals "involuntarily" homeless (and thus entitled to camp on public property) only when the overall homeless population exceeds the total number of "adequate" and "practically available" shelter beds. See 920 F.3d, at 617–618, and n. 8. But as sometimes happens with abstract rules created by those far from the front lines, that test has proven all but impossible to administer in practice.

City officials report that it can be "monumentally difficult" to keep an accurate accounting of those experiencing homelessness on any given day. Los Angeles Cert. Brief 14. Often, a city's homeless population "fluctuate[s] dramatically," in part because homelessness is an inherently dynamic status. Brief for City of San Clemente as *Amicus Curiae* 16 (San Clemente Brief). While cities sometimes make rough estimates based on a single point-in-time count, they say it would be "impossibly expensive and difficult" to undertake that effort with any regularity. *Id.*, at 17. In Los Angeles, for example, it takes three days to count the homeless population block-by-block—even with the participation of thousands of volunteers. *Martin*, 920 F.3d, at 595 (Smith, J., dissenting from denial of rehearing en banc).

Beyond these complexities, more await. Suppose even large cities could keep a running tally of their homeless citizens forevermore. And suppose further that they could keep a live inventory of available shelter beds. Even so, cities face questions over which shelter beds count as "adequate" and "available" under *Martin*. *Id.*, at 617, and n. 8. Rather than resolve the challenges associated with defining who qualifies as "involuntarily" homeless, these standards more nearly return us to them. Is a bed "available" to a smoker if the shelter requires residents to abstain from nicotine, as the shelter in Grants Pass does? 72 F.4th, at 896; App. 39, Third Amended Complaint ¶13. Is a bed "available" to an atheist if the shelter includes "religious" messaging? 72 F.4th, at 877. And how is a city to know whether the accommodations it provides will prove "adequate" in later litigation? 920 F.3d, at 617, n. 8. Once more, a large number of cities in the Ninth Circuit tell us they have no way to be sure. See, *e.g.*, Phoenix Brief 28; San Clemente Brief 8–12; Brief for City of Los Angeles as *Amicus Curiae* 22–23 ("What may be available, appropriate, or actually beneficial to one [homeless] person, might not be so to another").

Consider an example. The city of Chico, California, thought it was complying with *Martin* when it constructed an outdoor shelter facility at its municipal airport to accommodate its homeless population. *Warren v. Chico*, 2021 WL 2894648, *3 (ED Cal., July 8, 2021). That shelter, we are told, included "protective fencing, large water totes, handwashing stations, portable toilets, [and] a large canopy for shade." Brief for City of Chico as *Amicus Curiae* on Pet. for Cert. 16. Still, a district court enjoined the city from enforcing its public-camping ordinance. Why? Because, in that court's view, "appropriate" shelter requires " 'indoo[r],' " not outdoor, spaces. *Warren*, 2021 WL 2894648, *3 (quoting *Martin*, 920 F.3d, at 617). One federal court in Los Angeles ruled, during the COVID pandemic, that "adequate" shelter must also include nursing staff, testing for communicable diseases, and on-site security, among other things. See *LA Alliance for Hum. Rights v. Los Angeles*, 2020 WL 2512811, *4 (CD Cal., May 15, 2020). By imbuing the availability of shelter with constitutional significance in this way, many cities tell us, *Martin* and its progeny have "paralyzed" communities and prevented them from implementing even policies designed to help the homeless while remaining sensitive to the limits of their resources and the needs of other citizens. Cities Cert. Brief 4 (boldface and capitalization deleted).

There are more problems still. The Ninth Circuit held that "involuntarily" homeless individuals cannot be punished for camping with materials "necessary to protect themselves from the elements." 72 F.4th, at 896. It suggested, too, that cities cannot proscribe "life-sustaining act[s]" that flow necessarily from homelessness. 72 F.4th, at 921 (joint statement of Silver and Gould, JJ., regarding denial of rehearing). But how far does that go? The plaintiffs before us suggest a blanket is all that is required in Grants Pass. Brief for Respondents 14. But might a colder climate trigger a right to permanent tent encampments and fires for warmth? Because the contours of this judicial right are so "uncertai[n]," cities across the West have been left to guess whether *Martin* forbids their officers from removing everything from tents to "portable heaters" on city sidewalks. Brief for City of Phoenix et al. on Pet. for Cert. 19, 29 (Phoenix Cert. Brief). There is uncertainty, as well, over whether *Martin* requires cities to tolerate other acts no less "attendant [to] survival" than sleeping, such as starting fires to cook food and "public urination [and] defecation." Phoenix Cert. Brief 29–30; see also *Mahoney v. Sacramento*, 2020 WL 616302, *3 (ED Cal., Feb. 10, 2020) (indicating that "the [c]ity may not prosecute or otherwise penalize the [homeless] for eliminating in public if there is no alternative to doing so"). By extending *Robinson* beyond the narrow class of status crimes, the Ninth Circuit has created a right that has proven "impossible" for judges to delineate except "by fiat." *Powell*, 392 U.S., at 534, 88 S.Ct. 2145.

Doubtless, the Ninth Circuit's intervention in *Martin* was well-intended. But since the trial court entered its injunction against Grants Pass, the city shelter reports that utilization of its resources has fallen by roughly 40 percent. See Brief for Grants Pass Gospel Rescue Mission as *Amicus Curiae* 4–5. Many other cities offer similar accounts about their experiences after *Martin*, telling us the decision has made it more difficult, not less, to help the homeless accept shelter off city streets. See Part I–B, *supra* (recounting examples). Even when "policymakers would prefer to invest in more permanent" programs and policies designed to benefit homeless and other citizens, *Martin* has forced these "overwhelmed jurisdictions to

concentrate public resources on temporary shelter beds." Cities Brief 25; see Oregon Cities Brief 17–20; States Brief 16–17. As a result, cities report, *Martin* has undermined their efforts to balance conflicting public needs and mired them in litigation at a time when the homelessness crisis calls for action. See States Brief 16–17.

All told, the *Martin* experiment is perhaps just what Justice Marshall anticipated ones like it would be. The Eighth Amendment provides no guidance to "confine" judges in deciding what conduct a State or city may or may not proscribe. *Powell*, 392 U.S., at 534, 88 S.Ct. 2145. Instead of encouraging "productive dialogue" and "experimentation" through our democratic institutions, courts have frozen in place their own "formulas" by "fiat." *Id.*, at 534, 537, 88 S.Ct. 2145. Issued by federal courts removed from realities on the ground, those rules have produced confusion. And they have interfered with "essential considerations of federalism," taking from the people and their elected leaders difficult questions traditionally "thought to be the[ir] province." *Id.*, at 535–536, 88 S.Ct. 2145.[7]

E

Rather than address what we have actually said, the dissent accuses us of extending to local governments an "unfettered freedom to punish," *post*, at 2241, and stripping away any protections "the Constitution" has against "criminalizing sleeping," *post*, at 2230. "Either stay awake," the dissent warns, "or be arrested." *Post*, at 2228. That is gravely mistaken. We hold nothing of the sort. As we have stressed, cities and States are not bound to adopt public-camping laws. They may also choose to narrow such laws (as Oregon itself has recently). Beyond all that, many substantive legal protections and provisions of the Constitution may have important roles to play when States and cities seek to enforce their laws against the homeless. See Parts II–A, II–C, *supra*. The only question we face is whether one specific provision of the Constitution—the Cruel and Unusual Punishments Clause of the Eighth Amendment—prohibits the enforcement of public-camping laws.

Nor does the dissent meaningfully engage with the reasons we have offered for our conclusion on that question. It claims that we "gratuitously" treat *Robinson* "as an outlier." *Post*, at 2234, and n. 2. But the dissent does not dispute that the law *Robinson* faced was an anomaly, punishing mere status. The dissent does not dispute that *Robinson*'s decision to address that law under the rubric of the Eighth Amendment is itself hard to square with the Amendment's text and this Court's other precedents interpreting it. And the dissent

7. The dissent suggests we cite selectively to the *amici* and "see only what [we] wan[t]" in their briefs. *Post*, at 2240 – 2241. In fact, all the States, cities, and counties listed above (n. 3, *supra*) asked us to review this case. Among them all, the dissent purports to identify just two public officials and two cities that, according to the dissent, support its view. *Post*, at 2240 – 2241. But even among that select group, the dissent overlooks the fact that each expresses strong dissatisfaction with how *Martin* has been applied in practice. See San Francisco Brief 15, 26 ("[T]he Ninth Circuit and its lower courts have repeatedly misapplied and overextended the Eighth Amendment" and "hamstrung San Francisco's balanced approach to addressing the homelessness crisis"); Brief for City of Los Angeles as *Amicus Curiae* 6 ("[T]he sweeping rationale in *Martin* ... calls into question whether cities can enforce public health and safety laws"); California Governor Brief 3 ("In the wake of *Martin*, lower courts have blocked efforts to clear encampments while micromanaging what qualifies as a suitable offer of shelter"). And for all the reasons we have explored and so many other cities have suggested, we see no principled basis under the Eighth Amendment for federal judges to administer anything like *Martin*.

all but ignores *Robinson*'s own insistence that a different result would have obtained in that case if the law there had proscribed an act rather than status alone.

Tellingly, too, the dissent barely mentions Justice Marshall's opinion in *Powell*. There, reasoning exactly as we do today, Justice Marshall refused to extend *Robinson* to actions undertaken, "in some sense, 'involuntar[ily].' " 392 U.S., at 533, 88 S.Ct. 2145. Rather than confront any of this, the dissent brusquely calls *Powell* a "straw-man" and seeks to distinguish it on the inscrutable ground that Grants Pass penalizes "status[-defining]" (rather than "involuntary") conduct. *Post*, at 2240. But whatever that might mean, it is no answer to the reasoning Justice Marshall offered, to its obvious relevance here, or to the fact this Court has since endorsed Justice Marshall's reasoning as correct in cases like *Kahler* and *Jones*, cases that go undiscussed in the dissent. See n. 6, *supra*. The only extraordinary result we might reach in this case is one that would defy *Powell*, ignore the historical reach of the Eighth Amendment, and transform *Robinson*'s narrow holding addressing a peculiar law punishing status alone into a new rule that would bar the enforcement of laws that are, as the dissent puts it, " 'pervasive' " throughout the country. *Post*, at 2236; Part I–A, *supra*.

To be sure, the dissent seeks to portray the new rule it advocates as a modest, "limited," and "narrow" one addressing only those who wish to fulfill a "biological necessity" and "keep warm outside with a blanket" when they have no other "adequate" place "to go." *Post*, at 2228, 2230, 2232 – 2233, 2239, 2240 – 2241. But that reply blinks the difficult questions that necessarily follow and the Ninth Circuit has been forced to confront: What does it mean to be "involuntarily" homeless with "no place to go"? What kind of "adequate" shelter must a city provide to avoid being forced to allow people to camp in its parks and on its sidewalks? And what are people entitled to do and use in public spaces to "keep warm" and fulfill other "biological necessities"?[8]

Those unavoidable questions have plunged courts and cities across the Ninth Circuit into waves of litigation. And without anything in the Eighth Amendment to guide them, any answers federal judges can offer (and have offered) come, as Justice Marshall foresaw, only by way of "fiat." *Powell*, 392 U.S., at 534, 88 S.Ct.

8. The dissent brushes aside these questions, declaring that "available answers" exist in the decisions below. *Post*, at 2239. But the dissent misses the point. The problem, as Justice Marshall discussed, is not that it is impossible for someone to dictate answers to these questions. The problem is that nothing in the Eighth Amendment gives federal judges the authority or guidance they need to answer them in a principled way. Take just two examples. First, the dissent says, a city seeking to ban camping must provide "adequate" shelter for those with "no place to go." *Post*, at 2239 – 2240. But it never says what qualifies as "adequate" shelter. *Ibid.* And, as we have seen, cities and courts across the Ninth Circuit have struggled mightily with that question, all with nothing in the Eighth Amendment to guide their work. Second, the dissent seems to think that, if a city lacks enough "adequate" shelter, it must permit " 'bedding' " in public spaces, but not campfires, tents, or " 'public urination or defecation.' " *Post*, at 2235 – 2236, 2239 – 2240, 2240 – 2241. But where does that rule come from, the federal register? See *post*, at 2239 – 2240. After *Martin*, again as we have seen, many courts have taken a very different view. The dissent never explains why it disagrees with those courts. Instead, it merely quotes the district court's opinion in this case that announced a rule it seems the dissent happens to prefer. By elevating *Martin* over our own precedents and the Constitution's original public meaning, the dissent faces difficult choices that cannot be swept under the rug—ones that it can resolve not by anything found in the Eighth Amendment, only by fiat.

2145. The dissent cannot escape that hard truth. Nor can it escape the fact that, far from narrowing *Martin*, it would expand its experiment from one circuit to the entire country—a development without any precedent in this Court's history. One that would authorize federal judges to freeze into place their own rules on matters long "thought to be the province" of state and local leaders, *id.*, at 536, 88 S.Ct. 2145, and one that would deny communities the "wide latitude" and "flexibility" even the dissent acknowledges they need to address the homelessness crisis, *post*, at 2228 – 2229, 2230.

III

Homelessness is complex. Its causes are many. So may be the public policy responses required 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. Almost 200 years ago, a visitor to this country remarked upon the "extreme skill with which the inhabitants of the United States succeed in proposing a common object to the exertions of a great many men, and in getting them voluntarily to pursue it." 2 A. de Tocqueville, Democracy in America 129 (H. Reeve transl. 1961). If the multitude of *amicus* briefs before us proves one thing, it is that the American people are still at it. Through their voluntary associations and charities, their elected representatives and appointed officials, their police officers and mental health professionals, they display that same energy and skill today in their efforts to address the complexities of the homelessness challenge facing the most vulnerable among us.

Yes, people will disagree over which policy responses are best; they may experiment with one set of approaches only to find later another set works better; they may find certain responses more appropriate for some communities than others. But in our democracy, that is their right. Nor can a handful of federal judges begin to "match" the collective wisdom the American people possess in deciding "how best to handle" a pressing social question like homelessness. *Robinson*, 370 U.S., at 689, 82 S.Ct. 1417 (White, J., dissenting). The Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation's homelessness policy. The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

I join the Court's opinion in full because it correctly rejects the respondents' claims under the Cruel and Unusual Punishments Clause. As the Court observes, that Clause "focuses on the question what method or kind of punishment a government may impose after a criminal conviction." *Ante,* at 2216 (internal quotation marks omitted). The respondents, by contrast, ask whether Grants Pass "may criminalize particular behavior in the first place." *Ibid.* I write separately to make two additional observations about the respondents' claims.

First, the precedent that the respondents primarily rely upon, *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), was wrongly decided. In *Robinson*, the Court held that the Cruel and Unusual Punishments Clause prohibits the enforcement of laws criminalizing a person's status. *Id.*, at 666, 82 S.Ct. 1417. That holding conflicts with the plain text and history of the Cruel and Unusual Punishments Clause. See *ante,* at 2215 – 2216.

That fact is unsurprising given that the *Robinson* Court made no attempt to analyze the Eighth Amendment's text or discern its original meaning. Instead, *Robinson*'s holding rested almost entirely on the Court's understanding of public opinion: The *Robinson* Court observed that "in the light of contemporary human knowledge, a law which made a criminal offense of . . . a disease [such as narcotics addiction] would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 370 U.S., at 666, 82 S.Ct. 1417. Modern public opinion is not an appropriate metric for interpreting the Cruel and Unusual Punishments Clause—or any provision of the Constitution for that matter.

Much of the Court's other Eighth Amendment precedents make the same mistake. Rather than interpret our written Constitution, the Court has at times "proclaim[ed] itself sole arbiter of our Nation's moral standards," *Roper v. Simmons*, 543 U.S. 551, 608, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (Scalia, J., dissenting), and has set out to enforce "evolving standards of decency," *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). "In a system based upon constitutional and statutory text democratically adopted, the concept of 'law' ordinarily signifies that particular words have a fixed meaning." *Roper*, 543 U.S., at 629, 125 S.Ct. 1183 (opinion of Scalia, J.). I continue to believe that we should adhere to the Cruel and Unusual Punishments Clause's fixed meaning in resolving any challenge brought under it.

To be sure, we need not reconsider *Robinson* to resolve this case. As the Court explains, the challenged ordinances regulate conduct, not status, and thus do not implicate *Robinson*. *Ante,* at 2218 – 2219. Moreover, it is unclear what, if any, weight *Robinson* carries. The Court has not once applied *Robinson*'s interpretation of the Cruel and Unusual Punishments Clause. And, today the Court rightly questions the decision's "persuasive force." *Ante,* at 2218. Still, rather than let *Robinson*'s erroneous holding linger in the background of our Eighth Amendment jurisprudence, we should dispose of it once and for all. In an appropriate case, the Court should certainly correct this error.

Second, the respondents have not established that their claims implicate the Cruel and Unusual Punishments Clause in the first place. The challenged ordinances are enforced through the imposition of civil fines and civil park exclusion orders, as well as through criminal trespass charges. But, "[a]t the time the Eighth Amendment was ratified, the word 'punishment' referred to the penalty imposed for the commission of a crime." *Helling v. McKinney*, 509 U.S. 25, 38, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (THOMAS, J., dissenting); see *ante,* at 2215 – 2216. The respondents have yet to explain how the civil fines and park exclusion orders constitute a "penalty imposed for the commission of a crime." *Helling*, 509 U.S., at 38, 113 S.Ct. 2475.

For its part, the Court of Appeals concluded that the Cruel and Unusual Punishments Clause governs these civil penalties because they can "later . . . become criminal offenses." 72 F.4th 868, 890 (CA9 2023). But, that theory rests on layer upon layer of speculation. It requires reasoning that because violating one of the ordinances "*could* result in civil citations and fines, [and] repeat violators *could* be excluded from specified City property, and . . . violating an exclusion order *could* subject a violator to criminal trespass prosecution," civil fines and park exclusion orders therefore must be governed by the Cruel and Unusual Punishments Clause. *Id.*, at

926 (O'Scannlain, J., statement respecting denial of rehearing en banc) (emphasis added). And, if this case is any indication, the possibility that a civil fine turns into a criminal trespass charge is a remote one. The respondents assert that they have been involuntarily homeless in Grants Pass for years, yet they have never received a park exclusion order, much less a criminal trespass charge. See *ante,* at 2213.

Because the respondents' claims fail either way, the Court does not address the merits of the Court of Appeals' theory. See *ante,* at 2215 – 2217, and n. 4. Suffice it to say, we have never endorsed such a broad view of the Cruel and Unusual Punishments Clause. Both this Court and lower courts should be wary of expanding the Clause beyond its text and original meaning.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

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 those 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. That 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, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

Homelessness is a reality for too many Americans. On any given night, over half a million people across the country lack a fixed, regular, and adequate nighttime residence. Many do not have access to shelters and are left to sleep in cars, sidewalks, parks, and other public places. They experience homelessness due to complex and interconnected issues, including crippling debt and stagnant wages; domestic and sexual abuse; physical and psychiatric disabilities; and rising housing costs coupled with declining affordable housing options.

At the same time, States and cities face immense challenges in responding to homelessness. To address these challenges and provide for public health and safety, local governments need wide latitude, including to regulate when, where, and how homeless people sleep in public. The decision below did, in fact, leave cities free to punish "littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence." App. to Pet. for Cert. 200a. The only question for the Court today is 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.

It is possible to acknowledge and balance the issues facing local governments, the humanity and dignity of homeless people, and our constitutional principles. Instead, the majority focuses 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. The Constitution provides a baseline of rights for all Americans rich and poor, housed and unhoused. This Court must safeguard those rights even when, and perhaps especially when, doing so is uncomfortable or unpopular. Otherwise, "the words of the Constitution become little more than good advice." *Trop v. Dulles*, 356 U.S. 86, 104, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

I

The causes, consequences, and experiences of homelessness are complex and

interconnected. The majority paints a picture of "cities across the American West" in "crisis" that are using criminalization as a last resort. *Ante*, at 2207. That narrative then animates the majority's reasoning. This account, however, fails to engage seriously with the precipitating causes of homelessness, the damaging effects of criminalization, and the myriad legitimate reasons people may lack or decline shelter.

A

Over 600,000 people experience homelessness in America on any given night, meaning that they lack "a fixed, regular, and adequate nighttime residence." Dept. of Housing and Urban Development, T. de Sousa et al., The 2023 Annual Homeless Assessment Report to Congress 4 (2023 AHAR). These people experience homelessness in different ways. Although 6 in 10 are able to secure shelter beds, the remaining 4 in 10 are unsheltered, sleeping "in places not meant for human habitation," such as sidewalks, abandoned buildings, bus or train stations, camping grounds, and parked vehicles. See *id.*, at 2. "Some sleep alone in public places, without any physical structures (like tents or shacks) or connection to services. Others stay in encampments, which generally refer to groups of people living semipermanently in tents or other temporary structures in a public space." Brief for California as *Amicus Curiae* 6 (California Brief) (citation omitted). This is in part because there has been a national "shortage of 188,000 shelter beds for individual adults." Brief for Service Providers as *Amici Curiae* 8 (Service Providers Brief).

People become homeless for many reasons, including some beyond their control. "[S]tagnant wages and the lack of affordable housing" can mean some people are one unexpected medical bill away from being unable to pay rent. Brief for Public Health Professionals and Organizations as *Amici Curiae* 3. Every "$100 increase in median rental price" is "associated with about a 9 percent increase in the estimated homelessness rate." GAO, A. Cackley, Homelessness: Better HUD Oversight of Data Collection Could Improve Estimates of Homeless Populations 30 (GAO–20–433, 2020). Individuals with disabilities, immigrants, and veterans face policies that increase housing instability. See California Brief 7. 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." 2023 AHAR 52. Further, "mental and physical health challenges," and family and domestic "violence and abuse" can be precipitating causes of homelessness. California Brief 7.

People experiencing homelessness are young and old, live in families and as individuals, and belong to all races, cultures, and creeds. Given the complex web of causes, it is unsurprising that the burdens of homelessness fall disproportionately on the most vulnerable in our society. People already in precarious positions with mental and physical health, trauma, or abuse may have nowhere else to go if forced to leave their homes. Veterans, victims of domestic violence, teenagers, and people with disabilities are all at an increased risk of homelessness. For veterans, "those with a history of mental health conditions, including post-traumatic stress disorder (PTSD) . . . are at greater risk of homelessness." Brief for American Psychiatric Association et al. as *Amici Curiae* 6. For women, almost 60% of those experiencing homelessness report that fleeing domestic violence was the "immediate cause." Brief for Advocates for Survivors of Gender-Based Violence as *Amici Curiae* 9. For young people, "family dysfunction and rejection,

sexual abuse, juvenile legal system involvement, 'aging out' of the foster care system, and economic hardship" make them particularly vulnerable to homelessness. Brief for Juvenile Law Center et al. as *Amici Curiae* 2. For American Indians, "policies of removal and resettlement in tribal lands" have caused displacement, resulting in "a disproportionately high rate of housing insecurity and unsheltered homelessness." Brief for StrongHearts Native Helpline et al. as *Amici Curiae* 10, 24. For people with disabilities, "[l]ess than 5% of housing in the United States is accessible for moderate mobility disabilities, and less than 1% is accessible for wheelchair use." Brief for Disability Rights Education and Defense Fund et al. as *Amici Curiae* 2 (Disability Rights Brief).

B

States and cities responding to the homelessness crisis face the difficult task of addressing the underlying causes of homelessness while also providing for public health and safety. This includes, for example, dealing with the hazards posed by encampments, such as "a heightened risk of disease associated with living outside without bathrooms or wash basins," "deadly fires" from efforts to "prepare food and create heat sources," violent crime, and drug distribution and abuse. California Brief 12.

Local governments need flexibility in responding to homelessness with effective and thoughtful solutions. See *infra*, at 2237 – 2239. Almost all of these policy solutions are beyond the scope of this case. The only question here is whether the Constitution permits criminalizing sleeping outside when there is nowhere else to go. That question is increasingly relevant because many local governments have made criminalization a frontline response to homelessness. "[L]ocal measures to criminalize 'acts of living' " by "prohibit[ing] sleeping, eating, sitting, or panhandling in public spaces" have recently proliferated. U. S. Interagency Council on Homelessness, Searching Out Solutions 1 (2012).

Criminalizing homelessness can cause a destabilizing cascade of harm. "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." *Id.*, at 6. When a homeless person is arrested or separated from their property, for example, "items frequently destroyed include personal documents needed for accessing jobs, housing, and services such as IDs, driver's licenses, financial documents, birth certificates, and benefits cards; items required for work such as clothing and uniforms, bicycles, tools, and computers; and irreplaceable mementos." Brief for 57 Social Scientists as *Amici Curiae* 17–18 (Social Scientists Brief). Consider Erin Spencer, a disabled Marine Corps veteran who stores items he uses to make a living, such as tools and bike parts, in a cart. He was arrested repeatedly for illegal lodging. Each time, his cart and belongings were gone once he returned to the sidewalk. "[T]he massive number of times the City or State has taken all I possess leaves me in a vacuous déjà vu." Brief for National Coalition for Homeless Veterans et al. as *Amici Curiae* 28.

Incarceration and warrants from unpaid fines can also result in the loss of employment, benefits, and housing options. See Social Scientists Brief 13, 17 (incarceration and warrants can lead to "termination of federal health benefits such as Social Security, Medicare, or Medicaid," the "loss of a shelter bed," or disqualification from "public housing and Section 8 vouchers"). Final-

ly, criminalization can lead homeless people to "avoid calling the police in the face of abuse or theft for fear of eviction from public space." *Id.*, at 27. Consider the tragic story of a homeless woman "who was raped almost immediately following a police move-along order that pushed her into an unfamiliar area in the dead of night." *Id.,* at 26. She described her hesitation in calling for help: "What's the point? If I called them, they would have made all of us move [again]." *Ibid.*

For people with nowhere else to go, fines and jail time do not deter behavior, reduce homelessness, or increase public safety. In one study, 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. *Id.*, at 23. Police officers in these cities recognize as much: " 'Look we're not really solving anybody's problem. This is a big game of whack-a-mole.' " *Id.*, at 24. Consider Jerry Lee, a Grants Pass resident who sleeps in a van. Over the course of three days, he was woken up and cited six times for "camping in the city limits" just because he was sleeping in the van. App. 99 (capitalization omitted). Lee left the van each time only to return later to sleep. Police reports eventually noted that he "continues to disregard the city ordinance and returns to the van to sleep as soon as police leave the area. Dayshift needs to check on the van this morning and . . . follow up for tow." *Ibid.* (same).

Shelter beds that are available in theory may be practically unavailable because of "restrictions based on gender, age, income, sexuality, religious practice, curfews that conflict with employment obligations, and time limits on stays." Social Scientists Brief 22. Studies have shown, however, that the "vast majority of those who are unsheltered would move inside if safe and affordable options were available." Service Providers Brief 8 (collecting studies). Consider CarrieLynn Hill. She cannot stay at Gospel Rescue Mission, the only entity in Grants Pass offering temporary beds, because "she would have to check her nebulizer in as medical equipment and, though she must use it at least once every four hours, would not be able to use it in her room." Disability Rights Brief 18. Similarly, Debra Blake's "disabilities prevent her from working, which means she cannot comply with the Gospel Rescue Mission's requirement that its residents work 40-hour work weeks." *Ibid.*

Before I move on, consider one last example of a Nashville man who experienced homelessness for nearly 20 years. When an outreach worker tried to help him secure housing, the worker had difficulty finding him for his appointments because he was frequently arrested for being homeless. He was arrested 198 times and had over 250 charged citations, all for petty offenses. The outreach worker made him a t-shirt that read "Please do not arrest me, my outreach worker is working on my housing." Service Providers Brief 16. Once the worker was able to secure him stable housing, he "had no further encounters with the police, no citations, and no arrests." *Ibid.*

These and countless other stories reflect the reality of criminalizing sleeping outside when people have no other choice.

II

Grants Pass, a city of 38,000 people in southern Oregon, adopted three ordinances (Ordinances) that effectively make it unlawful to sleep anywhere in public, including in your car, at any time, with as little as a blanket or a rolled-up shirt as a pillow. The Ordinances prohibit "[c]amping" on "any sidewalk, street, alley, lane, public right of way, park, bench, or any

other publicly-owned property or under any bridge or viaduct." Grants Pass, Ore. Municipal Code § 5.61.030 (2024). 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." § 5.61.010(B). Relevant here, the definition of "campsite" includes sleeping in "any vehicle." *Ibid.* The Ordinances also prohibit camping in public parks, including the "[o]vernight parking" of any vehicle. § 6.46.090(B).[1]

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 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).

In 2019, the Ninth Circuit held 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.' " *Martin v. Boise*, 920 F.3d 584, 616, cert. denied, 589 U. S. ——, 140 S.Ct. 674, 205 L.Ed.2d 438 (2019). Considering an ordinance from Boise, Idaho, that made it a misdemeanor to use "streets, sidewalks, parks, or public places" for "camping," 920 F.3d, at 603, the court concluded that "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property," *id.*, at 617.

Respondents here, two longtime residents of Grants Pass who are homeless and sleep in their cars, sued on behalf of themselves and all other involuntarily homeless people in the City, seeking to enjoin enforcement of the Ordinances. The District Court eventually certified a class and granted summary judgment to respondents. "As was the case in *Martin*, Grants Pass has far more homeless people than 'practically available' shelter beds." App. to Pet. for Cert. 179a. The City had "zero emergency shelter beds," and even counting the beds at the Gospel Rescue Mission (GRM), which is "the only entity in Grants Pass that offers any sort of temporary program for some class members," "GRM's 138 beds would not be nearly enough to accommodate the at least 602 homeless individuals in Grants Pass." *Id.*, at 179a–180a. Thus, "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." *Id.*, at 178a.

The District Court entered a narrow injunction. It 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.*,

1. The City's "sleeping" ordinance prohibits sleeping "on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety." § 5.61.020(A). That ordinance is not before the Court today because, after the only class representative with standing to challenge this ordinance died, the Ninth Circuit remanded to the District Court "to determine whether a substitute representative is available as to that challenge alone." 72 F.4th 868, 884 (2023).

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.

The Ninth Circuit largely agreed that the Ordinances violated the Eighth Amendment because they punished people who lacked "some place, such as [a] shelter, they can lawfully sleep." 72 F.4th 868, 894 (2023). It further narrowed the District Court's already-limited injunction. The Ninth Circuit noted that, beyond prohibiting bedding, "the ordinances also prohibit the use of stoves or fires, as well as the erection of any structures." *Id.*, at 895. Because the record did not "establis[h that] the fire, stove, and structure prohibitions deprive homeless persons of sleep or 'the most rudimentary precautions' against the elements," the court remanded for the District Court "to craft a narrower injunction recognizing Plaintiffs' limited right to protection against the elements, as well as limitations when a shelter bed is available." *Ibid.*

III

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." Amdt. 8 (Punishments Clause). This prohibition, which is not limited to medieval tortures, places " 'limitations' on 'the power of those entrusted with the criminal-law function of government.' " *Timbs v. Indiana*, 586 U.S. 146, 151, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019). The Punishments Clause "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (citations omitted).

In *Robinson* v. *California*, this Court detailed one substantive limitation on criminal punishment. Lawrence Robinson was convicted under a California statute for " 'be[ing] addicted to the use of narcotics' " and faced a mandatory 90-day jail sentence. 370 U.S., at 660, 82 S.Ct. 1417. The California statute did not "punis[h] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration." *Id.*, at 666, 82 S.Ct. 1417. Instead, it made "the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' " *Ibid.*

The Court held that, because it criminalized the " 'status' of narcotic addiction," *ibid.*, the California law "inflict[ed] a cruel and unusual punishment in violation" of the Punishments Clause, *id.*, at 667, 82 S.Ct. 1417. Importantly, the Court did not limit that holding to the status of narcotic addiction alone. It began by reasoning that the criminalization of the "mentally ill, or a leper, or [those] afflicted with a venereal disease" "would doubtless be universally thought to be an infliction of cruel and unusual punishment." *Id.*, at 666, 82 S.Ct. 1417. It extended that same reasoning to the status of being an addict, because "narcotic addiction is an illness" "which may be contracted innocently or involuntarily." *Id.*, at 667, 82 S.Ct. 1417.

Unlike the majority, see *ante,* at 2215 – 2217, the *Robinson* Court did not rely on the harshness of the criminal penalty itself. It understood that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." 370 U.S., at 667, 82 S.Ct. 1417. Instead, it reasoned that, when imposed because of a

person's status, "[e]ven one day in prison would be a cruel and unusual punishment." *Ibid.*

Robinson did not prevent States from using a variety of tools, including criminal law, to address harmful conduct related to a particular status. The Court candidly recognized the "vicious evils of the narcotics traffic" and acknowledged the "countless fronts on which those evils may be legitimately attacked." *Id.*, at 667–668, 82 S.Ct. 1417. It left untouched the "broad power of a State to regulate the narcotic drugs traffic within its borders," including the power to "impose criminal sanctions . . . against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics," and the power to establish "a program of compulsory treatment for those addicted to narcotics." *Id.*, at 664–665, 82 S.Ct. 1417.

This Court has repeatedly cited *Robinson* for the proposition that the "Eighth Amendment . . . imposes a substantive limit on what can be made criminal and punished as such." *Rhodes v. Chapman*, 452 U.S. 337, 346, n. 12, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); see also *Gregg v. Georgia*, 428 U.S. 153, 172, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("The substantive limits imposed by the Eighth Amendment on what can be made criminal and punished were discussed in *Robinson*"). Though it casts aspersions on *Robinson* and mistakenly treats it as an outlier, the majority does not overrule or reconsider that decision.[2] Nor does the majority 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" violates the Punishments Clause. *Estelle v. Gamble*, 429 U.S. 97, 103, and n. 7, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Instead, the majority sees this case as requiring an application or extension of *Robinson*. The majority's understanding of *Robinson*, however, is plainly wrong.

IV

Grants Pass's Ordinances criminalize being homeless. The status of being homeless (lacking available shelter) is defined by the very behavior singled out for punishment (sleeping outside). The majority protests that the Ordinances "do not criminalize mere status." *Ante,* at 2218. Saying so does not make it so. Every shred of evidence points the other way. The Ordinances' purpose, text, and enforcement confirm that they target status, not conduct. For someone with no available shelter, the only way to comply with the Ordinances is to leave Grants Pass altogether.

A

Start with their purpose. The Ordinances, as enforced, are intended to criminalize being homeless. The Grants Pass City Council held a public meeting in 2013 to " 'identify solutions to current vagrancy problems.' " App. to Pet. for Cert. 168a. The council discussed the City's previous efforts to banish homeless people by "buying the person a bus ticket to a specific destination," or transporting them to a different jurisdiction and "leaving them there." App. 113–114. That was unsuccessful, so the council discussed other ideas,

2. See *ante,* at 2218 (''[N]o one has asked us to reconsider *Robinson*. Nor do we see any need to do so today''); but see *ante,* at 2220 (gratuitously noting that *Robinson* ''sits uneasily with the Amendment's terms, original meaning, and our precedents''). The most important takeaway from these unnecessary swipes at *Robinson* is just that. They are unnecessary. *Robinson* remains binding precedent, no matter how incorrectly the majority applies it to these facts.

including a "'do not serve'" list or "a 'most unwanted list' made by taking pictures of the offenders ... and then disseminating it to all the service agencies." *Id.*, at 121. The council even contemplated denying basic services such as "food, clothing, bedding, hygiene, and those types of things." *Ibid.*

The idea was deterrence, not altruism. "[U]ntil the pain of staying the same outweighs the pain of changing, people will not change; and some people need an external source to motivate that needed change." *Id.*, at 119. One councilmember opined that "[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.'" *Id.*, at 114.[3]

One action item from this meeting was the "'targeted enforcement of illegal camping'" against homeless people. App. to Pet. for Cert. 169a. "The year following the [public meeting] saw a significant increase in enforcement of the City's anti-sleeping and anti-camping ordinances. From 2013 through 2018, the City issued a steady stream of tickets under the ordinances." 72 F.4th, at 876–877.

B

Next consider the text. The Ordinances by their terms single out homeless people. They define "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." § 5.61.010. The majority claims that it "makes no difference whether the charged defendant is homeless." *Ante,* at 2218. Yet the Ordinances do not apply unless bedding is placed to maintain a temporary place to live. Thus, "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." Brief for Criminal Law and Punishment Scholars as *Amici Curiae* 12.

Put another way, the Ordinances single out for punishment the activities that define the status of being homeless. By most definitions, homeless individuals are those that lack "a fixed, regular, and adequate nighttime residence." 42 U.S.C. § 11434a(2)(A); 24 C.F.R. §§ 582.5, 578.3 (2023). Permitting Grants Pass to criminalize sleeping outside with as little as a blanket permits Grants Pass to criminalize homelessness. "There is no ... separation between being without available indoor shelter and sleeping in public—they are opposite sides of the same coin." Brief for United States as *Amicus Curiae* 25. The Ordinances use the definition of "campsite" as a proxy for homelessness because those lacking "a fixed, regular, and adequate nighttime residence" are those who need

3. The majority does not contest that the Ordinances, as enforced, are intended to target homeless people. The majority observes, however, that the council also discussed other ways to handle homelessness in Grants Pass. See *ante,* at 2213, n. 1. That is true. Targeted enforcement of the Ordinances to criminalize homelessness was only one solution discussed at the meeting. See App. 131–132 (listing "[a]ctions to move forward," including increasing police presence, exclusion zones, "zero tolerance" signs, "do not serve" or "most unwanted" lists, trespassing letters, and building a sobering center or youth center (internal quotation marks omitted)).

to sleep in public to "maintai[n] a temporary place to live."

Take the respondents here, two longtime homeless residents of Grants Pass who sleep in their cars. The Ordinances define "campsite" to include "any vehicle." § 5.61.010(B). For respondents, the Ordinances as applied do not criminalize any behavior or conduct related to encampments (such as fires or tents). Instead, the Ordinances target respondents' status as people without any other form of shelter. Under the majority's logic, cities cannot criminalize the status of being homeless, but they can criminalize the conduct that defines that status. The Constitution cannot be evaded by such formalistic distinctions.

The Ordinances' definition of "campsite" creates a situation where homeless people necessarily break the law just by existing. "[U]nsheltered people have no private place to survive, so they are virtually guaranteed to violate these pervasive laws." S. Rankin, Hiding Homelessness: The Transcarceration of Homelessness, 109 Cal. L. Rev. 559, 561 (2021); see also Disability Rights Brief 2 ("[T]he members of Grants Pass's homeless community do not choose to be homeless. Instead, in a city with no public shelters, they have no alternative but to sleep in parks or on the street"). Every human needs to sleep at some point. Even if homeless people with no available shelter options can exist for a few days in Grants Pass without sleeping, they eventually must leave or be criminally punished.

The majority resists this understanding, arguing that the Ordinances criminalize the conduct of being homeless in Grants Pass while sleeping with as little as a blanket. Therefore, the argument goes, "[r]ather than criminalize mere status, Grants Pass forbids actions." *Ante,* at 2218. With no discussion about what it means to criminalize "status" or "conduct," the majority's analysis consists of a few sentences repeating its conclusion again and again in hopes that it will become true. See *ante,* at 2218 (proclaiming that the Ordinances "forbi[d] actions" "[r]ather than criminalize mere status"; and that they "do not criminalize mere status"). The best the majority can muster is the following tautology: The Ordinances criminalize conduct, not pure status, because they apply to conduct, not status.

The flaw in this conclusion is evident. The majority countenances the criminalization of status as long as the City tacks on an essential bodily function—blinking, sleeping, eating, or breathing. That is just another way to ban the person. By this logic, the majority would conclude that the ordinance deemed unconstitutional in *Robinson* criminalizing "being an addict" would be constitutional if it criminalized "being an addict and breathing." Or take the example in *Robinson*: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S., at 667, 82 S.Ct. 1417. According to the majority, although it is cruel and unusual to punish someone for having a common cold, it is not cruel and unusual to punish them for sniffling or coughing because of that cold. See *Manning v. Caldwell*, 930 F.3d 264, 290 (CA4 2019) (Wilkinson, J., dissenting) ("In the rare case where the Eighth Amendment was found to invalidate a criminal law, the law in question sought to punish persons merely for their need to eat or sleep, which are essential bodily functions. This is simply a variation of *Robinson*'s command that the state identify conduct in crafting its laws, rather than punish a person's mere existence" (citation omitted)).

C

The Ordinances are enforced exactly as intended: to criminalize the status of being

homeless. City officials sought to use the Ordinances to drive homeless people out of town. See *supra*, at 2234 – 2235. The message to homeless residents is clear. As Debra Blake, a named plaintiff who passed away while this case was pending, see n. 1, *supra*, shared:

> "I have been repeatedly told by Grants Pass police that I must 'move along' and that there is nowhere in Grants Pass that I can legally sit or rest. I have been repeatedly awakened by Grants Pass police while sleeping and told that I need to get up and move. I have been told by Grants Pass police that I should leave town.
>
> Because I have no choice but to live outside and have no place else to go, I have gotten tickets, fines and have been criminally prosecuted for being homeless." App. 180–181.

Debra Blake's heartbreaking message captures the cruelty of criminalizing someone for their status: "I am afraid at all times in Grants Pass that I could be arrested, ticketed and prosecuted for sleeping outside or for covering myself with a blanket to stay warm." *Id.*, at 182. So, at times, when she could, Blake "slept outside of the city." *Ibid.* Blake, who was disabled, unemployed, and elderly, "owe[d] the City of Grants Pass more than $5000 in fines for crimes and violations related directly to [her] involuntary homelessness and the fact that there is no affordable housing or emergency shelters in Grants Pass where [she could] stay." *Ibid.*

Another homeless individual was found outside a nonprofit "in severe distress outside in the frigid air." *Id.*, at 109. "[H]e could not breathe and he was experiencing acute pain," and he "disclosed fear that he would be arrested and trespassed again for being outside." *Ibid.* Another, CarrieLynn Hill, whose story you read earlier, see *supra*, at 2231, was ticketed for "lying down on a friend's mat" and "lying down under a tarp to stay warm." App. 134. She was "constantly afraid" of being "cited and arrested for being outside in Grants Pass." *Ibid.* She is unable to stay at the only shelter in the City because she cannot keep her nebulizer, which she needs throughout the night, in her room. So she does "not know of anywhere in the city of Grants Pass where [she] can safely sleep or rest without being arrested, trespassed, or moved along." *Id.*, at 135. As she put it: "The only way I have figured out how to get by is try to stay out of sight and out of mind." *Ibid.* Stories like these fill the record and confirm the City's success in targeting the status of being homeless.

The majority proclaims, with no citation, that "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." *Ante,* at 2218. That describes a fantasy. In reality, the deputy chief of police operations acknowledged that he was not aware of "any nonhomeless person ever getting a ticket for illegal camping in Grants Pass." Tr. of Jim Hamilton in *Blake* v. *Grants Pass*, No. 1:18–cr–01823 (D Ore., Oct. 16, 2019), ECF Doc. 63–4, p. 16. Officers testified that "laying on a blanket enjoying the park" would not violate the ordinances, ECF Doc. 63–7, at 2; and that bringing a sleeping bag to "look at stars" would not be punished, ECF Doc. 63–5, at 5. Instead, someone violates the Ordinance only if he or she does not "have another home to go to." *Id.,* at 6. That is the definition of being homeless. The majority does not contest any of this. So much for the Ordinances applying to backpackers and students.

V

Robinson should squarely resolve this case. Indeed, the majority seems to agree

that an ordinance that fined and jailed "homeless" people would be unconstitutional. See *ante,* at 2218 (disclaiming that the Ordinances "criminalize mere status"). The majority resists a straightforward application of *Robinson* by speculating about policy considerations and fixating on extensions of the Ninth Circuit's narrow rule in *Martin*.

The majority is wrong on all accounts. First, no one contests the power of local governments to address homelessness. Second, the majority overstates the line-drawing problems that this case presents. Third, a straightforward application of *Robinson* does not conflict with *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). Finally, the majority draws the wrong message from the various *amici* requesting this Court's guidance.

A

No one contests that local governments can regulate the time, place, and manner of public sleeping pursuant to their power to "enact regulations in the interest of the public safety, health, welfare or convenience." *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 160, 60 S.Ct. 146, 84 L.Ed. 155 (1939). This power includes controlling "the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). When exercising that power, however, regulations still "may not abridge the individual liberties secured by the Constitution." *Schneider*, 308 U.S., at 160, 60 S.Ct. 146.

The Ninth Circuit in *Martin* provided 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." 920 F.3d, at 604. *Martin* was narrow.[4] Consider these qualifications:

> "[O]ur 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 sleeping outside at particular times or in particular locations might well be constitutionally permissible. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures." *Id.*, at 617, n. 8 (citation omitted).

Upholding *Martin* does not call into question all the other tools that a city has to deal with homelessness. "Some cities have established approved encampments on public property with security, services, and other resources; others have sought to impose geographic and time-limited bans on public sleeping; and others have worked to clear and clean particularly dangerous encampments after providing notice and reminders to those who lived there." California Brief 14. Others might "limit the use of fires, whether for cooking or other purposes" or "ban (or enforce already-existing bans on) particular conduct that negatively affects other people, including harassment of passersby, illegal drug use, and litter-

4. Some district courts have since interpreted *Martin* broadly, relying on it to enjoin time, place, and manner restrictions on camping outside. See *ante,* at 2210 – 2213, 2222 – 2223. This Court is not asked today to consider any of these interpretations or extensions of *Martin*.

ing." Brief for Maryland et al. as *Amici Curiae* 12. All of these tools remain available to localities seeking to address homelessness within constitutional bounds.

B

The scope of this dispute is narrow. Respondents do not challenge the City's "restrictions on the use of tents or other camping gear," "encampment clearances," "time and place restrictions on sleeping outside," or "the imposition of fines or jail time on homeless people who decline accessible shelter options." Brief for Respondents 18.

That means the majority does not need to answer most of the hypotheticals it poses. The City's hypotheticals, echoed throughout the majority opinion, concern "violent crime, drug overdoses, disease, fires, and hazardous waste." Brief for Petitioner 47. For the most part, these concerns are not implicated in this case. The District Court's injunction, for example, permits the City to prohibit "littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence." App. to Pet. for Cert. 200a. The majority's framing of the problem as one involving drugs, diseases, and fires instead of one involving people trying to keep warm outside with a blanket just provides the Court with cover to permit the criminalization of homeless people.

The majority also overstates the line-drawing problems that a baseline Eighth Amendment standard presents. Consider the "unavoidable" "difficult questions" that discombobulate the majority. *Ante,* at 2224 – 2226. Courts answer such factual questions every day. For example, the majority asks: "What does it mean to be 'involuntarily' homeless with 'no place to go'?" *Ibid.* *Martin*'s answer was clear: It is when " 'there is a greater number of homeless individuals in [a city] than the number of available beds [in shelters,]' " not including "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." 920 F.3d, at 617, and n. 8. The District Court here found that Grants Pass had "zero emergency shelter beds" and that Gospel Rescue Mission's "138 beds would not be nearly enough to accommodate the at least 602 homeless individuals in Grants Pass." App. to Pet. for Cert. 179a–180a. The majority also asks: "[W]hat are people entitled to do and use in public spaces to 'keep warm' "? *Ante,* at 2225. The District Court's opinion also provided a clear answer: They are permitted "bedding type materials to keep warm and dry," but cities can still "implement time and place restrictions for when homeless individuals . . . must have their belonging[s] packed up." App. to Pet. for Cert. 199a. Ultimately, these are not metaphysical questions but factual ones. See, *e.g.*, 42 U.S.C. § 11302 (defining "homeless," "homeless individual," and "homeless person"); 24 C.F.R. § 582.5 (defining "[a]n individual or family who lacks a fixed, regular, and adequate nighttime residence").

Just because the majority can list difficult questions that require answers, see *ante,* at 2225, n. 8, does not absolve federal judges of the responsibility to interpret and enforce the substantive bounds of the Constitution. The majority proclaims that this dissent "blinks the difficult questions." *Ante,* at 2225. The majority should open its eyes to available answers instead of throwing up its hands in defeat.

C

The majority next spars with a strawman in its discussion of *Powell* v. *Texas*. The Court in *Powell* considered the distinction between status and conduct but

could not agree on a controlling rationale. Four Justices concluded that *Robinson* covered any "condition [the defendant] is powerless to change," 392 U.S., at 567, 88 S.Ct. 2145 (Fortas, J., dissenting), and four Justices rejected that view. Justice White, casting the decisive fifth vote, left the question open because the defendant had "made no showing that he was unable to stay off the streets on the night in question." *Id.*, at 554, 88 S.Ct. 2145 (opinion concurring in judgment). So, in his view, it was "unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place." *Id.*, at 553, 88 S.Ct. 2145.

This case similarly called for a straightforward application of *Robinson*. The majority finds it telling that this dissent "barely mentions" Justice Marshall's opinion in *Powell*. *Ante,* at 2224 – 2225.[5] The majority completely misses the point. Even Justice Marshall's plurality opinion in *Powell* agreed that *Robinson* prohibited enforcing laws criminalizing "a mere status." 392 U.S., at 532, 88 S.Ct. 2145. The *Powell* Court considered a statute that criminalized voluntary conduct (getting drunk) that could be rendered involuntary by a status (alcoholism); here, the Ordinances criminalize conduct (sleeping outside) that defines a particular status (homelessness). So unlike the debate in *Powell*, this case does not turn on whether the criminalized actions are " 'involuntary' or 'occasioned by' " a particular status. *Id.*, at 533, 88 S.Ct. 2145 (Marshall, J., dissenting). For all the reasons discussed above, see *supra,* at 2234 – 2238, these Ordinances criminalize status and are thus unconstitutional under any of the opinions in *Powell*.

D

The majority does not let the reader forget that "a large number of States, cities, and counties" all "urg[ed] the Court to grant review." *Ante*, at 2214; see also *ante,* at 2212 ("An exceptionally large number of cities and States have filed briefs in this Court"); *ante,* at 2226 (noting the "multitude of *amicus* briefs before us"); *ante,* at 2214 – 2215, n. 3 (listing certiorari-stage *amici*). No one contests that States, cities, and counties could benefit from this Court's guidance. Yet the majority relies on these *amici* to shift the goalposts and focus on policy questions beyond the scope of this case. It first declares that "[t]he only question we face is whether one specific provision of the Constitution ... prohibits the enforcement of public-camping laws." *Ante,* at 2224. Yet it quickly shifts gears and claims that "the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes [of homelessness] and devising those responses." *Ante,* at 2226. This sleight of hand allows the majority to abdicate its responsibility to answer the first (legal) question by declining to answer the second (policy) one.

The majority cites various *amicus* briefs to amplify Grants Pass's belief that its homelessness crisis is intractable absent the ability to criminalize homelessness. In so doing, the majority chooses to see only

5. The majority claims that this dissent does not dispute that *Robinson* is "hard to square" with the Eighth Amendment's "text and this Court's other precedents." *Ante,* at 2224. That is wrong. See *supra,* at 2234 (recognizing *Robinson*'s well-established rule). The majority also claims that this dissent "ignores *Robinson*'s own insistence that a different result would have obtained in that case if the law there had proscribed an act rather than status alone." *Ante,* at 2225. That too is wrong. See *supra,* at 2233 – 2234 (discussing *Robinson*'s distinction between status and conduct).

what it wants. Many of those stakeholders support the narrow rule in *Martin*. See, *e.g.*, Brief for City and County of San Francisco et al. as *Amici Curiae* 4 ("[U]nder the Eighth Amendment ... a local municipality may not prohibit sleeping—a biological necessity—in all public spaces at all times and under all conditions, if there is no alternative space available in the jurisdiction for unhoused people to sleep"); Brief for City of Los Angeles as *Amicus Curiae* 1 ("The City agrees with the broad premise underlying the *Martin* and *Johnson* decisions: when a person has no other place to sleep, sleeping at night in a public space should not be a crime leading to an arrest, criminal conviction, or jail"); California Brief 2–3 ("[T]he Constitution does not allow the government to punish people for the status of being homeless. Nor should it allow the government to effectively punish the status of being homeless by making it a crime in all events for someone with no other options to sleep outside on public property at night").

Even the Federal Government, which restricts some sleeping activities on park lands, see *ante,* at 2210 – 2211, has for nearly three decades "taken the position that laws prohibiting sleeping in public at all times and in all places violate the *Robinson* principle as applied to individuals who have no access to shelter." Brief for United States as *Amicus Curiae* 14. The same is true of States across the Nation. See Brief for Maryland et al. as *Amici Curiae* 3–4 ("Taking these policies [criminalizing homelessness] off the table does not interfere with our ability to address homelessness (including the effects of homelessness on surrounding communities) using other policy tools, nor does it amount to an undue intrusion on state sovereignty").

Nothing in today's decision prevents these States, cities, and counties from declining to criminalize people for sleeping in public when they have no available shelter. Indeed, although the majority describes *Martin* as adopting an unworkable rule, the elected representatives in Oregon codified that very rule. See *infra*, at 2241 – 2242. The majority does these localities a disservice by ascribing to them a demand for unfettered freedom to punish that many do not seek.

VI

The Court wrongly concludes that the Eighth Amendment permits Ordinances that effectively criminalize being homeless. Grants Pass's Ordinances may still raise a host of other legal issues. Perhaps recognizing the untenable position it adopts, the majority stresses that "many substantive legal protections and provisions of the Constitution may have important roles to play when States and cities seek to enforce their laws against the homeless." *Ante,* at 2224. That is true. Although I do not prejudge the merits of these other issues, I detail some here so that people experiencing homelessness and their advocates do not take the Court's decision today as closing the door on such claims.[6]

A

The Court today does not decide whether the Ordinances are valid under a new Oregon law that codifies *Martin*. In 2021, Oregon passed a law that constrains the ability of municipalities to punish homeless residents for public sleeping. "Any city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively

6. The majority does not address whether the Eighth Amendment requires a more particularized inquiry into the circumstances of the individuals subject to the City's ordinances. See Brief for United States as *Amicus Curiae* 27. I therefore do not discuss that issue here.

reasonable as to time, place and manner with regards to persons experiencing homelessness." Ore. Rev. Stat. § 195.530(2). The law also grants persons "experiencing homelessness" a cause of action to "bring suit for injunctive or declaratory relief to challenge the objective reasonableness" of an ordinance. § 195.530(4). This law was meant to " 'ensure that individuals experiencing homelessness are protected from fines or arrest for sleeping or camping on public property when there are no other options.' " Brief in Opposition 35 (quoting Speaker T. Kotek, Hearing on H. B. 3115 before the House Committee on the Judiciary, 2021 Reg. Sess. (Ore., Mar. 9, 2021)). The panel below already concluded that "[t]he city ordinances addressed in *Grants Pass* will be superseded, to some extent," by this new law. 72 F.4th, at 924, n. 7. Courts may need to determine whether and how the new law limits the City's enforcement of its Ordinances.

B

The Court today also does not decide whether the Ordinances violate the Eighth Amendment's Excessive Fines Clause. That Clause separately "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (internal quotation marks omitted). "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.*, at 334, 118 S.Ct. 2028.

The District Court in this case concluded that the fines here serve "no remedial purpose" but rather are "intended to deter homeless individuals from residing in Grants Pass." App. to Pet. for Cert. 189a. Because it concluded that the fines are punitive, it went on to determine that the fines are " 'grossly disproportionate to the gravity of the offense' " and thus excessive. *Ibid.* The Ninth Circuit declined to consider this holding because the City presented "no meaningful argument on appeal regarding the excessive fines issue." 72 F.4th, at 895. On remand, the Ninth Circuit is free to consider whether the City forfeited its appeal on this ground and, if not, whether this issue has merit.

C

Finally, the Court does not decide whether the Ordinances violate the Due Process Clause. "The Due Process Clauses of the Fifth and Fourteenth Amendments ensure that officials may not displace certain rules associated with criminal liability that are 'so old and venerable,' ' "so rooted in the traditions and conscience of our people[,] as to be ranked as fundamental." ' " *Ante,* at 2215 (quoting *Kahler v. Kansas*, 589 U.S. 271, 279, 140 S.Ct. 1021, 206 L.Ed.2d 312 (2020)). The majority notes that due process arguments in *Robinson* "may have made some sense." *Ante,* at 2217. On that score, I agree. "[H]istorically, crimes in England and this country have usually required proof of some act (or *actus reus*) undertaken with some measure of volition (*mens rea*)." *Ibid.* "This view 'took deep and early root in American soil' where, to this day, a crime ordinarily arises 'only from concurrence of an evil-meaning mind with an evil-doing hand.' *Morissette v. United States*, 342 U.S. 246, 251–252 [72 S.Ct. 240, 96 L.Ed. 288] (1952)." *Ibid.* Yet the law at issue in *Robinson* "was an anomaly, as it required proof of neither of those things." *Ante,* at 2217.

Relatedly, this Court has concluded that some vagrancy laws are unconstitutionally vague. See, *e.g.*, *Kolender v. Lawson*, 461

U.S. 352, 361–362, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (invalidating California law that required people who loiter or wander on the street to provide identification and account for their presence); *Papachristou v. Jacksonville*, 405 U.S. 156, 161–162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (concluding that vagrancy law employing " 'archaic language' " in its definition was "void for vagueness"); accord, *Desertrain v. Los Angeles*, 754 F.3d 1147, 1155–1157 (CA9 2014) (holding that an ordinance prohibiting the use of a vehicle as " 'living quarters' " was void for vagueness because the ordinance did not define "living quarters"). Other potentially relevant due process precedents abound. See, *e.g.*, *Winters v. New York*, 333 U.S. 507, 520, 68 S.Ct. 665, 92 L.Ed. 840 (1948) ("Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained"); *Chicago v. Morales*, 527 U.S. 41, 57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (opinion of Stevens, J.) (invalidating ordinance that failed "to distinguish between innocent conduct and conduct threatening harm").

The Due Process Clause may well place constitutional limits on anti-homelessness ordinances. See, *e.g.*, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263–264, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974) (considering statute that denied people medical care depending on duration of residency and concluding that "to the extent the purpose of the [statute] is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible"); *Pottinger v. Miami*, 810 F.Supp. 1551, 1580 (SD Fla. 1992) (concluding that "enforcement of laws that prevent homeless individuals who have no place to go from sleeping" might also unconstitutionally "burde[n] their right to travel"); see also *ante*, at 2218, n. 5 (noting that these Ordinances "may implicate due process and our precedents regarding selective prosecution").

D

The Ordinances might also implicate other legal issues. See, *e.g.*, *Trop*, 356 U.S., at 101, 78 S.Ct. 590 (plurality opinion) (concluding that a law that banishes people threatens "the total destruction of the individual's status in organized society"); Brief for United States as *Amicus Curiae* 21 (describing the Ordinances here as "akin to a form of banishment, a measure that is now generally recognized as contrary to our Nation's legal tradition"); *Lavan v. Los Angeles*, 693 F.3d 1022, 1029 (CA9 2012) (holding that a city violated homeless plaintiffs' Fourth Amendment rights by seizing and destroying property in an encampment, because "[v]iolation of a City ordinance does not vitiate the Fourth Amendment's protection of one's property").

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.

* * *

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 numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." *Furman v. Georgia*, 408 U.S. 238, 245, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring).

I remain hopeful that our society will come together "to address the complexities of the homelessness challenge facing the most vulnerable among us." *Ante,* at 2226. That responsibility is shared by those vulnerable populations, the States and cities in which they reside, and each and every one of us. "It is only after we begin to see a street as *our* street, a public park as *our* park, a school as *our* school, that we can become engaged citizens, dedicating our time and resources for worthwhile causes." M. Desmond, Evicted: Property and Profit in the American City 294 (2016).

This Court, too, has a role to play in faithfully enforcing the Constitution to prohibit punishing the very existence of those without shelter. 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.

LOPER BRIGHT ENTERPRISES, et al., Petitioners

v.

Gina RAIMONDO, Secretary of Commerce, et al.

Relentless, Inc., et al., Petitioners

v.

Department of Commerce, et al.

No. 22-451, No. 22-1219

Supreme Court of the United States.

Argued January 17, 2024

Decided June 28, 2024

Background: In first case, herring fishing companies operating in the Atlantic herring fishery brought action against Secretary of Commerce and National Marine Fisheries Service (NMFS), alleging that Magnuson-Stevens Fishery Conservation and Management Act (MSA) did not authorize Service, in implementing statutory amendment establishing industry-funded monitoring programs for fishery management, to promulgate final rule requiring Atlantic herring fishery to fund costs for on-board observers required by fishery management plan. The United States District Court for the District of Columbia, Emmet G. Sullivan, J., 544 F.Supp.3d 82, granted summary judgment to Secretary and Service. Companies appealed. The United States Court of Appeals for the District of Columbia Circuit, Rogers, Circuit Judge, 45 F.4th 359, affirmed. Certiorari was granted. In second case, owners of fishing vessels operating in the Atlantic herring fishery brought action asserting similar claims. The United States District Court for the District of Rhode Island, William E. Smith, J., 561 F.Supp.3d 226, entered summary judgment in government's favor. Owners appealed. The United States Court of Appeals for the First Circuit, Kayatta, Circuit Judge, 62 F.4th 621, affirmed. Certiorari was granted in part.

Holdings: The Supreme Court, Chief Justice Roberts, held that courts need not, and under the Administrative Procedure Act (APA) may not, defer to an agency's interpretation of the law simply because a statute is ambiguous; overruling *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694.

Vacated and remanded.

Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined.

Justice Thomas filed a concurring opinion.