CITY OF GRANTS PASS V. JOHNSON:
The Aftermath for Unhoused people since the U.S. Supreme Court's Ruling

Presented by the Gus Solomon Inns of Court
May Pupilage Group
May 20, 2025

INN OF COURT – GRANTS PASS INTRO

- Quote paragraph from start of majority opinion –
  - "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. Some have been forced from their homes to escape domestic violence and other forms of exploitation. And still others struggle with drug addiction and mental illness."
- Compare with this paragraph from the start of the dissenting opinion –
  - 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. Every "$100 increase in median rental price" is "associated with about a 9 percent increase in the estimated homelessness rate." Individuals with disabilities, immigrants, and veterans face policies that increase housing instability. * * * Further, "mental and physical health challenges," and family and domestic "violence and abuse" can be precipitating causes of homelessness.

- Overall scope of the problem
  - 22,875 people in latest point in time count
    - Explain why the point in time count is artificially low
  - Eighth highest number in the country; other seven states much larger

- The City of Grants Pass case deals with one particular portion of the homeless population – people living outside, primarily in homeless encampments.
  - It's the portion of the population that gets the most attention, because it is the most visible.
  - We'll spend the rest of the evening talking about the case and its legal implications.

- Before we do that, we thought it was important to talk about the portions of the homeless population that get far less attention.
    - Families with children
        - Driven primarily by economic need
            - Cannot afford an apartment on minimum wage (87 hours)
        - Oregon has the highest percentage of children experiencing homelessness in the country
            - 14 times the national average; more than twice the rate of next state
        - More than 22,000 students were classified as homeless during the 2023-2024 school year (Oregon Department of Education)
            - That doesn't include younger kids who are not in school
        - Local organization -- Path Home
    - Unaccompanied youth/teens
        - Varied definitions make it hard to estimate – definitely thousands of unaccompanied teens and young adults
        - Complex causes – aging out of foster care; running away from home
        - Local organization -- p:ear
    - Seniors
        - Nearly one in four people experiencing homelessness is over age 55
        - Also driven by economic issues – fixed incomes and rising rents
        - Concerns that this is a rapidly growing population experiencing homelessness
        - Local organization -- Northwest Pilot Project
    - One example of how these populations are different -- availability of shelter beds
        - Majority opinion: "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."
        - For families, there is a wait list – there is no shelter space every night
        - Housing Choice Vouchers (Section 8) – the waitlist only opens every couple of years and thousands apply

- Further reading
    - Evicted, by Matthew Desmond
    - Rough Sleepers, by Tracy Kidder
    - There Is No Place For Us, by Brian Goldstone
        - At Powells on June 9

Positive
As of: March 25, 2025 5:43 PM Z

City of Grants Pass v. Johnson

Supreme Court of the United States

April 22, 2024, Argued; June 28, 2024, Decided

No. 23-175.

Reporter
603 U.S. 520 *; 144 S. Ct. 2202 **; 219 L. Ed. 2d 941 ***; 2024 U.S. LEXIS 2881 ****; 30 Fla. L. Weekly Fed. S 495

CITY OF GRANTS PASS, OREGON, PETITIONER v. GLORIA JOHNSON, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

Notice: The pagination of this document is subject to change pending release of the final published version.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Johnson v. City of Grants Pass, 72 F.4th 868, 2023 U.S. App. LEXIS 17187 (9th Cir. Or., July 5, 2023)

Disposition: *72 F. 4th 868*, reversed and remanded.

Core Terms

homeless, shelter, sleeping, Ordinances, criminalize, beds, encampments, Amici, punish, camping, homeless people, Amicus, fines, local government, experiencing, streets, involuntarily, housing, spaces, questions, residents, sidewalks, temporary, arrested, addict, limits, public property, disabilities, unsheltered, injunction

Case Summary

Overview

HOLDINGS: [1]-An Oregon city's ordinances restricting camping in public spaces did not violate the *Eighth Amendment's Cruel and Unusual Punishments Clause* as the Clause did not focus on whether a government could criminalize particular behavior in the first place, and none of the sanctions imposed by the city were either cruel or unusual; [2]-The ordinances did not criminalize the mere status of homelessness, but instead prohibited such actions as occupying a campsite on public property for the purpose of maintaining a temporary place to live. Nothing in the *Eighth Amendment* permitted extension of the "mere status" rule to laws addressing actions that, even if undertaken with the requisite mens rea, might in some sense qualify as involuntary.

Outcome

Judgment reversed and case remanded. 6-3 decision; 1 concurrence; 1 dissent.

LexisNexis® Headnotes

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Property

HN1[] **Local Governments, Ordinances & Regulations**

Like many American cities, Grants Pass, Oregon, has laws restricting camping in public spaces. One prohibits sleeping on public sidewalks, streets, or alleyways. Grants Pass, Or., Municipal Code § 5.61.020(A) (2023). A second prohibits "camping" on public property. Grants Pass, Or., Municipal Code § 5.61.030. Camping is defined as setting up or remaining in or at a campsite, and a “campsite” is defined as any place where bedding, sleeping bags, or other material used for bedding purposes, or any stove or fire is placed for the purpose of maintaining a temporary place to live. Grants Pass, Or., Municipal Code § 5.61.010(A)-(B). A third prohibits “camping” and “overnight parking” in the city’s parks. Grants Pass, Or., Municipal Code § 6.46.090(A)-(B). Penalties for violating these ordinances escalate stepwise. An initial violation may trigger a fine. Grants Pass, Or., Municipal Code § 1.36.010(I)-(J). Those who

receive multiple citations may be subject to an order barring them from city parks for 30 days. Grants Pass, Or., Municipal Code § 6.46.350. 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. *Or. Rev. Stat. §§ 164.245*, *161.615(3)*, 161.635(1)(c) (2023).

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

HN2[] **Equal Protection, Nature & Scope of Protection**

The U.S. 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 the people, as to be ranked as fundamental. 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.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN3[] **Fundamental Rights, Cruel & Unusual Punishment**

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. The *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 impose for the violation of criminal statutes.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN4[] **Fundamental Rights, Cruel & Unusual Punishment**

The *Cruel and Unusual Punishments Clause of the Eighth Amendment* 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. To the extent the Constitution speaks to those other matters, it does so in other provisions.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Property

HN5[] **Fundamental Rights, Cruel & Unusual Punishment**

Under the City of Grants Pass, Oregon's, public camping 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. None of the city's sanctions qualifies as cruel because none is designed to superadd terror, pain, or

disgrace. Nor are the city's sanctions unusual, because similar punishments have been and remain among the usual modes for punishing offenses throughout the country. Fines have been described as the drudge-horse of criminal justice, probably the most common form of punishment. In fact, large numbers of cities and states across the country have long employed, and today employ, similar punishments for similar offenses.

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Property

HN6[] Local Governments, Ordinances & Regulations

Rather than criminalize mere status, Grants Pass, Oregon, forbids actions like occupying a campsite on public property for the purpose of maintaining a temporary place to live. Grants Pass, Or., Municipal Code §§ 5.61.030, 5.61.010. 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.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN7[] Fundamental Rights, Cruel & Unusual Punishment

Robinson v. California authorizes a very small intrusion by courts into the substantive criminal law under the aegis of the *Cruel and Unusual Punishments Clause of the Eighth Amendment*. That small intrusion prevents states only from enforcing laws that criminalize a mere status. 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. That remains true regardless whether the defendant's act in some sense might be described as involuntary or occasioned by a particular status.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN8[] Fundamental Rights, Cruel & Unusual Punishment

Robinson v. California sits uneasily with the *Eighth Amendment's* terms, original meaning, and the United States Supreme Court's precedents. Its holding is restricted to laws that criminalize mere status. Nothing in the decision calls into question the broad power of states to regulate acts undertaken with some mens rea. And the Court discerns nothing in the *Eighth Amendment* that might provide the Court with lawful authority to extend Robinson beyond its narrow holding.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN9[] Procedural Due Process, Scope of Protection

A state rule about criminal liability may violate due process if it departs from a rule so rooted in the traditions of the Nation that it might be said to rank as fundamental. But questions about whether an individual who has committed a proscribed act with the requisite mental state should be relieved of responsibility, due to a lack of moral culpability, are generally best resolved by the people and their elected representatives. Those are questions of recurrent controversy to which history supplies few entrenched answers, and on which the Constitution generally commands no one view.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN10[] Fundamental Rights, Cruel & Unusual Punishment

The *Eighth Amendment* provides no guidance to confine judges in deciding what conduct a state or city may or may not proscribe.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN11[] Fundamental Rights, Cruel & Unusual Punishment

The *U.S. 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 the Nation's homelessness policy.

Syllabus

[2204] [*520]** 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* ***[****2]*** 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*.

[*521] *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. 541-561.

(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 **[****3]** 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 **[**2205]** "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, 20 L. Ed. 2d 1254*.

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." **[****4]** *Bucklew, 587 U. S., at 130, 139 S. Ct. 1112, 203 L. Ed. 2d 521* (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, 72 U.S. 475, 5 Wall. 475, 480, 18 L. Ed. 608*. Indeed, cities and States across the country have long employed similar punishments for similar offenses. Pp. 541-543.

(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. Cal., 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, 8 L. Ed. 2d 758*. While California could not make "the 'status' of narcotic addiction a criminal offense," *id., at 666, 82 S. Ct. 1417, 8 L. Ed. 2d 758*, **[*522]** 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, 8 L. Ed. 2d 758*. 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, 8 L. Ed. 2d 758* The Court read the Cruel and Unusual Punishments Clause (in a way unprecedented in 1962) to impose a limit on what a State may **[****5]** 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, 8 L. Ed. 2d 758*. 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, 8 L. Ed. 2d 758*. 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 public-camping **[**2206]** 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, **[****6]** *Robinson* is not implicated. Pp. 543-547.

(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, 20 L. Ed. 2d 1254* (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, 20 L. Ed. 2d 1254*. 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, 20 L. Ed. 2d 1254.* It does nothing to curtail a State's **[*523]** authority to secure a conviction when "the accused has committed some act . . . society has an interest in preventing." **[****7]** *Id., at 533, 88 S. Ct. 2145, 20 L. Ed. 2d 1254*. 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. 547-550.

(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, 20 L. Ed. 2d 1254*. 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 **[****8]** his "'condition.'" *Id., at 535-536, 88 S. Ct. 2145, 20 L. Ed. 2d 1254*. 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, 20 L. Ed. 2d 1254*. 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, 206 L. Ed. 2d 312*, due to a lack of "moral culpability," *id., at 286, 140 S. Ct. 1021, 206 L. Ed. 2d 312*, are generally best resolved by the people and their elected representatives.

[2207]** Though doubtless well intended, the Ninth Circuit's *Martin* experiment defied these lessons. Answers to questions such as what constitutes "involuntary" 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, 20 L. Ed. 2d 1254*. As Justice Marshall **[****9]** 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 **[*524]** questions traditionally "thought to be the[ir] province." *Id., at 535-536, 88 S. Ct. 2145, 20 L. Ed. 2d 1254*. Pp. 550-560.

(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, 8 L. Ed. 2d 758* (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. Pp. 560-561.

72 F. 4th 868, reversed and remanded.

Counsel: Theane D. Evangelis argued the cause for petitioner.

Edwin S. Kneedler argued the cause for United States, as amicus curiae.

Kelsi B. Corkran argued the cause for respondents.

Judges: 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 **[****10]** opinion, in which KAGAN and JACKSON, JJ., joined.

Opinion by: GORSUCH

Opinion

[*525] **[***949]** 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 **[*526]** public **[**2208]** 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 **[*527]** 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 **[*528]** 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" **[****11]** 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 **[*529]** 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 **[***950]** homes to escape domestic violence and other forms of exploitation. *Ibid.* And still others struggle **[****12]** 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." ***[****13]*** *Id*., at 7. And still others may seek them out for **[**2209]** "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 **[*530]** 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 **[****14]** 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. **[***951]** 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 **[****15]** 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).

[*531] 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 **[****16]** unsheltered populations have continued to grow. *Id*., at 9-11. The city of Seattle, for example, reports that **[**2210]** 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 **[*532]** may reject shelter because accepting it would take them further from family and local ties. See Brief for 57 Social Scientists as *Amici Curiae* ***[****17]*** 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 **[***952]** 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 **[****18]** 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 **[*533]** 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 **[****19]** 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 CFR §§7.96(i), (j)(1) (2023). And it, too, has exercised that authority **[**2211]** 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 **[***953]** against homeless individuals **[****20]** who lacked "access to alternative shelter." *Id., at* ***[*534]*** *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 **[****21]** 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 U.S. Dist. LEXIS 202038, 2023 WL 7283885, *1-*2 (ND Cal., Nov. 2, 2023)*; *Fund for Empowerment v. Phoenix, 646 F. Supp. 3d 1117, 1132 (Ariz. 2022)*; *Warren v. Chico, 2021 U.S. Dist. LEXIS 128471, 2021 WL 2894648, *3 (ED Cal., July 8, 2021)*.

[*535] 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 **[**2212]** 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 **[****22]** 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 **[***954]** 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 **[****23]** insist, has prevented local governments from pursuing "effective solutions to this humanitarian crisis while simultaneously protecting **[*536]** 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* ***[****24]*** *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, **[*537]** and do not well serve the homeless **[**2213]** 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 **[****25]** Oregon, the city is home to roughly 38,000 people. Among them are an estimated 600 individuals who experience homelessness on a given **[***955]** day. *72 F. 4th, at 874*; App. to Pet. for Cert. 167a-168a; 212a-213a.

HN1[↑] 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 **[****26]** 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 **[*538]** 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

[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 575-576* (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.

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 **[**2214]** sought to pursue their claim on behalf of a class encompassing "all **[***956]** involuntarily homeless people living in Grants Pass." *Id.*, at 48, ¶52.[2]

[*539] The district **[****27]** 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 **[****28]** 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).

[*540] 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 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 **[****29]** 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 **[***957]** 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, 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

[2215]** **[*541]** II

A

HN2[] 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 **[****30]** confront his accusers and have serious criminal charges resolved by a jury of his peers. One could go on.

HN3[] 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 **[*542]** 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 **[***958]** 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 **[**2216]** 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, 203 L. Ed. 2d 521 (quoting 4 Blackstone 370). And they were "unusual" because, by the time **[****31]** of the Amendment's adoption, they had "long fallen out of use." 587 U. S., at 130, 139 S. Ct. 1112, 203 L. Ed. 2d 521. 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.

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*. HN4[] 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 **[*543]** a conviction for that offense. Powell, 392 U. S., at 531-532, 88 S. Ct. 2145, 20 L. Ed. 2d 1254. To the extent the Constitution speaks to those other matters, it does so, as we have seen, in other provisions.

Nor, focusing on the criminal punishments Grant Pass imposes, can we say they qualify as cruel and unusual. HN5[] Recall that, under the city's ordinances, an initial offense may trigger a civil fine. Repeat **[****32]** 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, 203 L. Ed. 2d 521 (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, 72 U.S. 475, 5

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.

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 **[***959]** 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 **[****33]** theory. They do not question that, by its terms, **[*544]** the *Cruel and Unusual Punishments Clause* **[**2217]** 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, 8 L. Ed. 2d 758*. 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, 8 L. Ed. 2d 758*. 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, 8 L. Ed. 2d 758*.

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 **[****34]** possession, or for antisocial or disorderly behavior resulting from their administration." *Id., at 666, 82 S. Ct. 1417, 8 L. Ed. 2d 758*. 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, 8 L. Ed. 2d 758*. 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, 8 L. Ed. 2d 758*. 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 **[*545]** 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 **[***960]** 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. 111, 28 L. Ed. 232 (1884)*; see also *Kahler, 589 U. S., at 279, 140 S. Ct. 1021, 206 L. Ed. 2d 312*. And, historically, crimes in England and **[****35]** 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

[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.

[2218]** 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 **[****36]** to withdraw from drugs after conviction qualified as cruel and unusual punishment.

[*546] 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, 8 L. Ed. 2d 758. 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 **[****37]** 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, 8 L. Ed. 2d 758. The Court held only that a State may not criminalize the "'status'" **[***961]** of being an addict. Id., at 666, 82 S. Ct. 1417, 8 L. Ed. 2d 758. 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. **HN6**[↑] 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 **[*547]** 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 **[****38]** do not criminalize mere status, *Robinson* is not implicated.[5]

[2219]** 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 578-579 (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 578-579. To rule otherwise, the argument goes, would "'effectively'" allow cities to **[*548]** punish a person because of his status. Post, at 586. The Ninth Circuit pursued just this line of thinking below and in *Martin*.

The problem is, this Court has already rejected **[****39]** that view. In Powell v. Texas, 392 U. S. 514, 88 S. Ct.

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[5] At times, the dissent seems to suggest, mistakenly, that laws like Grants Pass's apply only to the homeless. See post, at 575. 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 579-581. 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.

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, 20 L. Ed. 2d 1254* (plurality opinion). Like the plaintiffs here, Mr. **[***962]** Powell argued that his drunkenness was an "'involuntary'" byproduct of his status as an alcoholic. *Id., at 533, 88 S. Ct. 2145, 20 L. Ed. 2d 1254*. 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, 20 L. Ed. 2d 1254 (Fortas, J., dissenting).

The Court did not agree. Writing for a plurality, Justice Marshall observed that HN7[↑] *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, 20 L. Ed. 2d 1254. That small intrusion, Justice Marshall said, prevents **[****40]** States only from enforcing laws that criminalize "a mere status." *Id., at 532, 88 S. Ct. 2145, 20 L. Ed. 2d 1254*. 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, 20 L. Ed. 2d 1254*. 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, **[*549]** 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, 8 L. Ed. 2d 758. 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. **[**2220]** 2145, 20 L. Ed. 2d 1254.[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 **[****41]** addressing actions that, even if undertaken **[***963]** 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, HN8[↑] *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 **[*550]** nothing in the Eighth Amendment that might provide us with lawful authority to extend *Robinson* beyond its narrow holding.

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

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[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, 20 L. Ed. 2d 1254 (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).

536, 88 S. Ct. 2145, 20 L. Ed. 2d 1254. States and cities are free as well to add additional substantive **[****42]** 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 **[**2221]** the dangers that would likely attend any attempt to do so. Were the Court to pursue that path **[*551]** in the name of the Eighth Amendment, Justice Marshall warned, "it is difficult to see any limiting principle that would serve **[****43]** 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, 20 L. Ed. 2d 1254*. After all, nothing in the Amendment's text or history exists to "confine" or guide our review. *Id., at 534, 88 S. Ct. 2145, 20 L. Ed. 2d 1254*. 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, 20 L. Ed. 2d 1254*. Along the way, we would interfere with "essential considerations of federalism" that reserve **[***964]** to the States primary responsibility for drafting their own criminal laws. *Id., at 535, 88 S. Ct. 2145, 20 L. Ed. 2d 1254*.

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, 20 L. Ed. 2d 1254*. 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, 20 L. Ed. 2d 1254*. 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 **[****44]** of the Constitution that does not speak to them. *Id., at 536, 88 S. Ct. 2145, 20 L. Ed. 2d 1254*. 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, 20 L. Ed. 2d 1254*.

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 **HN9**[↑] "a state rule about criminal liability" may violate due process if it departs from a rule "so rooted in the **[*552]** traditions" of this Nation that it might be said to "ran[k] as fundamental." *589 U. S., at 279, 140 S. Ct. 1021, 206 L. Ed. 2d 312* (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, 206 L. Ed. 2d 312*, due to a lack of "moral culpability," *id., at 286, 140 S. Ct. 1021, 206 L. Ed. 2d 312*, 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, 206 L. Ed. 2d 312*.

The Ninth Circuit's *Martin* experiment defied these lessons. **[****45]** 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." *589 U. S., at 283, 286, 140 S. Ct. 1021, 206 L. Ed. 2d 312*. 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 standard? **[**2222]** 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 **[***965]** 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, **[****46]** they cannot be found in the *Cruel and Unusual Punishments Clause*. Nor **[*553]** 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 **[****47]** 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 **[*554]** 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 **[****48]** 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 **[***966]** 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").

[2223]** 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 U.S. Dist. LEXIS 128471, 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 **[****49]** outdoor, spaces. *Warren, 2021 U.S. Dist. LEXIS 128471, 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 U.S. Dist. LEXIS 85999, 2020 WL 2512811, *4 (CD Cal., May 15, 2020)*. By imbuing the availability of shelter **[*555]** 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 **[****50]** 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 U.S. Dist. LEXIS 22905, 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, **[***967]** *392 U. S., at 534, 88 S. Ct. 2145, 20 L. Ed. 2d 1254*.

Doubtless, the Ninth Circuit's intervention in *Martin* was well-intended. But since the trial court entered its injunction **[*556]** 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 **[****51]** 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 **[**2224]** 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. ***HN10***[] 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, 20 L. Ed. 2d 1254*. 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, 20 L. Ed. 2d 1254*. Issued by federal courts **[****52]** 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, 20 L. Ed. 2d 1254*.[7]

[*557] 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 587*, and stripping away any protections "the Constitution" has against "criminalizing sleeping," *post, at 567*. "Either stay awake," the dissent warns, "or be arrested." *Post, at 564*. That is **[***968]** gravely mistaken. We hold nothing of the sort. As we have stressed, cities and States are not bound to adopt public-camping laws.

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[7] The dissent suggests we cite selectively to the *amici* and "see only what [we] wan[t]" in their briefs. *Post, at 586*. 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 586-587*. 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*.

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 **[****53]** 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 574, 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* **[*558]** is itself hard to square with the Amendment's text and this Court's other precedents interpreting it. And the dissent **[**2225]** 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, 20 L. Ed. 2d 1254*. Rather than confront any of this, the dissent brusquely calls *Powell* a "strawman" and seeks to distinguish it on the inscrutable ground that Grants Pass penalizes "status[-defining]" (rather than "involuntary") conduct. *Post, at 584-585*. But whatever that might mean, it is no answer to the reasoning Justice **[****54]** 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 577*; 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 563, 567, 572, 583-584, 586*. 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? **[***969]** And **[****55]** what are people entitled to do and use **[*559]** 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. **[**2226]** 2145, 20 L. Ed. 2d 1254*. 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, 20 L.*

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[8] The dissent brushes aside these questions, declaring that "available answers" exist in the decisions below. *Post, at 584*. 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 583-584*. 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 576, 583-584, 586*. But where does that rule come from, the federal register? See *post, at 584*. 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.

Ed. 2d 1254, and one that would deny communities the "wide latitude" **[*560]** and "flexibility" even the dissent acknowledges they need to address the homelessness crisis, *post, at 564, 567*.

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 **[****56]** 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.

[*970]** 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 **[****57]** best to handle" a pressing social question like homelessness. *Robinson, 370 U. S., at 689, 82 S. Ct. 1417, 8 L. Ed. 2d 758* (White, J., dissenting). ***HN11***[⬆] 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 **[*561]** judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: THOMAS

Concur

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 542 (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, 8 L. Ed. 2d 758*. That holding conflicts with the plain **[****58]** text and history of the *Cruel and Unusual Punishments Clause*. See *ante, at 541-543*. **[**2227]** 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, 8 L. Ed. 2d 758*. 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.

[*562] 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, **[***971]** 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, 161 L. Ed. 2d 1* (opinion of Scalia, J.). I

continue to **[****59]** 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 546-547*. 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 546*. 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 541-543*. The respondents have yet to explain how the civil fines **[****60]** and park **[*563]** exclusion orders constitute a "penalty imposed for the commission of a crime." *Helling, 509 U. S., at 38, 113 S. Ct. 2475, 125 L. Ed. 2d 22*.

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 **[**2228]** 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 537-538*.

Because the respondents' claims fail either way, the Court does not address the merits of the Court of **[***972]** Appeals' theory. See *ante, at 542-543*, and **[****61]** 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.

Dissent by: SOTOMAYOR

Dissent

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 **[*564]** 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; **[****62]** 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 **[****63]** 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 **[*565]** 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 **[**2229]** interconnected. The majority paints a picture of "cities across the American West" in "crisis" that are using criminalization as a last resort. **[***973]** *Ante*, at 525. 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, **[****64]** 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 connections 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 **[*566]** 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 **[****65]** 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 **[****66]** mental health conditions, including post-traumatic stress disorder (PTSD) . . . are at greater risk of **[***974]** 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, **[**2230]** sexual **[*567]** 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 **[****67]** 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 581-583. 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 **[****68]** (2012).

[*568] 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 **[***975]** 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." **[****69]** 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"). Finally, **[**2231]** 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*.

[*569] 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 **[****70]** 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 **[****71]** 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, **[*570]** the worker had difficulty finding him for **[***976]** 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 **[****72]** 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 **[**2232]** 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]

[*571] 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 **[****73]** 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 **[***977]** 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. **[****74]** 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

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[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)***.

on public property within the City is if they lay on the ground **[*572]** 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*., **[**2233]** 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, **[****75]** 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, **[*573]** 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: **[****76]** 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).

[*978]** 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, 8 L. Ed. 2d 758*. 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, 8 L. Ed. 2d 758*. 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, 8 L. Ed. 2d 758*. Importantly, the Court did not limit that holding to the status of narcotic addiction alone. It began by reasoning that the criminalization **[****77]** 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, 8 L. Ed. 2d 758*. 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, 8 L. Ed. 2d 758*.

Unlike the majority, see *ante, at 541-543*, 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, 8 L. Ed. 2d 758*. Instead, it reasoned that, **[*574]** when imposed because of a **[**2234]** 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, 8 L. Ed. 2d 758*. 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 **[****78]** . . . 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, 8 L. Ed. 2d 758*.

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 **[***979]** 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, 97 S. Ct. 285, 50 L. Ed. 2d 251, **[*575]** and n. 7 (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 **[****79]** 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 547*. 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, **[**2235]** 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 **[****80]** 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 **[*576]** 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]

[*980]** 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

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[2] See *ante*, at 546 ("[N]o one has asked us to reconsider *Robinson*. Nor do we see any need to do so today"); but see *ante,* at 549 (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.

[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 538, 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)).

material used for bedding purposes" is placed **[****81]** "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 546-547*. 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 **[*577]** 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 CFR §§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 **[****82]** 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 **[**2236]** 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, **[***981]** 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)*; **[*578]** see also Disability **[****83]** 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 546*. 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 546-547* (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 **[****84]** 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, 8 L. Ed. 2d 758*. 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, **[*579]** 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)).

[**85]** C

The Ordinances are enforced exactly as intended: to criminalize the status of being **[**2237]** homeless. City officials sought to use the Ordinances to drive homeless people out of town. See *supra*, at 575-576. 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 **[***982]** 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, **[****86]** 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 **[*580]** the fact that there is no affordable housing or emergency shelter 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 7, 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 **[****87]** 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 546-547. That describes a fantasy. In reality, the deputy chief of police operations acknowledged that he was not aware of "any non-homeless 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 **[*581]** 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 **[***983]** to agree **[**2238]** that an ordinance that **[****88]** fined and jailed "homeless" people would be unconstitutional. See *ante, at 547* (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 **[****89]** liberties secured by the Constitution." *Schneider, 308 U. S., at 160, 60 S. Ct. 146, 84 L. Ed. 155*.

The Ninth Circuit in *Martin* provided that "an ordinance violates the *Eighth Amendment* insofar as it imposes criminal **[*582]** 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, **[****90]** services, and other resources; others have sought to impose **[***984]** 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 littering." **[**2239]** Brief for Maryland et al. as *Amici Curiae* 12. All of **[*583]** 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, **[****91]** 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 558-559*. 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, **[****92]** whether because they have the means to pay for it or because it is realistically available to them for free." **[*584]** *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 558-559*. The District Court's opinion also provided a clear answer: They are

[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 533-537, 554-555*. This Court is not asked today to consider any of these interpretations or extensions of *Martin*.

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 **[***985]** ones. See, *e.g.*, 42 U. S. C. §11302 (defining "homeless," "homeless individual," and "homeless person"); 24 CFR §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 559, n. 8*, does not absolve federal judges of the responsibility to interpret and **[****93]** enforce the substantive bounds of the Constitution. The majority proclaims that this dissent "blinks the difficult questions." *Ante, at 558*. 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 **[**2240]** 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, 20 L. Ed. 2d 1254* (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, 20 L. Ed. 2d 1254* (opinion concurring **[*585]** 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, 20 L. Ed. 2d 1254*.

This case similarly called for a straightforward application of *Robinson*. The majority finds it telling that this dissent "barely mentions" Justice Marshall's **[****94]** opinion in *Powell*. *Ante, at 558*.[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, 20 L. Ed. 2d 1254*. 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, 20 L. Ed. 2d 1254*. For all the reasons discussed above, see *supra,* at 575-581, these Ordinances criminalize status and are thus unconstitutional under any of the opinions in *Powell*.

[*986]** 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 540*; see also *ante, at 535* ("An exceptionally large number of cities and States have filed briefs in **[*586]** this Court"); *ante, at 560* (noting the "multitude of *amicus* briefs before us"); *ante, at 540, n. 3* (listing certiorari-stage **[****95]** *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 557*. 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 560*. 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 **[**2241]** what it wants. Many of those stakeholders support the narrow rule in *Martin*. See,

[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 558*. That is wrong. See *supra*, at 574 (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 558. That too is wrong. See *supra*, at 573-574 (discussing *Robinson*'s distinction between status and conduct).

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 **[****96]** 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 **[*587]** 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 533, 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. **[****97]** 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 **[***987]** 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 588. 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 **[****98]** laws against the homeless." *Ante*, at 557. That is true. Although I do not prejudge the merits of these other issues, I detail some here so that people experiencing **[*588]** 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 **[**2242]** 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 arrests for sleeping or camping on public property when there are no other options.'" Brief in Opposition 35 (quoting Speaker **[****99]** 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 **[*589]** 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

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[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.

constitutional inquiry under **[***988]** 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, 141 L. Ed. 2d 314.

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. **[****100]** *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 541 (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 545. 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 **[*590]** 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." **[****101]** Ante, at 545.

Relatedly, this Court has concluded that some vagrancy laws are unconstitutionally vague. See, *e.g.*, Kolender v. Lawson, 461 U. S. 352, 361-362, ***[**2243]*** 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 **[***989]** 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 **[****102]** 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 547, n. 5 (noting that these Ordinances " **[*591]** 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, 2 L. Ed. 2d 630 (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.

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Homelessness in America is a complex and heartbreaking crisis. People experiencing homelessness face immense **[****103]** 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).

[*592] **[**2244]** 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 560*. 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 **[***990]** our time and resources for worthwhile causes." M. Desmond, Evicted: Poverty and Profit in the American City 294 (2016).

This Court, too, has a role **[****104]** 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.

ARTICLE: CITY OF GRANTS PASS V. JOHNSON: THE LIMITS OF THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

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ABSTRACT

The case of *City of Grants Pass v. Johnson* arose against the backdrop of a rising homeless population not seen before and the struggles cities faced with addressing this rise in homelessness and the proliferation of homeless encampments in urban areas. The case presented the question whether the City of Grants Pass ordinances that prohibited the homeless from sleeping or camping outside constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Both the District Court and the Ninth Circuit Court of Appeals held that it did. The United States Supreme Court reversed, finding that the ordinances did not violate the Eighth Amendment. In its decision, the Court confined its prior precedent in *Robinson v. California* and *Powell v. Texas*, which the Ninth Circuit expanded to hold that homelessness was an involuntary status that could not be criminally punished under the Eighth Amendment. The Supreme Court confined *Robinson* and *Powell* and restored an originalist and textualist interpretation of the Eighth Amendment. The Court's decision and rationale are consistent with Christian worldview principles of limited jurisdiction and justice to the poor and vulnerable. After the *Grants Pass* decision, Christians must continue, as they have for centuries, to reach out in new and various ways to the homeless, especially considering the current unprecedented level of homelessness in the United States.

Text

[*487]
I. INTRODUCTION

What does cruel and unusual punishment mean? When does a punishment cross the line to be considered cruel? Or when and how is a punishment unusual? Must a criminal sanction be limited to punishing certain behavior, or is it permissible to punish a person for something over which they have no control? These are general questions about the scope and reach of the Eighth Amendment's Cruel and Unusual Punishments Clause. The United States Supreme Court has wrestled with these general questions over the span of time since the adoption of the Eighth Amendment. The case of *City of Grants Pass v. Johnson*[1] presented these same general questions but in the

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context of a more specific inquiry namely, does the Eighth Amendment's prohibition on cruel and unusual punishment prohibit punishing someone for sleeping outside when that person has nowhere else to sleep?

The case had been popularly described in the media as presenting the question of whether a city could punish homeless people for sleeping outside.[2] Yet, the case presented far more fundamental questions than that. The questions presented in the *Grants Pass* case arose against the backdrop of a rising homeless population across the country, squalid and dangerous homeless encampments, and judicial control over the tools local cities and counties could utilize to address the homelessness crisis. The case also was the product of a unique Supreme Court case that had been extended by the Ninth Circuit Court of Appeals in ways that threatened to upend the Eighth **[*488]** Amendment and stretch it beyond its original or textual meaning. This article will begin by describing the factual background of the case and the precedential history prior to the case. The article will then discuss the Supreme Court's decision before concluding with an analysis of the case in light of a Christian worldview.

II. *CITY OF GRANTS PASS V. JOHNSON* CASE BACKGROUND

The United States is experiencing a dramatic rise in homelessness. The number of homeless people has risen to the point where in 2023, the United States Department of Housing and Urban Development reported to Congress that "roughly 653,100 people or about 20 of every 10,000 people in the United States were experiencing homelessness."[3] The report noted that the 2023 numbers were "the highest number of people reported as experiencing homelessness on a single night since reporting began in 2007."[4] The report also found that "[s]ix out of every 10 people experiencing homelessness did so in an urban area."[5]

This congregation of the majority of homeless in urban areas began to put a strain on cities and led to unique issues. One example is the increase in homeless encampments. For instance, the City of Phoenix's encampment became colloquially known as "the Zone."[6] The Zone was a homeless encampment in downtown Phoenix which, "at its largest, held over a thousand unsheltered residents."[7] The City of Phoenix changed its policy toward homeless persons in 2018 to one of non-enforcement of regulations limiting where and when the homeless could gather and stay.[8] As a result, the homeless began to congregate in the downtown area of the city, where they set up "semi-permanent tent encampments on the public sidewalks, public grounds, and public rights of way, making the Zone the largest 'homeless **[*489]** encampment' in the State of Arizona."[9] The City did not enforce its criminal, health, and other quality of life statutes and ordinances in the Zone, leading to numerous problems, including a dramatic increase in violent crime and public drug use.[10] Because of the high concentration of homeless in the Zone, the area became a known biohazard, emptying human waste into the state's waterways.[11] Residents and

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[1] City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

[2] *See, e.g.*, Claire Rush, *Can Homeless People be Fined for Sleeping Outside? A Rural Oregon City Asks the US Supreme Court*, ASSOCIATED PRESS (Apr. 14, 2024, 12:13 AM), https://apnews.com/article/grants-pass-oregon-supreme-court-homeless-encampments-a8dcddb518bd76b11d409666c06701b8.

[3] TANYA DE SOUSA, ET AL., DEP'T OF HOUSING & URBAN DEV., OFF. OF COM. PLANNING & DEV., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 2 (2023).

[4] *Id.*

[5] *Id.*

[6] Fund for Empowerment v. City of Phoenix, 646 F. Supp. 3d 1117, 1122 (D. Ariz. 2022).

[7] *Id.*

[8] Brown v. City of Phoenix, No. CV 2022-010439, slip op. at 3 (Ariz. Super. Ct. 2023) (granting preliminary injunction).

[9] *Id.* at 3-4.

[10] *Id.* at 5-7.

business owners in the area of the Zone saw a dramatic increase in property crimes, prostitution, public indecency, fire hazards, and blocking of the right of way.[12] These issues were not solely directed outside of the Zone but affected the homeless inside the Zone at an alarming rate. The issues involved with the Zone led a group of property owners, residents, and business owners to file a lawsuit alleging a public nuisance and seeking to force the City of Phoenix to clean up the Zone.[13]

Phoenix was not the only city facing such encampments. In 2020, the United States Department of Housing and Urban Development detailed in a report nine cities facing homeless encampments and their various responses.[14] The report stated that "[a]s of 2019, homeless encampments were appearing in numbers not seen in almost a century."[15] It also noted that "[t]he growth of encampments mirrored the increase in unsheltered **[*490]** homelessness overall . . . ."[16] The report also acknowledged that "[e]ncampments have implications for the health, safety, and well-being of the people who use them as well as for the surrounding communities with possible adverse effects on public health and safety, environmental quality, economic vitality, and the allocation of public resources."[17]

The issues created by homeless encampments and the rise in the number of homeless overall prompted many cities to seek different ways to address the issue of the homeless, including the associated problems with encampments and living unsheltered. The City of Grants Pass, Oregon, was one such city. Grants Pass is home to about 38,000 people, and there are, at any given time, an estimated 600 homeless individuals in the city.[18] The City passed three different ordinances restricting camping in public places. One prohibited sleeping "on public sidewalks, streets or alleyways."[19] The second prohibited "[c]amping: on public property" and defined camping as "set[ting] up . . . or remain[ing] in or at a campsite."[20] A "campsite" was defined in the ordinance 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."[21] The third ordinance passed by the City prohibited camping

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[11] *Id.* at 7-8.

[12] *Id.* at 8-9.

[13] *Id.* at 2.

[14] The nine cities were Chicago, Illinois; Fresno, California; Houston, Texas; Las Vegas, Nevada; Minneapolis, Minnesota; Philadelphia, Pennsylvania; Portland, Oregon; San Jose, California; and Tacoma, Washington. LAUREN DUNTON ET AL., DEP'T OF HOUSING & URBAN DEV., OFF. OF POLICY DEV. & RSCH., EXPLORING HOMELESSNESS AMONG PEOPLE LIVING IN ENCAMPMENTS & ASSOCIATED COST: CITY APPROACHES TO ENCAMPMENT & WHAT THEY COST ES1 (2020), https://www.huduser.gov/portal/sites/default/files/pdf/Exploring-Homelessness-Among-People.pdf.

[15] *Id.* A study by homeless advocacy groups showed that homelessness has been on the rise since 2017 and approximately 421,392 homeless persons existed in the United States in 2023. *State of Homelessness: 2023 Edition*, NAT'L ALL. TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/.The City of Los Angeles reported in 2024 that, "[a]pproximately 42,000 people are unsheltered and sleeping on the streets of the City of Los Angeles on a given night." *Homelessness*, L.A. CITY ATT'Y, https://cityattorney.lacity.gov/homelessness (last visited Oct. 21, 2024).

[16] DUNTON ET AL., *supra* note 14, at ES1.

[17] *Id.* (citations omitted).

[18] City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2213 (2024).

[19] *Id.* (quoting GRANTS PASS MUNICIPAL CODE § 5.61.020(A) (2023)).

[20] *Id.* (alterations in original) (quoting GRANTS PASS MUNICIPAL CODE § 5.61.030 (2023)).

[21] *Id.* (alterations in original) (quoting GRANTS PASS MUNICIPAL CODE §§ 5.61.010(A)-(B) (2023)).

and overnight parking in city parks.[22] Initial violations resulted in a fine, multiple violations can result in an order barring the individual from a city park, and escalation can eventually lead to criminal trespass and associated punishment of jail time and fine.[23]

After the Ninth Circuit Court of Appeals invalidated a similar ordinance in the City of Boise,[24] a group of homeless individuals filed suit against the City of Grants Pass, seeking to invalidate the three ordinances. The lawsuit **[*491]** claimed that the "ordinances violated the Eighth Amendment's Cruel and Unusual Punishments Clause."[25]

At the time of filing the lawsuit, Plaintiff Debra Blake had been homeless for eight to ten years and lived in transitional housing.[26] Plaintiff John Logan had been intermittently homeless for about ten years and slept in different places or in his car.[27] Plaintiff Gloria Johnson lived full-time in her van.[28] All three plaintiffs filed a class action "on behalf of all involuntarily homeless persons in Grants Pass."[29] The District Court certified the class action finding, in part, that the City's conduct of "punishing homeless individuals for engaging in activities necessary to sustain life" applied equally to all class members.[30]

The District Court later issued an injunction prohibiting the City from enforcing its three ordinances.[31] The court held that the case was controlled by an earlier Ninth Circuit opinion, *Martin v. Boise*,[32] which held that when there are more homeless people in a city than there are available shelter beds, the city is prohibited under the Eighth Amendment's Cruel and Unusual Punishments Clause from punishing homeless people for sleeping outside. Finding that the record was undisputed that Grants Pass had more homeless individuals than it had available beds, the district court stated that: "[I]ts practice of punishing people who have no access to shelter for the act of sleeping or resting outside while having a blanket or other bedding to stay warm and dry constitutes cruel and unusual punishment in violation of the Eighth Amendment."[33]

A divided panel of the Ninth Circuit affirmed the District Court, agreeing that the anti-camping ban violated the Eighth Amendment.[34] A clearly **[*492]** divided appeals court denied rehearing en banc with six different opinions filed regarding the denial of rehearing.[35] The division among the court of appeals judges was primarily over the

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[22] *Id.*

[23] *Id.*

[24] **Martin v. Boise, 920 F.3d 584 (9th Cir. 2019)**.

[25] *City of Grants Pass*, 144 S. Ct. at 2213.

[26] Blake v. Grants Pass, No. 1:18-cv-01823-CL, 2019 U.S. Dist. LEXIS 132508, at *1 (D. Or. 2019).

[27] *Id.* at *2.

[28] *Id.*

[29] *Id.* at *5.

[30] *Id.* at *18-19.

[31] Blake v. City of Grants Pass, No. 1:18-cv-01823-CL, 2020 U.S. Dist. LEXIS 129494 (D. Or. 2020).

[32] **Martin v. Boise, 920 F.3d 584 (9th Cir. 2019)**.

[33] *Blake*, 2020 U.S. Dist. LEXIS 129494, at *27.

[34] Johnson v. City of Grants Pass, 50 F.4th 787, 813 (9th Cir. 2022).

[35] The court issued its en banc denial order and amended opinion reprint under the same reporter entry. *See* **Johnson v. City of Grants Pass, 72 F.4th 868 (9th Cir. 2023)**.

reach and applicability of past Supreme Court precedent that, in the view of some of the judges, concluded with "a dubious holding premised on a fanciful interpretation of the Eighth Amendment."[36] The United States Supreme Court granted the City's petition for a writ of certiorari.[37]

To understand the United States Supreme Court's opinion, we must first understand the precedential background of the Eighth Amendment and the analytical approach under that precedent that contributed to such sharp disagreement among the lower courts regarding the ordinances at issue in the City of Grants Pass.

III. PRECEDENTIAL BACKGROUND

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[38] The Cruel and Unusual Punishments Clause is the most amorphous portion of the amendment. The United States Supreme Court has not defined the clause with any precision, and its precedent reflects differing opinions on both the definition and the applicable analytical framework for interpreting the clause.

In the nineteenth century, the United States Supreme Court precedent under the Eighth Amendment's Cruel and Unusual Punishments Clause addressed what type of punishment for a specified crime was "cruel" and "unusual," often by evaluating whether the punishment was disproportionate to the crime.[39] These cases afforded some opportunity to explicate the **[*493]** meaning of the Cruel and Unusual Punishments Clause but did not set forth any clear analytical or decisional framework for interpreting new challenges as they arose under the Eighth Amendment.

In 1910, in *Weems v. United States*, the Supreme Court considered whether the Eighth Amendment's Cruel and Unusual Punishments Clause had a fixed meaning at the time of the passage of the amendment or whether it meant something more.[40] The Court stated its view that the Clause was not limited to the meaning at the time of the passage of the Amendment, but it also applied to "coercive cruelty being exercised through other forms of punishment."[41] The *Weems* Court believed that a constitutional amendment like the Eighth Amendment

> [was] enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.[42]

The Court explained that the Cruel and Unusual Punishments Clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice."[43] However, the

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[36] ***Id.* at 924-25** (O'Scannlain, J., dissenting) (regarding denial of rehearing en banc).

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

[38] U.S. CONST. amend. VIII.

[39] *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130, 135 (1878) (holding that "the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included . . . within the meaning of the eighth amendment."); O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J. dissenting) (stating that the Eighth Amendment "is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.").

[40] Weems v. United States, 217 U.S. 349 (1910).

[41] *Id.* at 373.

[42] *Id.* It should be noted that the *Weems* court was not construing the Eighth Amendment itself but rather a section of the Philippines Bill of Rights the Court held had the same meaning as the Eighth Amendment. *See id.* at 367.

[43] *Id.* at 378.

Court did not explain when enlightenment would occur, how what was considered "humane" would be decided, or how future courts should apply the Cruel and Unusual Punishments Clause beyond a "you know it when you see it as society evolves" approach.

In a later case, the Court cited to *Weems* and stated: "The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[44] In that **[*494]** case, the Court struck down loss of citizenship as punishment for a crime. It stated as part of its rationale that: "The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation."[45]

While these pronouncements may make general sense or even appeal to sensibilities in a modern age, subsequent courts have struggled to discern a limiting principle for the meaning of the Cruel and Unusual Punishments Clause. Just how evolving or living are the principles of the Eighth Amendment? And how does a court determine whether a "standard of decency" has evolved to the point where a particular punishment is now considered cruel or unusual? The confusion was significantly exacerbated by two Supreme Court decisions that wrestled with how to apply the Eighth Amendment to criminal punishment based on an individual's status or condition.

A. Robinson v. California: *Criminalizing Addiction as a Status*

Drawing upon *Weems* and past precedent, the United States Supreme Court significantly expanded the reach and applicability of the Eighth Amendment's Cruel and Unusual Punishments Clause in 1962 in the case of *Robinson v. California*. Lawrence Robinson was convicted under a California statute that made it a criminal offense to "be addicted to the use of narcotics."[46] A Los Angeles police officer testified at Robinson's trial that he had observed numerous needle marks on Robinson's arm and that Robinson had admitted when questioned that he occasionally used narcotics.[47] The jury was instructed that the criminal prohibition on the part of the statute that criminalized being "addicted to the use" of narcotics was "based upon a condition or status" and that it was different than the act of using drugs.[48] Stated differently, the jury instruction was that Robinson could be convicted of being addicted to the use of narcotics in the absence of any evidence of actual use of narcotics. Based on this instruction, Robinson was convicted. The California appellate court affirmed the conviction, and the United States Supreme Court agreed to hear the case to determine "whether the statute as **[*495]** construed by the California courts in this case is repugnant to the Fourteenth Amendment of the Constitution."[49]

The Court noted that the California statute could operate to convict a person without any actual proof that the person had used narcotics.[50] Robinson could be convicted if the jury merely found "that [his] 'status' or 'chronic condition' was that of being 'addicted to the use of narcotics.'"[51] The Court thus noted that it was dealing "with a

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[44] Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

[45] *Id.* at 103.

[46] Robinson v. California, 370 U.S. 660, 662 (1962).

[47] *Id.* at 661.

[48] *Id.* at 662.

[49] *Id.* at 664. The Court specifically would review the applicability of the Eighth Amendment's Cruel and Unusual Punishments Clause made applicable to the states through the Fourteenth Amendment.

[50] *Id.* at 665.

[51] *Id.*

statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'"[52]

In a short analysis,[53] the Court stated that it would be cruel and unusual for a state to "make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease."[54] The Court then found that the California statute was in the "same category" as a statute like this.[55] The Court rested its holding on a finding that "narcotic addiction is an illness" and was an "illness which may be contracted innocently or involuntarily."[56] In a footnote, the Court cited several medical studies to support its assertion that "[n]ot 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."[57] To underscore its holding, the Court concluded that while imprisonment for ninety days (the punishment levied under the California statute) is not necessarily cruel or unusual in the abstract, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[58]

[*496] Justice Douglas wrote a concurring opinion in which he highlighted the nature of addiction, reasoning that "[i]f 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."[59] Douglas concluded his concurring opinion stating, "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."[60]

Justice Harlan concurred in the judgment, not because he agreed that states could not subject narcotics addicts to its criminal law but because the jury instructions under the California statute "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."[61]

Justices Clark and White dissented from the Court's judgment, reasoning that the California statute was not a punishment for having an involuntary status but, in Justice Clark's view, was simply part of California's overall treatment regime for drug addiction.[62] Justice White's view was that the California statute should not be read as criminalizing an involuntary status but rather as criminalizing the act of "regular, repeated or habitual use of

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[52] Robinson v. California, 370 U.S. 660, 666 (1962).

[53] One legal scholar described the majority opinion as "somewhat vague in its interpretation of the eighth amendment." James S. Campbell, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1009 (1964).

[54] *Robinson*, 370 U.S. at 666.

[55] *Id.* at 667.

[56] *Id.*

[57] *Id.* at 667 n.9.

[58] *Id.* at 667.

[59] *Id.* at 674 (Douglas, J., concurring).

[60] Robinson v. California, 370 U.S. 660, 678 (1962) (Douglas, J., concurring).

[61] *Id.* at 678 (Harlan, J., concurring).

[62] *Id.* at 684-85 (Clark, J., dissenting).

narcotics immediately prior to . . . arrest . . . "[63] Both dissenting opinions rejected the characterization of the California statute as punishing an involuntary status similar to mental illness.[64]

The decision in *Robinson* raised more questions than it answered. One legal comment about the case shortly after it was decided noted that the Supreme Court had earlier expanded the reach of the Cruel and Unusual Punishments Clause "first by prohibiting punishments which are disproportionately severe in relation to the crime charged, and, recently by holding that the mental suffering incident to a punishment could be of prime **[*497]** importance in evaluating its severity."[65] The comment then described *Robinson* as "the Court further expand[ing] the scope of the eighth amendment by holding that the illness of narcotic addiction cannot be made a crime."[66]

Indeed, the *Robinson* expansion of the Cruel and Unusual Punishments Clause was done with broad language that left questions pending regarding how far the Court intended to expand the Eighth Amendment.[67] What constituted an involuntary status such that punishment of it violated the Clause? Does the "status" of a person need to be involuntary to come within the protection of the Clause? When would punishment be considered cruel and unusual when applied to laws punishing drug use or addiction? Was *Robinson* intended merely to be an outlier, or did it signal a broader reach of the Eighth Amendment than had previously been known? After all, *Robinson* was the first time the Court had invalidated a criminal law for punishing a "status."[68] As one legal scholar noted, "If it is unconstitutional to punish someone for suffering from a disease, can it be constitutional to punish him for acts that are caused by the disease? It seems clear that this question was intentionally left unanswered by the majority."[69] Some lower courts took *Robinson* expansively, holding that it was cruel and unusual punishment to punish a person for acts or behavior committed as a symptom of a disease.[70]

[*498] Some of these unanswered questions were revisited by the Court just six years after the *Robinson* decision in *Powell v. Texas*.[71]

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[63] *Id.* at 686 (White, J., dissenting).

[64] *Id.* at 680 (Clark, J. dissenting); *id.* at 685 (White, J. dissenting).

[65] *Imprisonment for the "Crime" of Narcotics Addiction Held Unconstitutional As Cruel and Unusual Punishment*, 111 U. PA. L. REV. 122, 123 n.4 (1962) (citing Weems v. United States, 217 U.S. 349 (1910)) (holding that punishment for falsification of an official record of imprisonment at a penal institution of hard labor for a period of twelve to twenty years while shackled at the ankle and wrist violated the Cruel and Unusual Punishments Clause); *Id.* at 123 n.5 (citing Trop v. Dulles, 356 U.S. 86, 100-02 (1958)) (holding that the Eighth Amendment violated when penalty was loss of citizenship).

[66] *Id.* at 123.

[67] One legal scholar noted that in *Robinson*, "The Court hedged potentially broad principles with careful, if confusing, narrowing language." Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 COLUM. L. REV. 927 (1969).

[68] *See* Robinson v. California, 370 U.S. 660, 660-61, 667-68 (1962).

[69] Greenawalt, *supra* note 67, at 929.

[70] Greenawalt surveyed the post-*Robinson* precedent and noted two high profile cases.

In *Driver v. Hinnant* and *Easter v. District of Columbia*, the Court of Appeals for the Fourth Circuit and four circuit court judges in the District of Columbia held that it is cruel and unusual punishment to impose a criminal penalty on a chronic alcoholic for public drunkenness. Alcoholism is a disease, they said, and drunk appearances in public, unwilled and ungovernable, are symptoms of the disease. It is as unconstitutional to punish such symptoms as the disease itself.

Id. at 929-30 (citations omitted) (first citing Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); and then Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966) (en banc)).

B. Powell v. Texas: *Criminalizing Drunkenness*

In *Powell*, the United States Supreme Court decided an Eighth Amendment challenge to Leroy Powell's conviction under a Texas statute that prohibited being "drunk or be[ing] found in a state of intoxication in any public place . . . ."[72] Powell was convicted of violating the statute and was fined twenty dollars.[73] He appealed, arguing that he was afflicted with chronic alcoholism and that his appearance in a public place was "not of his own volition," so to fine him would amount to cruel and unusual punishment prohibited by the Eighth Amendment.[74] Powell heavily relied upon *Robinson* in arguing his appeal.[75]

In a fractured opinion, the Supreme Court affirmed Powell's conviction, although there was no majority opinion regarding the rationale.[76] The plurality opinion (joined by Justices Marshall, Black, Harlan, and Chief Justice Warren) initially expressed reservations about the evidence Powell put on at trial regarding chronic alcoholism and concluded that "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."[77] The plurality **[*499]** admitted that "[w]e know very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself."[78] The opinion also highlighted the lack of agreement in the medical community regarding whether chronic alcoholism was a disease or what the manifestations of alcoholism really were.[79]

The plurality opinion also addressed the subject of alcoholism, generally agreeing that "it cannot be denied that the destructive use of alcoholic beverages is one of our principal social and public health problems."[80] Recognizing that, at the time, there appeared to be no effective method of treatment for alcoholism, the plurality opinion was nonetheless unwilling to conclude 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."[81]

When it came to Powell's reliance on *Robinson* in support of his position, the plurality noted that the Eighth Amendment's Cruel and Unusual Punishments Clause had historically been focused on the "method or kind of punishment" and not "the nature of the conduct made criminal."[82] The nature of the conduct criminalized had historically only been relevant to determine whether, in colloquial terms, the punishment fit the crime.[83] The plurality

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[71] Powell v. Texas, 392 U.S. 514 (1968).

[72] *Id.* at 517.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 532.

[76] *See id.* at 537.

[77] Powell v. Texas, 392 U.S. 514, 521 (1968).

[78] *Id.* at 521-22.

[79] *Id.* at 522-23.

[80] *Id.* at 526-27.

[81] *Id.* at 530.

[82] *Id.* at 531-32.

distinguished *Robinson* by stating that Powell was not convicted for his status as an alcoholic but rather for his behavior in appearing drunk in a public place.[84] The plurality was unwilling to view *Robinson* as anything more than an aberration that dealt with a conviction based on status in the absence of any criminal behavior (actus reus).[85] The plurality rejected the contention that "Robinson stands for the simple but subtle principle that criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[86] If that was the holding of *Robinson*, then the **[*500]** plurality saw no "limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."[87] The opinion underscored this lack of limiting principle by reasoning that if Powell could not be convicted under a rationale that he could not control his alcoholism, then it would be difficult to see how a state could convict a murderer who kills under a compulsion for killing.[88] The plurality concluded its opinion by stating that it was unable to conclude that Powell suffered from a compulsion and was unable to control his behavior such that punishing him for it would amount to cruel and unusual punishment.[89] The opinion reasoned: "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."[90]

Had the plurality opinion been the majority, perhaps *Robinson* could have been confined to its facts and occupy an important, albeit rare, cul-de-sac in Eighth Amendment precedent. However, two concurrences accompanied the opinion, creating uncertainty over *Robinson*'s reach and continued vitality in precedent and over what was the ultimate holding of the Court.[91]

Justice Black's concurrence, joined by Justice Harlan, underscored the reasoning in the plurality opinion by arguing that extending *Robinson* to reverse Powell's conviction "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."[92] Justice Black argued that the result urged by Powell was not required by the *Robinson* opinion because accepting Powell's construction of *Robinson* "would require converting *Robinson* into a case protecting actual **[*501]** behavior, a step we explicitly refused to take in that decision."[93] The concurrence noted that extending *Robinson* would have a "revolutionary impact" on criminal law and any possible limits to continuing that expansion would be

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[83] Powell v. Texas, 392 U.S. 514, 532 (1968) (stating "the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed.").

[84] *Id.*

[85] *See id.*

[86] *Id.* at 533.

[87] *Id.*

[88] *Id.* at 534.

[89] Powell v. Texas, 392 U.S. 514, 536 (1968).

[90] *Id.*

[91] The Ninth Circuit, for instance, in *Martin v. Boise* held that Justice White's sole concurrence turned the dissenting opinion in *Robinson* into the majority opinion. *See* **920 F.3d 584, 616-17 (9th Cir. 2019)**.

[92] *Powell*, 392 U.S. at 537 (Black, J., concurring).

[93] *Id.* at 542.

"wholly illusory."[94] Justice Harlan rested the foundation of his concurrence on principles of federalism by arguing that extending *Robinson* would assert too much central control over states and would

> 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.[95]

Justice White's separate and solo concurrence argued to extend *Robinson* to all cases involving chronic conditions like drug addiction or alcoholism.[96] However, Justice White concurred in the judgment because, in his understanding, Powell was convicted for the behavior of being drunk in a public place and not for the status of being an alcoholic.[97] Justice White left open the possibility that a future alcoholic could present evidence of compulsion such that his conviction would offend the Eighth Amendment.[98]

Four justices dissented in *Powell* Justices Fortas, Douglas, Brennan, and Stewart. The dissenting opinion attempted to frame the issue before the Court as:

> [W]hether 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.'[99]

[*502] The dissent then engaged in a lengthy discussion of alcoholism and its manifestations as "context for consideration of the instant case."[100]

The dissent then turned to *Robinson* and characterized the principle of the case as: "Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[101] The opinion characterized Robinson's actions by concluding: "Once Robinson had become an addict, he was utterly powerless to avoid criminal guilt. He was powerless to choose not to violate the law."[102] Understood in this way, the dissent reasoned that: "[T]he essential constitutional defect [in Powell's case] 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."[103] The dissent then concluded:

> 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 a public place would be "cruel and inhuman punishment" within the prohibition of the Eighth Amendment.[104]

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[94] *Id.* at 544.

[95] *Id.* at 547.

[96] *See id.* at 548-49 (White, J., concurring).

[97] *Id.* at 549.

[98] *See* Powell v. Texas, 392 U.S. 514, 553-54 (1968).

[99] *Id.* at 558 (Fortas, J., dissenting).

[100] *Id.* at 559-65.

[101] *Id.* at 567.

[102] *Id.*

[103] *Id.* at 567-68.

The dissenting opinion in *Powell* offered no rejoinder to the majority's argument that reading *Robinson* expansively would have no limiting principle to arrest its expansion. Rather, Justice Fortas' dissent seemed comfortable with establishing and extending *Robinson*'s holding to any case where a criminal defendant could establish that some compulsion or addiction that led to his behavior would render any punishment of that behavior cruel and unusual.

[*503] Lower courts in later years picked up on the confusing state of the law after *Powell*, leading to further expansion of *Robinson* in Eighth Amendment precedent.

C. Martin v. Boise: *Criminalizing Camping in Public Places*

Perhaps the lower court most famous for extending *Robinson* is the Ninth Circuit Court of Appeals in its decision in *Martin v. Boise*.[105] The opinion, in that case, stated succinctly: "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."[106] The Boise City Code made it a misdemeanor to "use 'any of the streets, sidewalks, parks, or public places as a camping place at any time,'" and defined "camping" as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence."[107] A group of six homeless individuals challenged the law as violative of the Eighth Amendment's Cruel and Unusual Punishments Clause.[108]

The Ninth Circuit relied heavily on *Powell* and *Robinson* in striking down the Boise code provision.[109] The court surprisingly construed *Powell*'s dissenting opinion by four justices to be the majority opinion under a confused rationale that Justice White's concurrence in *Powell* agreed more with the dissenting justices than with the plurality opinion.[110] Reframing the **[*504]** case in this way allowed the court to construe *Powell* by stating: "[F]ive 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.'"[111] From here, the court 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."[112] The court stated that its holding was

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[104] Powell v. Texas, 392 U.S. 514, 569-70 (1968).

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

[106] ***Id.* at 603**.

[107] ***Id.* at 603-04** (quoting BOISE CITY CODE § 9-10-02).

[108] ***Id.* at 603**.

[109] *See* ***id.* at 615-16**.

[110] ***Id.* at 616** (stating: "The four dissenting Justices [in *Powell*] adopted a position consistent with that taken by Justice White [in concurrence]: 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.") (internal quotation marks omitted). The Supreme Court noted this incorrect interpretation of *Powell* by the Ninth Circuit in the *Grants Pass* case, stating:

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.

City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2219 n.6 (2024) (citing Kahler v. Kansas, 589 U.S. 271, 280 (2020); Clark v. Arizona, 548 U.S. 735, 768, n.38 (2006); Jones v. United States, 463 U.S. 354, 365, n.13 (1983)).

[111] ***Martin*, 920 F.3d at 616** (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1135 (9th Cir. 2006)).

[112] *Id.*

narrow in that it only prohibited criminalizing sleeping outside on public property "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]."[113] The full Ninth Circuit Court of Appeals denied rehearing en banc.[114]

In the years following the *Martin* opinion, many cities and counties faced *Martin* injunctions against camping bans.[115] Indeed, one dissenting judge in a 2023 Ninth Circuit opinion noted: "If 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 lawsuit in the few short years since our court initiated its *Martin* experiment."[116]

The City of Grants Pass was one such city that faced a *Martin* injunction.

[*505]

IV. *CITY OF GRANTS PASS V. JOHNSON*

The Supreme Court's decision repudiated *Robinson* and restored an originalist and textual approach to the Cruel and Unusual Punishments Clause. It confined *Robinson* to its unusual set of facts, restored a proper interpretation of *Powell*'s plurality opinion, and established the outer limits of the Eighth Amendment's Cruel and Unusual Punishments Clause.

Writing for a six-justice majority, Justice Gorsuch began his opinion with an acknowledgment that "[m]any cities across the American West face a homelessness crisis. The causes are varied and complex . . . ."[117] The opinion noted that "homelessness in this country has reached its highest levels since the government began reporting data on the subject in 2007."[118] The court stated: "People become homeless for a variety of reasons, too, many beyond their control. . . . In brief, the reasons why someone will go without shelter on a given night vary widely by the person and by the day."[119] Justice Gorsuch cataloged a host of difficulties facing the homeless as they congregated in the homeless encampments that had proliferated in many cities in the western states. These difficulties included increases in crimes, a heightened risk of sexual assault, a rise in shootings, the distribution of illegal drugs, the spread of diseases, and the open disposal of used needles and human waste.[120] The opinion then explained that the homeless reject offers of shelter for "many and complex" reasons even when shelter beds are available to help, and it noted that many charitable organizations serving the homeless "have come to the conclusion, as they put it, just building more shelter beds and public housing options is almost certainly not the answer by itself."[121]

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[113] ***Id.* at 617** (quoting *Jones*, 444 F.3d at 1138) (alterations in original).

[114] ***Id.* at 588**.

[115] *See, e.g.*, Fund for Empowerment v. City of Phoenix, 646 F. Supp. 3d 1117, 1132 (D. Ariz. 2022); Boyd v. San Rafael, 2023 U.S. Dist. LEXIS 202038, *1-2 (N.D. Cal. 2023); Warren v. Chico, 2021 U.S. Dist. LEXIS 128471, *1-2 (E.D. Cal. 2021).

[116] **Johnson v. City of Grants Pass, 72 F.4th 868, 940 (9th Cir. 2023)** (Smith, J., dissenting), *cert. granted sub nom.* **City of Grants Pass v. Johnson, 144 S. Ct. 679 (2024)**, *rev'd and remanded sub nom.* City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

[117] *City of Grants Pass*, 144 S. Ct. at 2207.

[118] *Id.* at 2208.

[119] *Id.* at 2208-09.

[120] *Id.* at 2209.

[121] *Id.* at 2209-10.

Against this complex backdrop of reasons for homelessness and challenges to offering help to those who find themselves homeless, the Court noted that many cities had passed laws restricting camping in public places, as the City of Grants Pass had.[122] The opinion stated that these laws were intended to be one tool in a multi-faceted approach and that many governments agree that **[*506]** "policymakers need access to the full panoply of tools in the policy toolbox to tackle the complicated issues of housing and homelessness."[123] However, as the Court noted, the Ninth Circuit in *Martin v. Boise* removed the tool of the camping bans from the toolbox of cities attempting to address the homeless in their jurisdiction.[124] The opinion discussed the fact that the *Martin* opinion's removal of the camping ban tool from cities has served to exacerbate the problem with homeless encampments and even thwarted unique approaches to serving the homeless.[125] Quoting from amicus briefs filed by cities, that opinion stated: "Many cities further report that, rather than help alleviate the homelessness crisis, *Martin* injunctions have inadvertently contributed to it."[126]

The Court then moved to a discussion of the Eighth Amendment, noting that "[t]hat Clause 'has always been considered, and properly so, to be directed at the method or kind of punishment' a government may impose for the violation of criminal statutes."[127] The Court noted that the Eighth Amendment was not focused on the question of "whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense."[128] If that were the end of the application of the Eighth Amendment, the case might have been fairly easy because, as the Court noted, none of the City's sanctions qualified as cruel (designed to superadd terror, pain, or disgrace), nor were the sanctions imposed unusual in that they were run of the mill sanctions imposed on offenses throughout the country.[129] Instead, the confusion caused by the Court's prior precedent in *Robinson* and *Powell* had provided an argument for the Plaintiffs in the case that the Grants Pass ordinances violated the Eighth Amendment because they criminalized the mere status of being homeless, which was, in their view, an involuntary status.

[*507]

A. *Confining* Robinson v. California

The opinion confined *Robinson* to its appropriate place as addressing an anomaly in criminal law. The Court stated that the statute at issue in *Robinson* "made the mere status of being an addict a crime. And it was that feature of the law, the Court held, that went too far."[130] The opinion found that the law at issue was "an anomaly" as it required no proof of either an act (*actus reus*) or volition (*mens rea*) with respect to a crime.[131] The Court noted that

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[122] *Id.* at 2210.

[123] City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2211 (2024).

[124] *Id.*

[125] *Id.* at 2211-12.

[126] *Id.* at 2212.

[127] *Id.* at 2215 (quoting Powell v. Texas, 392 U.S. 514, 531-32 (1968)).

[128] *Id.* at 2216 (citing *Powell*, 392 U.S. at 531-32).

[129] City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2216 (2024).

[130] *Id.* at 2217.

[131] *Id.*

"[i]n 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."[132]

Justice Gorsuch's opinion also confined *Powell* and its reliance on and discussion of *Robinson*. The plaintiffs argued that both *Robinson* and *Powell* had established a principle that laws could not punish "actions that are in some sense 'involuntary,' for some homeless persons cannot help but do what the law forbids."[133] However, Justice Gorsuch's opinion noted that the Court had already rejected that view in *Powell* itself, citing to Justice Marshall's plurality opinion, which stated that *Robinson* was "a very small intrusion by courts into the substantive criminal law under the aegis of the Cruel and Unusual Punishments Clause."[134] That small intrusion was, as Marshall explained in *Powell*, a prohibition preventing States "only from enforcing laws that criminalize 'a mere status.'"[135] Leaving no doubt, the majority opinion in *Grants Pass* concluded, "As we have seen, *Robinson* already sits uneasy with the Amendment's terms, original meaning, and our precedents. Its holding is restricted to laws that criminalize 'mere status.'"[136]

[*508] After the Court's opinion in *Grants Pass*, the *Robinson* case is narrowly confined to the unusual set of facts that brought it about. The Court will not entertain any expansion of *Robinson* beyond laws that criminalize "mere status."

B. *Textual Limits of the Eighth Amendment*

The majority opinion then noted the attendant dangers of expanding the Eighth Amendment's Cruel and Unusual Punishments Clause in the way the plaintiffs were requesting. The main and inherent defect in applying the Eighth Amendment in this way is the lack of any limiting principle.[137] Justice Gorsuch noted that "nothing in the Amendment's text or history exists to confine or guide our review," and, therefore, judges would be "left to write into the Constitution our own formulas," which might be unworkable in practice and would most certainly "interfere with essential considerations of federalism."[138] Indeed, this is one of the inherent defects in defining the Cruel and Unusual Punishments Clause based on "evolving standards of decency that mark the progress of a maturing society."[139]

To illustrate the point, the Court asked, "[H]ow are city officials and law enforcement officers to know what it means to be 'involuntarily' homeless, or whether any particular person meets that standard?"[140] The Court concluded that "[i]If there are answers to these questions, they cannot be found in the Cruel and Unusual Punishments Clause."[141]

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[132] *Id.* at 2218.

[133] *Id.* at 2219.

[134] *Id.*

[135] City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2219 (2024).

[136] *Id.* at 2220. Justice Gorsuch also clarified that Justice Marshall's opinion in *Powell* was, in fact, the holding of the Court in contrast to the curious argument by the Ninth Circuit below that Justice White's dissent in *Powell* actually stated the holding of the Court. Justice Gorsuch noted that the Supreme Court itself had cited in several cases after *Powell* to Justice Marshall's opinion as the holding in that case. *Id.* at 2220 n.6.

[137] *Id.* at 2221.

[138] *Id.*

[139] *See supra* note 44 and accompanying text.

[140] *City of Grants Pass*, 144 S. Ct. at 2221.

[141] *Id.* at 2222.

The opinion noted that "[b]y 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.'"[142]

Responding to the dissent's argument that the *Robinson* rule could be narrow and limited, Justice Gorsuch's opinion again raised questions such as,

> 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 places to "keep warm" and fulfill other "biological necessities?"[143]

[*509] Citing back to Justice Marshall's opinion in *Powell*, the Court stated, "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."[144]

The Court concluded its opinion by returning to its beginning assertion that "[h]omelessness is complex. Its causes are many. So may be the public policy responses required to address it."[145] The Court then argued that the American people, through our myriad associations and charities, are best positioned to confront the public policy of addressing homelessness.[146] The Eighth Amendment, in the Court's view, "does not authorize federal judges to wrest these rights and responsibilities from the American people and in their place dictate this Nation's homelessness policy."[147]

V. THE CHRISTIAN WORLDVIEW AND *CITY OF GRANTS PASS V. JOHNSON*

Professor Roger Bern set forth a model for examining issues of public policy through a Christian worldview.[148] Bern's overarching principle remains a good starting point for any such examination. He states,

> The foundation on which the Biblical Model for analysis of legal and policy issues has been built is the belief that God the Creator is the source of all law, and that He has revealed His law order to mankind through the created order and through His written word, the Bible. Because God is Sovereign over all of creation, His law order is binding over all the globe.[149]

[*510] Using this as a model for assessing both the decision and the outcome of the *Grants Pass* case from a Christian worldview leads to discussions of limited jurisdiction and justice.

A. *Limited Jurisdiction*

Principles may be derived from the foundation set forth in Bern's model that aid in assessing the case from a Christian worldview. One such principle that Bern notes is the principle of jurisdiction. He states, "The principle of limited jurisdiction for Civil Government was confirmed by Jesus when He stated, 'render to Caesar the things that are Caesar's, and to God the things that are God's.' Caesar is not given control over all things."[150] While

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[142] *Id.* at 2223.

[143] *Id.* at 2225.

[144] *Id.* at 2225 n.8.

[145] *Id.* at 2226.

[146] City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2226 (2024).

[147] *Id.*

[148] Roger Bern, *A Biblical Model for Analysis of Issues of Law and Public Policy: With Illustrative Applications to Contracts, Antitrust, Remedies and Public Policy Issues*, 6 REGENT U. L. REV. 103, 108 (1996).

[149] *Id.* at 108.

implications from this principle are broad, one necessary and logical deduction is that limited jurisdiction is inherent in God's overall design for the world and for civil government. God retains all jurisdiction, and any jurisdiction claimed by man is thus derivative and limited.[151] Because jurisdiction is limited, those who seek to exercise jurisdiction must respect those limits.

Stated differently, if legal decision-making by courts becomes nothing more than an exercise of raw power divorced from any jurisdictional confines, the resulting instability in the law creates substantial and pervasive problems. Bern reasoned,

> However, as the understanding that there exists no standard for validation of law higher than the decision makers themselves pervades the non-elite of society, the implications for instability become more ominous. Why should the public believe the decision makers have made the right decisions, or even that they have authority to do so?[152]

[*511] This is true even if the exercise of raw power through legal decision-making is disguised as assertions, such as that by the Supreme Court in *Weems*, which was later reflected in *Robinson*, that standards for decision-making are unmoored to any transcendent principle and are instead "progressive, and [are] not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice."[153] What this statement means is, to put it bluntly, anyone's guess. It certainly provides no standard for legal decision-making, nor does it evince any respect for the limited jurisdiction of judges and courts.

The limited jurisdiction of federal judges is also a principle that can be easily discerned from the concept of jurisdiction in the Christian worldview. As Dean Rodney Chrisman puts it:

> [A]ssuming that the contemplated action is within the jurisdiction of the civil magistrate, the particulars of the American constitutional system require answering additional questions. Has the action been reserved to the states or entrusted to the federal government? This is a question of federalism and is a result of the conclusion that liberty is best protected by having competing governmental jurisdictions. Assuming that the authority to act on the particular issue in question has been given to the federal government by the Constitution, one must determine to which of the three branches of the federal government has this authority been entrusted. This is a question of the separation of powers, and it stands on sound biblical foundations.[154]

The Court's opinion in *Grants Pass* is a refreshing reaffirmance of the principle of limited jurisdiction. Justice Gorsuch's opinion recognizes the limited role of the derivative jurisdiction that the Court has in discerning what constitutes cruel and unusual punishment under the Eighth Amendment. It also recognizes the attendant and inescapable danger of **[*512]** going outside that limited jurisdiction to decide Eighth Amendment cases in the way the Ninth Circuit did in *Martin* and in the *Grants Pass* case itself. Indeed, Justice Gorsuch plainly describes this type of judicial decision-making as unmoored from the Eighth Amendment itself and bluntly labels it as nothing more than "fiat."[155]

The potential for judges to engage in this exercise of raw power under the Eighth Amendment comes into sharper focus when trying to discern what the appropriate limits would be to expanding *Robinson* as the plaintiffs wanted.

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[150] *Id.* at 122.

[151] Bern described it in this way: "Neither the Individual, nor any institution which God has established, has jurisdiction over all things, but each has been granted limited jurisdiction in which to function." *Id.* at 122.

[152] *Id.* at 106.

[153] Weems v. United States, 217 U.S. 349, 378 (1910).

[154] Rodney D. Chrisman, *Biden v. Nebraska: Student Loan Debt Forgiveness and the Dangers of the Administrative State*, 18 LIBERTY U. L. REV. 401, 434 (2024).

[155] City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2223 (2024) (citing Powell v. Texas 392 U.S. 514, 534 (1968)).

For example, what is an involuntary status that is sufficient to trigger Eighth Amendment protection? Think of, for example, asylum seekers who may challenge detention policies for crossing the border. One could conceive of an argument that being an asylum seeker is an involuntary status and that any punishment based on that status would be cruel and unusual. Such a result could undo immigration law entirely.

Another example is a prisoner who claims to be transgender and wants to be incarcerated with the sex they claim. Or a prisoner who claims to be transgender and challenges denial of the payment by the government of surgical alteration procedures as cruel and unusual punishment. Expanding *Robinson* beyond its unique set of facts would provide arguments for these kinds of cases.

To hit closer to the core of *Robinson* itself, imagine a challenge to punishment of criminal manslaughter for driving under the influence of drugs or alcohol because the "status" of being addicted to drugs or alcohol is involuntary. The Court in *Grants Pass* acknowledged these kinds of concerns when it quoted Justice Marshall's opinion in *Powell* that "extending *Robinson* to cover involuntary acts would effectively impel this Court into defining something akin to a new insanity test in constitutional terms."[156] The Court explained that this would be the case because "an individual like the defendant in *Powell* [accused of drunkenness in a public place] 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.'"[157] Therefore, the departure from the principle of limited **[*513]** jurisdiction has the potential to not only result in the exercise of raw power outside the jurisdiction of federal judges, it also has the potential to work injustice in society and excuse punishment for the morally culpable.

B. *Justice*

The *Grants Pass* case also raises questions, though, of justice and specifically justice to the poor. One may object to the outcome of the case as unjust and as callous to the homeless and the poor who have no place to sleep and now will be punished for simply having a blanket and trying to do something humanly inherent and necessary. A further objection may be that strict adherence to the Christian worldview concept of limited jurisdiction described above risks turning a blind eye to the plight of the poor.

To be sure, a Christian worldview of the law places a high view on justice.[158] Scripture itself is unambiguous on the subject. The Hebrew word for justice (*Mi p*) occurs over 400 times in the Old Testament alone.[159] In Micah 6:8, Scripture answers the age-old question of what God requires of man by declaring "to do justice, and to love kindness, and to walk humbly with your God."[160] The Old Testament prophet Amos declares that the Lord does not want meaningless religious feasts or offerings and instead exhorts the nation of Israel to "let justice roll down like waters, and righteousness like an ever-flowing stream."[161] The psalmist declared that God loves justice and

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[156] *Id.* at 2221.

[157] *Id.*

[158] *See, e.g.*, Jeffrey C. Tuomala, *Christ's Atonement As the Model for Civil Justice*, 38 AM. J. JURIS. 221, 222 (1993) (grounding criminal theories of justice in the Christian view of the atonement as the "judicial archetype of the way in which God deals with sin and crime."); HAROLD J. BERMAN, LAW AND REVOLUTION 195 (1983) ("Western concepts of law are in their origins, and therefore in their nature, intimately bound up with instinctively Western theological and liturgical concepts of the atonement and of the sacraments. . . . As God rules through law, so ecclesiastical and secular authorities, ordained by him, declare legal principles and impose appropriate sanction and remedies for their violation. They cannot look directly into men's souls, as God can, but they can find ways to approximate his judgment.").

[159] LAWRENCE O. RICHARDS, NEW INTERNATIONAL ENCYCLOPEDIA OF BIBLE WORDS 368 (1991).

[160] *Micah* 6:8 (English Standard).

[161] *Amos* 5:24 (English Standard).

declared that righteousness and justice are the foundation of God's throne.[162] **[*514]** These are but a few of a host of scriptural passages containing exhortations to justice.

Likewise, God is very concerned with whether justice is being done, particularly as it pertains to the most vulnerable in society. The psalmist stated, "Give justice to the weak and the fatherless; maintain the right of the afflicted and the destitute."[163] Similarly, the writer of Proverbs enjoined, "Open your mouth for the mute, for the rights of all who are destitute. Open your mouth, judge righteously, defend the rights of the poor and needy."[164] Indeed, the Old Testament prophets are replete with exhortations such as, "Thus says the Lord of hosts, render true judgments, show kindness and mercy to one another, do not oppress the widow, the fatherless, the sojourner, or the poor, and let none of you devise evil against another in your heart."[165] Jesus even identified himself with those who are poor and vulnerable:

> Then the righteous will answer him, saying, "Lord, when did we see you hungry and feed you, or thirsty and give you drink? And when did we see you a stranger and welcome you, or naked and clothe you? And when did we see you sick or in prison and visit you?" And the King will answer them, "Truly, I say to you, as you did it to one of the least of these my brothers, you did it to me."[166]

But does the Court's opinion in *Grants Pass* transgress the scriptural command to do justice to the poor? Did the Court, in adhering to the principles of limited jurisdiction, turn a blind eye to the undeniable plight of the homeless among us?

The answer to these questions is that the Court's opinion is consistent with principles of a Christian worldview of justice and, in particular, justice to the homeless. First, it is not at all clear that leaving the Grants Pass ordinance in place with its enforcement mechanisms would result in injustice to the homeless. Indeed, as the Court noted when discussing the Ninth Circuit's *Martin* case and the proliferation of injunctions against cities under *Martin*: **[*515]**

> 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*." 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." 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." In short, they say, *Martin* "make[s] solving this crisis harder."[167]

Grants Pass Gospel Rescue Mission is a Christian ministry and is the only overnight shelter for the homeless in the City of Grants Pass.[168] The Mission argued in its *amicus curiae* brief to the Supreme Court that:

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[162] *Psalm* 33:3, 37:28, 89:14; *see also Isaiah* 61:8 ("For I the Lord love justice; I hate robbery and wrong; I will faithfully give them their recompense, and I will make an everlasting covenant with them.").

[163] *Psalm* 82:3 (English Standard).

[164] *Proverbs* 31:8-9 (English Standard).

[165] *Zechariah* 7:9-10 (English Standard).

[166] *Matthew* 25:37-40 (English Standard).

[167] City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2212 (2024) (internal citation marks omitted).

[168] Brief of Amicus Curiae Grants Pass Gospel Rescue Mission in Support of Petitioner at 2, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175).

> [T]he data indicate that hundreds of homeless individuals each year in Grants Pass would avail themselves of the Mission's services, were they not allowed instead simply to camp in the City's public parks. But because the City can no longer enforce its ordinances prohibiting such camping, more of those individuals elect to remain on the streets and on other City property. As a result, far fewer individuals participate in the Mission's services and discharge from its shelter with income and a home than otherwise would.[169]

After cataloging the data, the Mission went on to explain:

> Crucially, the reduced number of individuals housed in the Mission's shelters is not because the homeless population in Grants Pass has decreased, such that fewer people need the Mission's services. Rather, the data here supports what Mission staff have seen first-hand: after 2019, fewer homeless individuals and families in Grants Pass are served, more available shelter beds go unused, and fewer residents overall are ultimately discharged from the Mission with income and a safe home to return to. Instead, they remain on the street in tents in city parks, camped across sidewalks, sprawled on public benches.[170]

[*516] Therefore, a very good argument can be made that the city's ordinances, in fact, worked to create an environment where homelessness could be more effectively addressed in a humane way.

Further, the expansion of *Robinson* through the *Martin* opinion actually worked an injustice to the homeless by contributing to the proliferation of homeless encampments, which were very dangerous places for the homeless to reside. It is not just to turn a blind eye to enforcement of the laws as the City of Phoenix did in the Zone and thereby allow the homeless to be subjected to horrible crimes in encampments that were devoid of police presence. And a corollary to this problem is the injustice suffered by property owners and businesses who found themselves swallowed by homeless encampments and subjected to the attendant property and personal crimes that seemed to plague these encampments.

The Court in the *Grants Pass* decision noted that taking the decision-making on how to address the homelessness crisis away from unelected federal judges and leaving it in the hands of the American people may be the best way to handle the homelessness crisis. The opinion stated:

> 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.". 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.[171]

[*517] Leaving the creation of ways to address the complex issue of homelessness to the American people may be the best way to promote justice toward the homeless. This is especially true when considering, as described above, that the progression of the standard set forth in *Robinson* in the way the Ninth Circuit applied it in *Martin* and in *Grants Pass* actually served to work an injustice to the homeless population.

VI. CONCLUSION

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[169] *Id.* at 5.

[170] *Id.* at 7.

[171] *City of Grants Pass*, 144 S. Ct. at 2226 (citing 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 129 (H. Reeve trans. 1961)).

Jesus said to his disciples, "For you always have the poor with you."[172] For centuries, Christians have ministered to the poor and the homeless in many ways and through many different faith traditions. Indeed, one could argue that ministry to the poor is distinctive of Christianity. For example, John Chrysostom was an early Christian church father who served as the Archbishop of Constantinople and used his position to rail against the excesses of wealth that turned a blind eye to the poor.[173] In an unbroken **[*518]** tradition, centuries later, William Booth founded the Salvation Army in 1865 "as a means to help the suffering souls throughout London who were not willing to attend or even welcomed into a traditional church."[174] Mother Teresa is yet another famous example of Christians who devoted their lives to caring for the poor. It would be a lengthy book indeed to catalog Christian efforts to care for the poor, including the homeless.

The primacy that Christianity places on care for the poor and doing justice to the poor and vulnerable makes the *Grants Pass* case an important subject for exploration in light of the Christian worldview. While one might disagree with the outcome of the case or even be uncomfortable with how Grants Pass chose to confront a rising homeless population in its city, it is plain that the United States Supreme Court's decision is consistent with a Christian worldview when explored through the principles of limited jurisdiction and justice.

Because Jesus's statement about the poor always being with us is true, the *Grants Pass* decision, though, is not the last word on homelessness in the United States, nor is it anywhere close to the complete understanding of how to address a rising homeless population. As the Court noted, though, because homelessness is an increasing problem, because its causes are varied and complex, and because efforts to address it must likewise use a variety of means, Christians have an opportunity to continue to do what we have done for centuries to care for the poor and the vulnerable, including the homeless. Because, after all, what we do for the least of these, we have done for Christ.[175]

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[172] *Mark* 14:7 (English Standard). Jesus's statement was in the context of his disciples' rebuke of the woman who anointed Jesus's feet with costly perfume shortly before his death on the cross. The disciples' objection was that the perfume could have been sold and the proceeds used for the poor. Jesus's full statement was, "But Jesus said, 'Leave her alone. Why do you trouble her? She has done a beautiful thing to me. For you always have the poor with you, and whenever you want, you can do good for them. But you will not always have me.'" *Id.* 14:6-7 (English Standard). While not Jesus's point, his answer to the disciples shows that the issue of the poor and the homeless will always be an issue on earth.

[173] JUSTO L. GONZALEZ, THE STORY OF CHRISTIANITY, VOL. 1 194-97 (2d ed. 1984). As an example of his preaching, Chrysostom once

[T]hundered from the pulpit: The gold bit on your horse, the gold circlet on the wrist of your slave, the gilding on your shoes, mean that you are robbing the orphan and starving the widow. When you have passed away, each passer-by who looks upon your great mansion will say, "How many tears did it take to build that mansion; how many orphans were stripped; how many widows wronged; how many laborers deprived of their honest wages?" Even death itself will not deliver you from your accusers.

Id. at 197.

[174] *History of the Salvation Army*, THE SALVATION ARMY, https://www.salvationarmyusa.org/usn/history-of-the-salvation-army/ (last visited Nov. 2, 2024).

[175] *Matthew* 25:40.

ARTICLE: Kennedy v. Louisiana and the Future of the Eighth Amendment

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ABSTRACT

In 2023, Florida passed a law permitting the imposition of the death penalty for the rape of a child under twelve. Tennessee enacted a similar law in 2024. These laws conflict with Kennedy v. Louisiana, *a 2008 decision in which the Supreme Court held that imposing the death penalty for the rape of a child violated the Eighth Amendment's Cruel and Unusual Punishments Clause because it was inconsistent with the evolving standards of decency. Legislators in Florida and Tennessee have expressed their hope that the Supreme Court will overrule* Kennedy v. Louisiana. *These laws, which resemble state attempts to undo abortion protections through legislation, are more than ordinary death penalty politics. Scholars have warned that the Court's growing reliance on original meaning, history, and tradition may undo extant Eighth Amendment protections. States have filed amicus briefs asking the Court to reject Eighth Amendment precedent. More recently, in* City of Grants Pass v. Johnson, *the Court described the Eighth Amendment in narrow, historically focused terms, signaling that further alterations to the Eighth Amendment are coming*.

This Article addresses the potential for overruling Kennedy v. Louisiana *and what that may mean for the future of the Eighth Amendment's Cruel and Unusual Punishments Clause. While* Kennedy *is settled law, the Court's current approach to constitutional questions and recent Eighth Amendment jurisprudence demonstrate that constitutional protections that were assumed to be settled are now at risk, and the Eighth Amendment is in jeopardy. The Supreme Court's recent decision in* Grants Pass *demonstrates that the Court is currently "stealth overruling" its Eighth Amendment jurisprudence. The Court is likely to continue this project because of changes to its membership, its new approach to stare decisis, and legislative opportunism. This Article contributes to recent academic literature that addresses the future of the Eighth Amendment by analyzing how new state laws expanding capital offenses to include the rape of a child may undermine precedent through the Court's reliance on "democratic deliberation" narratives, as described in scholarship by Professors Melissa Murray and Katherine Shaw that addresses the aftermath of* Dobbs v. Jackson Women's Health Organization.

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* Assistant Professor of Law, Washington & Lee University School of Law. My Death Penalty students at St. Mary's University School of Law inspired me to write this Article after their thoughtful discussion of Kennedy v. Louisiana during the Fall 2023 semester. I am grateful for the support of the Frances Lewis Law Center. My thanks to Will Berry, Jonathon Booth, Michal Buchhandler-Raphael, Match Dawson, Brandon Draper, Maureen Edobor, Shannon Fyfe, Matthew Garcia, Brandon Hasbrouck, Rachel Kincaid, Carla Laroche, Alexi Pfeffer-Gillett, Meghan Ryan, Michael Smith, Carrie Stanton, Amanda Stephens, Alan Trammell, and Sigrid Vendrell-Polanco for helpful comments, suggestions, and feedback. I am thankful for Sydney Roots's attention to detail and research assistance. Daeja Hall and the Dean's Research Fellows at St. Mary's University School of Law provided invaluable research assistance during the initial stages of this Article's development.

This Article describes two possible future directions for Eighth Amendment jurisprudence: "devolving" standards of decency in which states can create a national consensus to undo constitutional protections or, more likely, a restrictive historical approach. This Article concludes by discussing how these changes threaten the stability of Eighth Amendment jurisprudence and explaining the risks of legislative and judicial expansion of the death penalty after decades of judicial rulings that attempted to narrow it. It may be tempting to dismiss the consequences of overruling Kennedy *people convicted of sexually assaulting children are targets of universal revulsion. But undoing constitutional and legal standards because of outrage at criminal conduct weakens vital constitutional protections against cruel and unusual punishment*.

Text

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I. INTRODUCTION

"When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[1]

In 2008, the U.S. Supreme Court held in *Kennedy v. Louisiana* that imposing the death penalty for the rape of a child violated the Eighth Amendment.[2] The Court also concluded that death is not a constitutional punishment for nonhomicide crimes against individuals, although it left open the possibility that the death penalty might still apply to nonhomicide crimes against the state.[3]*Kennedy* is part of a strain of important Eighth Amendment jurisprudence that narrowed the scope of capital punishment, leading some contemporary observers to suggest that the Court might eventually discard the death penalty.[4] The decision received significant criticism for cutting off the possibility that a new national consensus might develop in favor of permitting the death penalty for child rape and for its application of the "independent judgment" portion of the "evolving standards of decency" (ESD) analysis.[5]

Alterations to the Court's composition that began in 2016 indicate, however, that the Court is unlikely to conclude that capital punishment is unconstitutional. Instead, a majority of Justices have further entrenched the death penalty by lifting lower court stays to allow executions to go forward and weakening constitutional standards in capital cases.[6] The Court has **[*297]** insisted that the death penalty is constitutional, and that abolition is up to individual

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[1] Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

[2] *Id.* at 413.

[3] *Id.* at 437.

[4] *See* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 4-5 (2016); Mary Graw Leary, Kennedy v. Louisiana: *A Chapter of Subtle Changes in the Supreme Court's Book on the Death Penalty Sex Offenders: Recent Developments in Punishment and Management*, 21 FED. SENT'G. REP. 98, 104 (2008).

[5] *See infra* Section II.B.

[6] *See generally* Madalyn K. Wasilczuk, *Killing Stays*, 2024 WIS. L. REV. 859, 902 (2024) ("Since 2019, the Court has allowed executions to proceed despite serious, unresolved legal issues regarding the constitutionality of execution protocols, competency to be executed, eligibility for execution, racial discrimination in the application of capital punishment, and innumerable statutory claims."); Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 660-61 (2022) (discussing the impact of the 2020-2021 federal execution spree); Jenny-Brooke Condon, *The Capital Shadow Docket and the Death of Judicial Restraint*, 23 NEV. L.J. 809, 809, 812 (2023) (arguing that through late-state execution challenges on its emergency docket, the

states.[7] It has also demonstrated an increasing willingness to reject precedent. In *Dobbs v. Jackson Women's Health Organization*,[8] the Court overturned *Roe v. Wade*,[9] even though it had not granted certiorari on that question.[10] The Court is enthusiastically dismantling core administrative law jurisprudence,[11] rejecting longstanding precedent about affirmative action in college admissions,[12] and increasingly relying on history and tradition to change the law.[13] Stare decisis does not mean what it used to.[14]

Eighth Amendment precedent is also at risk. In recent years, the Court **[*298]** has limited the reach of the Eighth Amendment in method-of-execution claims.[15] It walked back its application of the Eighth Amendment in juvenile life

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Supreme Court "play[s] a decisive role in the administration of capital punishment but with less restraint, transparency, and accountability than ever before").

[7] *See* Bucklew v. Precythe, 587 U.S. 119, 130 (2019) ("The same Constitution that permits States to authorize capital punishment also allows them to outlaw it. But it does mean that the judiciary bears no license to end a debate reserved for the people and their representatives.").

[8] 597 U.S. 215 (2022).

[9] 410 U.S. 113 (1973).

[10] *See infra* notes 311-314 and accompanying text (discussing *Dobbs*).

[11] *See generally* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) (overruling *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 825 (2024) (holding that the six-year statute of limitations window does not begin to run for an Administrative Procedure Act claim until agency action injures the plaintiff, expanding the time frame to sue federal agencies); West Virginia v. EPA, 597 U.S. 697, 735 (2022) (applying the major questions doctrine to hold that the EPA lacked authority to regulate generation-shifting measures under the Clean Air Act).

[12] *See* Students For Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023) (finding the race-based affirmative action programs at issue violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act).

[13] *See* Jacob D. Charles, *The Dead Hand of a Silent Past*: Bruen, *Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 69 (2023) (analyzing *Bruen*, which mandated that Second Amendment cases be reviewed based on text, history, and tradition); Melissa Murray, *Making History*, 133 YALE L.J. F. 990, 990 (2024) (describing the Court's recent "jurisprudential shift"); Michael L. Smith, *Abandoning Original Meaning*, 86 ALBANY L. REV. 43, 46 (2023) (criticizing the Supreme Court's decisions for equating history and tradition with constitutionality); R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1, 2 (2022) (discussing the Supreme Court's new requirement that constitutional rights claims show sufficient support in history and tradition).

[14] *See* Russell A. Miller, *The Purpose and Practice of Precedent: What the Decade Long Debate over Stare Decisis Teaches Us About the New Roberts Court*, 51 HASTINGS CONST. L.Q. 231, 279-80 (2024) [hereinafter Miller, *Purpose and Practice*] (discussing alterations to the Court's application of traditional stare decisis factors); *see also* Gamble v. United States, 587 U.S. 678, 717-18 (2019) (Thomas, J., concurring) ("[I]f the Court encounters a decision that is demonstrably erroneous *i.e.*, one that is not a permissible interpretation of the text the Court should correct the error, regardless of whether other factors support overruling the precedent. Federal courts may (but need not) adhere to an incorrect decision as precedent, but only when traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law. A demonstrably incorrect judicial decision, by contrast, is tantamount to *making* law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power.").

[15] *See* Bucklew v. Precythe, 587 U.S. 119, 141, 148-49 (2019) (granting summary judgment to the State after defendant's method-of-execution claim failed the *Baze-Glossip* test); Glossip v. Gross, 576 U.S. 863, 892 (2015) (denying a method-of-execution claim after petitioners failed to establish a likelihood of substantial and imminent risk and failed to introduce an available substitute method); Alexandra L. Klein, *The Eighth Amendment's Paper Tiger: Pain, Executions, and the Cruel and Unusual Punishments Clause*, 17 NE. U. L. REV. (forthcoming 2025) (criticizing Court's reliance on historical practice in evaluating method-of-execution claims with the *Baze/Glossip/Bucklew* analysis).

without parole cases.[16] During the October 2023 term, in *City of Grants Pass v. Johnson*, the Court offered a narrower, historically based definition of the Eighth Amendment's Cruel and Unusual Punishments Clause.[17] Professors Meghan Ryan and Kathryn Miller have recognized these threats to the Eighth Amendment and warned of the impact that the Court's reliance on original meaning, history, and tradition may have on the future of the Eighth Amendment.[18] Although the use of the death penalty has declined in the United States since the 1990s and continues to decline, alterations to the Eighth Amendment that may expand the death penalty should still be cause for concern.[19]

Cognizant of these changes, states have begun to test whether the Court is willing to modify its interpretation of the Eighth Amendment, including *Kennedy v. Louisiana*. In 2023, Florida passed a law permitting the imposition of the death penalty for the rape of a child under the age of **[*299]** twelve.[20] Governor Ron DeSantis signed the bill into law, announcing that it was intended to challenge *Kennedy v. Louisiana*.[21] Following Florida's lead, legislators in several other states began introducing similar laws.[22] In 2024, Tennessee also passed a law permitting the imposition of the death penalty for the rape of a child.[23] Although Governor Bill Lee did not sign the bill to set up a constitutional challenge, legislators in Tennessee expressed their hope that the Court would overrule *Kennedy*.[24] Project 2025, a conservative policy agenda, recommends "pursu[ing] the death penalty for applicable crimes particularly heinous crimes involving violence and sexual abuse of children until Congress says otherwise through legislation."[25] That recommendation notes that these actions "could require seeking the Supreme Court to overrule *Kennedy v. Louisiana*[] in applicable cases, but the department should place a priority on doing so."[26] Shortly after

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[16] *See* Cara H. Drinan, Jones v. Mississippi *and the Court's Quiet Burial of the* Miller *Trilogy*, 19 OHIO ST. J. CRIM. L. 181, 181 (2021) (arguing that the Supreme Court damaged its institutional reputation when it began "chipping away" at constitutional protections protecting juveniles); Kathryn E. Miller, *No Sense of Decency*, 98 WASH. L. REV. 115, 117-18 (2023) [hereinafter Miller, *Decency*] (arguing that *Jones* "implicitly overruled *Montgomery v. Louisiana*," undermining precedent that had limited states from sentencing juvenile offenders to life without parole except in certain circumstances).

[17] City of Grants Pass v. Johnson, 603 U.S. 520, 521 (2024) ("[The 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.'" (quoting Powell v. Texas, 392 U.S. 514, 531-32 (1968))).

[18] *See* Meghan J. Ryan, *The Death of the Evolving Standards of Decency*, 51 FLA. ST. L. REV. 255, 298-304 (2024) [hereinafter Ryan, *Death*] (analyzing the future of the Eighth Amendment's evolving standards of decency given the Supreme Court's shift toward an originalist approach); Miller, *Decency, supra* note 16, at 119-21 (discussing the conservative Court's abandonment of Eighth Amendment precedent in recent decisions).

[19] *See* BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 79-81 (2017) (describing the decline in capital sentences from the 1970s to the present day); William W. Berry III, *Eighth Amendment Stare Decisis*, S. CAL. L. REV. (forthcoming 2025) (manuscript at 34-35).

[20] Kit Maher, *DeSantis Signs Bill Making Child Rapists Eligible for Death Penalty at Odds with US Supreme Court Ruling*, CNN (May 1, 2023, 6:36 PM), https://www.cnn.com/2023/05/01/politics/desantis-child-rapists-death-penalty-bill-scotus/index.html.

[21] *Id.*

[22] *See infra* Section III.B.

[23] Kimberlee Kruesi, *Tennessee Governor OKs Bill Allowing Death Penalty for Child Rape Convictions*, AP NEWS (May 14, 2024, 12:34 PM), https://apnews.com/article/child-rape-death-penalty-tennessee-6edde756a71b0ae26eea703d1f69b572.

[24] *Id.* ("Lee told reporters Tuesday that he didn't sign the bill hoping it would be 'tested' in court. Instead, he said crimes against children are 'some of the most heinous that there are.'"); *id.* ("'Maybe the atmosphere is different on the Supreme Court,' said Republican Sen. Janice Bowling last month while debating in favor of the law. 'We're simply challenging a ruling.'").

[25] *See* Gene Hamilton, *Department of Justice, in* PROJECT 2025: MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 545, 554 (Paul Dans & Steven Groves eds., 2023).

taking office, President Trump issued an executive order directing the Attorney General to "take all appropriate action to seek the overruling of Supreme Court precedents that limit the authority of State and Federal governments to impose capital punishment."[27] The Attorney General has issued a memorandum directing the Criminal and Civil Divisions of the Department of Justice and the Office of the Solicitor General to take such actions.[28] A block of states have filed amicus briefs in multiple cases asking the Court to reject its traditional Eighth Amendment analysis.[29]

This Article addresses the potential for overruling *Kennedy v. Louisiana* and what that may mean for the future of the Eighth Amendment. Courts and **[*300]** legislatures have generally accepted that the ESD is a one-way ratchet: if the Supreme Court determines that a punishment violates the Eighth Amendment, that punishment is permanently prohibited absent a constitutional amendment.[30] Applying this precedent, *Kennedy* is settled law. The Court's current approach to constitutional questions and its recent Eighth Amendment jurisprudence indicate, however, that the Court is willing to reject its own precedent if it has five votes to do so, regardless of the consequences.[31] Constitutional protections that society assumed were settled law are now at risk of elimination, and the Eighth Amendment is no exception.

The Court has purported to be acting with restraint when it overrules precedent. Professors Melissa Murray and Katherine Shaw explain that *Dobbs* relied on a "democratic deliberation" narrative abortion decisions like *Roe* and *Casey* interfered with the political process and blocked the people from engaging with an issue of national and moral significance.[32] They explain that "democratic deliberation" may either create new justifications for the Court to overrule precedent based on the presence of national disagreement or "bypass conventional stare decisis analysis altogether if it views a precedent as so contentious and divisive that the underlying question should be decided through the political process, rather than through judicial **[*301]** resolution."[33] This Article draws on their analysis

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[26] *Id.* at 554 n.45.

[27] Exec. Order No. 14164, 90 Fed. Reg. 8463 (Jan. 20, 2025).

[28] *See* Memorandum from Pam Bondi, Att'y Gen., U.S. Dep't of Just., to All Dep't Emps. 4 (Feb. 5, 2025), https://www.justice.gov/ag/media/1388561/dl?inline.

[29] *See infra* notes 277-280 and accompanying text.

[30] *See* Rhodes v. Chapman, 452 U.S. 337, 351 (1981) ("This Court must proceed cautiously in making an Eighth Amendment judgment because, unless we reverse it, '[a] decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment . . . ." (citing Gregg v. Georgia, 428 U.S. 153, 176 (1976))); *Gregg*, 428 U.S. at 176 ("A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment."); Miller, *Decency, supra* note 16, at 136-37 (discussing critiques of the evolving standards of decency); Jeffrey Omar Usman, *State Legislatures and Solving the Eighth Amendment Ratchet Puzzle*, 20 U. PA. J. CONST. L. 677, 678-79 (2018) (explaining how the Eighth Amendment operates as a one-way ratchet that limits state legislatures); Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 870-71 (2007) [hereinafter Ryan, *Stare Decisis*] (describing lower courts' limitations when deciding Eighth Amendment cases); John F. Stinneford, *The Original Meaning of Unusual: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1816-17 (2008) [hereinafter Stinneford, *Unusual*] (arguing that the original meaning of "unusual" prohibits adopting punishments that are harsher than traditional forms of punishment). *But see* Harmelin v. Michigan, 501 U.S. 957, 990 (1991) ("The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.").

[31] *See* Miller, *Purpose and Practice, supra* note 14, at 279-80 (discussing the Court's "new conservative majority" and positing that "overruling precedent should largely depend on whether a contemporary majority of the Court believes that the binding rule was 'wrongly decided'").

[32] Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 731 (2024) (noting that the Court overturned "nearly fifty years' worth of precedent" in deciding *Dobbs*).

and discusses why *Kennedy* and other Eighth Amendment jurisprudence are vulnerable to the same "democratic deliberation" arguments that the Court wielded in *Dobbs*. Justice Alito, who wrote *Dobbs*, dissented in *Kennedy*, faulting the Court for judicial overreach that interfered with organic state political developments.[34] Like abortion, the death penalty is a matter of national controversy, and the Court has signaled that the moral questions it raises should be left to the political process.[35]

This Article contributes to the academic literature about the future of the Eighth Amendment by addressing how new state laws expanding the death penalty to convictions for child rape may undermine extant Eighth Amendment precedent through the application of the "democratic deliberation" arguments the Court has embraced. This Article also explores how *Grants Pass*, which offered a novel approach to the Eighth Amendment, contributes to the decline of Eighth Amendment jurisprudence.[36] It addresses why the new state laws may present an opportunity for the Court to dismantle Eighth Amendment protections.[37] The rape of a child is an especially heinous offense and this Article does not dispute the harms that these offenses inflict.[38] The nature of that offense and the fact that persons who have been convicted of that offense are considered to be among the worst offenders makes it easier to secure legislative and judicial support for increasingly harsh and even capital punishment. This threatens to undermine essential constitutional protections against the arbitrary and unjust infliction of capital punishment. Overruling *Kennedy v. Louisiana* would have a disastrous impact on the ESD and the Eighth Amendment.

Part II of this Article summarizes the majority and dissenting opinions in *Kennedy v. Louisiana*. It also identifies critiques of the opinion, which were primarily aimed at the Court's perceived hubris and overreach in interfering with state prerogatives to make moral decisions about offenses and **[*302]** punishments. These complaints are similar to those leveled against *Roe* and *Casey* particularly critiques about judicial overreach in areas better left to state control, democracy, and morality and highlight vulnerabilities in the Court's Eighth Amendment jurisprudence.

Part III provides an overview of the laws in Florida and Tennessee that authorize the death penalty for the rape of a child. It explains how they fit within existing capital punishment structures and procedures in those states and illustrates how states attempted to respond to the opinions in *Kennedy*. This Part also discusses why these laws are more than political posturing; prosecutors in Florida have already sought the death penalty against a person under the new law.[39] While procedural and constitutional barriers may hinder state prosecutions, it is possible that the issue could reach the Supreme Court.

Part IV addresses the uncertain future of the Eighth Amendment. The Court is currently engaged in "stealth overruling" the ESD, which weakens the jurisprudential foundations of that precedent, as illustrated by the Court's Eighth Amendment analysis in *Grants Pass*. The Court is likely receptive to challenges to the ESD because of changes to membership, legislative opportunism, and willingness to reverse precedent. This Part applies the stare decisis factors discussed in *Dobbs* to *Kennedy*, illustrating the relationships between the analyses in Justice Alito's majority opinion in *Dobbs* and his dissent in *Kennedy*. This Part also discusses future directions of the Eighth Amendment: "devolving" standards of decency in which states can create a new national consensus to undo Eighth

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[33] *Id.* at 732.

[34] Kennedy v. Louisiana, 554 U.S. 407, 452-57 (2008) (Alito, J., dissenting) (critiquing the Court's application of the evolving standards of decency).

[35] *See* Murray & Shaw, *supra* note 32, at 749 (discussing the Court's approach to stare decisis when the "subject matter involves an issue that the Court believes to be of high salience to the American people"); Bucklew v. Precythe, 587 U.S. 119, 130 (2019).

[36] *See infra* notes 291-302 and accompanying text.

[37] *See infra* Section III.A.

[38] *See* Rosemary Ardman, *Child Rape and the Death Penalty*, IDAHO L. REV. (forthcoming 2025) (manuscript at 26-28).

[39] *See infra* notes 268-269 and accompanying text.

Amendment precedent or, more likely, a restrictive historical approach like the one articulated in *Grants Pass* or in various separate opinions by Justice Clarence Thomas addressing the Eighth Amendment. This Article concludes by discussing the potential risks of legislative and judicial expansion of the death penalty after decades of deliberate narrowing. Undoing constitutional protections, even for people accused of committing serious crimes, threatens the stability of the Eighth Amendment.

II. UNDERSTANDING *KENNEDY*

Kennedy v. Louisiana is the Court's most recent decision applying the **[*303]** ESD to prohibit the death penalty for a category of offenses.[40] This analysis has been used to determine whether the death penalty should apply to a category of offenses or offenders and the permissibility of sentences of life without parole for juvenile offenders.[41] In evaluating whether a punishment comports with the ESD, a court evaluates two components. First, the court assesses the "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions."[42] Courts evaluate a range of information in performing this inquiry, including state laws, jury verdicts, proposed legislation, and international law trends.[43] Next, the court applies its "independent judgment."[44] This portion of the analysis may evaluate Supreme Court precedent, Eighth Amendment history, whether a punishment serves retributive or deterrent goals, and other factors relevant to a defendant's culpability.[45]

Section A briefly summarizes the majority and dissenting opinions in *Kennedy*. Section B describes some of the critiques of *Kennedy* and its application of the ESD and discusses similarities to state responses to abortion rulings. Understanding these critiques highlights *Kennedy*'s vulnerability.

[*304]

A. Kennedy v. Louisiana

Patrick Kennedy was sentenced to death in 2003 for raping his eight-year-old stepdaughter, L.H.[46] Louisiana had adopted the death penalty for the rape of a child in 1995.[47] Kennedy was the first person sentenced to death under

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[40] The Court applied the ESD in 2010 and 2012 to evaluate the constitutionality of life sentences for juvenile offenders. *See* Graham v. Florida, 560 U.S. 48, 58, 82 (2010) (prohibiting life without parole sentences for juvenile nonhomicide offenders); Miller v. Alabama, 567 U.S. 460, 469 (2012) (applying the ESD to preclude imposition of lifetime sentences without parole for juveniles convicted of homicide offenses). In *Hall v. Florida*, 572 U.S. 701 (2014), the Court used the ESD to determine that Florida's approach to determining whether a person is intellectually disabled under *Atkins* violated the Eighth Amendment. *See id.* at 709-10; Bidish J. Sarma, *How* Hall v. Florida *Transforms the Supreme Court's Eighth Amendment Evolving Standards of Decency Analysis*, 62 UCLA L. REV. DISC. 186, 193-95 (2014).

[41] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419 (2008); Coker v. Georgia, 433 U.S. 584, 600 (1977); Atkins v. Virginia, 536 U.S. 304, 311-12 (2002); Roper v. Simmons, 543 U.S. 551, 560-61 (2005); Enmund v. Florida, 458 U.S. 782, 788 (1982); Tison v. Arizona, 481 U.S. 137, 181 (1987) (Brennan, J., dissenting); Graham v. Florida, 560 U.S. 48, 58 (2010); *Miller*, 567 U.S. at 469; Thompson v. Oklahoma, 487 U.S. 815, 821 (1988).

[42] *Roper*, 543 U.S. at 563.

[43] *See* *Atkins*, 536 U.S. at 315-16 (analyzing legislation); *Roper*, 543 U.S. at 564-65 (analyzing legislation, execution practices, and death sentences); *see also* Miller, *Decency, supra* note 16, at 122-23.

[44] *Kennedy*, 554 U.S. at 427; *Atkins*, 536 U.S. at 321.

[45] *See* *Atkins*, 536 U.S. at 318-19 (discussing whether the justifications for capital punishment support sentencing people with intellectual disabilities to death); *Roper*, 543 U.S. at 569-70 (discussing why juveniles are less culpable than adults); *see also* Miller, *Decency, supra* note 16, at 123.

[46] *Kennedy*, 554 U.S. at 417.

the Louisiana statute.[48] The Supreme Court of Louisiana affirmed Kennedy's death sentence.[49] The Supreme Court of the United States granted certiorari on the question of whether the Eighth Amendment permitted the imposition of the death penalty for the rape of a child.[50]

1. The Majority Opinion

In the objective portion of the ESD analysis, the Court assessed the landscape of capital punishment for rape and the rape of a child, both before and after *Furman v. Georgia*.[51] After *Furman* when states began enacting new capital punishment statutes, Georgia, North Carolina, and Louisiana adopted capital punishment for "all rape offenses," and Tennessee, Mississippi, and Florida did so "with respect only to child rape."[52] Writing for the majority, Justice Anthony Kennedy observed that state and federal courts had held those provisions unconstitutional during the 1970s and 1980s for various reasons, predominately the mandatory imposition of capital **[*305]** punishment.[53] In other ESD cases, the Court had also evaluated the "consistency of the direction of change."[54] Thus the number of states that had or had not adopted the penalty was relevant to, but not necessarily dispositive of, a national consensus.[55]

During the 1990s and early 2000s, when support for capital punishment was at its highest, six states adopted the death penalty for the rape of a child.[56] The other states that retained the death penalty and the federal government had not made the rape of a child a capital crime.[57] The Court compared these numbers against those of other

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[47] *See id.* at 423. Aggravated rape was defined as rape in which "anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim" if certain circumstances were present, one of which was that the victim was under the age of twelve. LA. REV. STAT. ANN. § 14:42 (2023). If the victim was under twelve, the district attorney could seek the death penalty. *Id.* During the penalty phase, the jury could not impose a death sentence unless it found at least one statutory aggravating circumstance beyond a reasonable doubt and, after it considered any mitigating circumstances, concluded that death was the appropriate punishment. LA. CODE CRIM. PROC. ANN. art. 905.3 (2023), *invalidated by* Kennedy v. Louisiana, 554 U.S. 407 (2008).

[48] State v. Kennedy, 957 So. 2d 757, 793 (La. 2007), *rev'd*, 554 U.S. 407 (2008).

[49] *Kennedy*, 957 So. 2d at 793 (upholding Kennedy's death sentence), *rev'd*, 554 U.S. 407 (2008).

[50] *See Kennedy*, 554 U.S. at 419.

[51] *See id.* at 422-23; *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Court concluded in a brief per curiam opinion that the "imposition and carrying out of the death penalty . . . constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-40. Each Justice wrote separately to explain why they concurred or dissented with that conclusion. *Id.* at 240. As Professor Corinna Barrett Lain explains, "[b]ecause none of *Furman*'s concurring Justices joined in any other concurring Justice's opinion, identifying *Furman*'s doctrinal basis is itself no small feat." Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 11 (2007).

[52] *Kennedy*, 554 U.S. at 422; *see also* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 268-74 (2d ed. 2002) (discussing state legislative responses to *Furman*).

[53] *See Kennedy*, 554 U.S. at 422-23 (identifying cases in which courts held the death penalty unconstitutional).

[54] *See* Atkins v. Virginia, 536 U.S. 304, 315 (2002); Roper v. Simmons, 543 U.S. 551, 565-66 (2005) (emphasizing the consistent trend of states rejecting the death penalty for juvenile offenders).

[55] *See Kennedy*, 554 U.S. at 425 (comparing *Atkins, Roper*, and *Enmund*); *id.* at 455 (Alito, J., dissenting) (arguing that states enacting new capital punishment laws "might represent the beginning of a new evolutionary line").

[56] *See id.* at 423 (majority opinion) (identifying Georgia, Montana, Oklahoma, South Carolina, and Texas as the other states that had adopted similar capital punishment statutes). *See generally* J. Baxter Oliphant, *Support for Death Penalty Lowest in More Than Four Decades*, PEW RES. CTR. (Sept. 29, 2016), https://www.pewresearch.org/short-reads/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/ (explaining that public support for the death penalty peaked in the mid-1990s).

Eighth Amendment categorical challenges, concluding that the evidence of consensus on the death penalty for child rape "shows divided opinion but, on balance, an opinion against it."[58]

Louisiana and several amicus briefs advanced the argument that states might have desired to enact the penalty but did not under the incorrect assumption that *Coker v. Georgia*, which held that the Eighth Amendment prohibited the imposition of capital punishment for the rape of an adult woman, also prohibited capital punishment for the rape of a child and other nonhomicide crimes.[59]*Kennedy* rejected this argument, in part because *Coker* **[*306]** relied on the distinction between the rape of an adult and the rape of a child to illustrate that Georgia's law was an outlier and in part because there was insufficient evidence that states had relied on *Coker* to avoid enacting capital punishment for the rape of a child.[60] State court opinions had either recognized that *Coker* did not address that specific issue or had discussed it only in dicta.[61] The Supreme Court of Florida had applied *Coker* to conclude that imposing the death penalty for the rape of a child violated the Eighth Amendment.[62] But that court recognized that the Supreme Court had not applied *Coker* in that way and "made explicit that it was extending the reasoning but not the holding of *Coker* in striking down the death penalty for child rape."[63]

Finally, the Court observed that only two people in the United States Patrick Kennedy and Richard Davis had been sentenced to death for the rape of a child and were, in fact, the only two people on death row in the United States for *any* nonhomicide offense.[64] No person had been executed in the United States for the rape of a child since 1964.[65] Based upon its review of legislative action, state court decisions, and death sentences, the Court concluded there was a national consensus against the imposition of the death penalty for the rape of a child.[66]

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[57] *Kennedy*, 554 U.S. at 423 (stating that the Federal Death Penalty Act of 1994 expanded applicability of the death penalty to a number of crimes but did not expand it to the rape of a child). *But see infra* notes 123-127 and accompanying text (describing the discovery that the Uniform Code of Military Justice did authorize the death penalty for the rape of a child, a fact that the parties and Court had overlooked).

[58] *Kennedy*, 554 U.S. at 425-26 (stating that only six of the thirty-six U.S. jurisdictions authorizing the death penalty permitted the death penalty for child rape); *id.* at 431-34 (evaluating information regarding contemporary norms to ultimately find a "national consensus against capital punishment for the crime of child rape").

[59] *See id.* at 426-29 (outlining the respondent's claim that "the general propositions" outlined in *Coker* were "too expansive," leading state legislatures to incorrectly assume that the case applied to child rape); *see also* Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape").

[60] *See* *Kennedy*, 554 U.S. at 428-29 (citing *Coker*, 433 U.S. at 595-96) ("Respondent cites no reliable data to indicate that state legislatures have read *Coker* to bar capital punishment for child rape and, for this reason, have been deterred from passing applicable death penalty legislation.").

[61] *See* *id.* at 429-31 (concluding that differing state court opinions were either dicta or had been superseded by the state's supreme court); Leatherwood v. State, 548 So. 2d 389, 402 (Miss. 1989) (noting that defendant argued that the death penalty for the rape of a child was inconsistent with *Coker* but declining to address the argument because state law precluded the imposition of the death penalty on other grounds).

[62] Buford v. State, 403 So. 2d 943, 950-51 (Fla. 1981).

[63] *Kennedy*, 554 U.S. at 430-31 (citing *Buford*, 403 So. 2d at 950-51).

[64] *Id.* at 434.

[65] *Id.* at 433.

[66] *Id.* at 434.

The Court's independent judgment analysis assessed the proportionality of the offense to determine whether the death penalty was an excessive punishment.[67] The Court acknowledged the traumatic impact of sexual violence on children but emphasized that extending the death penalty **[*307]** necessitated "hesitation that has special force where no life was taken in the commission of the crime."[68] Although imposing capital punishment for child rape might serve punitive functions, specifically retribution and deterrence, the Court concluded that it was nonetheless disproportionate.[69]

Kennedy recognized that child rape "occurs more often than first-degree murder," thus the increased use of capital punishment might produce more arbitrarily imposed death sentences.[70] Although some states, mindful of the Court's capital punishment jurisprudence, had developed aggravating factors to narrow the category of who might be sentenced to death, *Kennedy* suggested that it was too difficult to identify aggravating factors that would prevent arbitrary death sentences in such cases.[71] The nature of the offense might lead to arbitrary infliction of capital punishment because the crime might "overwhelm a decent person's judgment" and interfere with a juror's ability to balance aggravating and mitigating factors.[72] To hold the penalty constitutional would require the Court to build out an additional body of capital punishment law and potentially risk unjust imposition of capital punishment in some cases.[73] Aggravating factors the Court had previously approved in capital murder sentencing were unhelpful because their application to capital sentencing in child rape prosecutions might produce inconsistent results an outcome at odds with the Court's attempts to ensure that capital sentences were not arbitrary.[74]

Justice Kennedy also addressed the potential impact of capital proceedings on child victims. Such testimony requires a "long-term commitment" and ultimately "forces a moral choice on the child, who is not of mature age to make that choice."[75] The child victim's testimony would **[*308]** likely be essential to convict, thus providing testimony would require a child victim to take an act that would ultimately lead to a person's death.[76] Justice Kennedy observed that the prosecutor "made L.H. a central figure in its decision to seek the death penalty, telling the jury in closing statements: '[L.H.] is asking you, asking you to set up a time and place when he dies.'"[77]

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[67] *See* *id.* at 438 (distinguishing between "intentional first-degree murder" and "nonhomicide crimes against individual persons").

[68] *Id.* at 435.

[69] *See* *id.* at 441-42 ("The incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment and counsels against a constitutional ruling that the death penalty can be expanded to include this offense.").

[70] *See* *id.* at 438-39.

[71] *Id.* at 439 ("We find it difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way.").

[72] *Id.*

[73] *See* *id.* at 440-41 ("[B]eginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty.").

[74] *See* *id.* at 440 ("[T]he resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred.").

[75] *Id.* at 442-43.

[76] *Id.* at 443.

[77] *Id.* at 443.

The Court expressed reluctance to put children in a position where they might be confronted with the moral choice of whether to testify in a case that could potentially lead to a family member's death at the hands of the state.[78] Such decisions are especially fraught in crimes involving sexual violence. Most victims of sexual assaults know the perpetrator, and of the sexual abuse cases reported to law enforcement, thirty-four percent of juvenile victims reported that the perpetrator was a family member.[79] For those reasons, rape and child sexual abuse often go underreported, something the Court found relevant to deterrence and prosecution of such offenses.[80] Using capital punishment as a penalty for the rape of a child might further decrease reporting, failing to serve the goal of deterrence.[81] The Court also speculated that imposing capital punishment could potentially incentivize offenders to kill their victims to avoid detection.[82]

Kennedy also raised the risk of wrongful convictions and executions because children, especially young children, may be vulnerable to "suggestive questioning techniques" and could potentially provide false testimony.[83] Retribution requires punishing those who deserve it.[84] The risk of wrongful convictions, especially in a case in which the victim and perpetrator are the sole witnesses to the crime, was a poor fit with retribution's focus on deserved **[*309]** punishment.[85] The risk is heightened when the violence associated with the rape serves as a critical aggravating factor to justify the imposition of capital punishment and the victim may provide inaccurate testimony in response to problematic questioning practices.[86]

In concluding that the Eighth Amendment prohibited the imposition of death for the crime of the rape of a child, the Court emphasized that the ESD "requires that use of the death penalty be restrained."[87] The Court reserved the question of whether capital punishment for nonhomicide "offenses against the State" was constitutional, but it asserted that "[a]s it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken."[88]*Kennedy* embraced the one-way ratchet of the ESD. The death

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[78] *See id.*

[79] *Perpetrators of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/perpetrators-sexual-violence (last visited Oct. 15, 2024) (demonstrating how frequently perpetrators of sexual violence know their victims); Sarah Zhang, *DNA Tests are Uncovering the True Prevalence of Incest*, THE ATL. (Mar. 18, 2024), https://www.theatlantic.com/health/archive/2024/03/dna-tests-incest/677791/ (discussing the prevalence of incest).

[80] *See* *Kennedy*, 554 U.S. at 444-45.

[81] *See* *id.* at 445 ("The experience of the *amici* who work with child victims indicates that, when the punishment is death, both the victim and the victim's family members may be more likely to shield the perpetrator from discovery, thus increasing underreporting.").

[82] *See* *id.* at 445-46 (citing Corey Rayburn, *Better Dead than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1159-60 (2004)).

[83] *See* *id.* at 443-44.

[84] *See* *id.* at 442.

[85] *See* *id.* at 443-44.

[86] *See* *id.* at 444 (recognizing that details regarding the crime's brutality are subject to "fabrication or exaggeration").

[87] *Id.* at 446.

[88] *Id.* at 437.

penalty had been consistently limited to avoid its arbitrary and excessive imposition.[89] States could not, by legislative action, reverse the evolutionary direction of the standards of decency.

2. The Dissent

Justice Alito's dissent faulted both the majority's assessment of a national consensus and the exercise of its independent judgment.[90] He asserted that states had read *Coker* too broadly, extending its prohibition to all nonhomicide offenses rather than just the rape of an adult woman.[91] Because of the difficulty of passing capital statutes, as well as state legislative concerns over extended litigation, he argued that states were unwilling to take the risk of passing laws that imposed the death penalty for child rape, "even though these legislators and their constituents may have believed that the laws would be appropriate and desirable."[92] Justice Alito appeared to take the position that state action *and* inaction were equally relevant and dictated that a state **[*310]** should win. If states enacted capital penalties, provided they believed they would prevail, then those enactments reflected state judgment "informed by whatever weight they attach to the values of their constituents."[93] But legislative decisions not to act could not be taken as an "expression of their understanding of prevailing societal values" if legislators did not think that the law they enacted would survive constitutional scrutiny.[94] States that enacted laws "despite the shadow cast by the *Coker* dicta" *also* acted according to their own standards of decency.[95]

The dissent suggested that states' decisions to pass laws that punished child rape with death were consistent with increasing social concern about the prevention of child sexual abuse.[96] Newer carceral practices such as more severe punishments, registries, and supervision indicated to the dissenters that the national consensus tipped in greater favor of tolerating capital punishment for child rape.[97] While the dissent admitted that six states was not a "national consensus," it argued that the Court had acted improperly by not permitting states to continue the "evolutionary line" and determine if a national consensus could develop.[98]

As in other categorical Eighth Amendment cases, the dissent reserved its harshest criticisms for the majority's independent judgment analysis.[99] Justice Alito argued that the impact on victims and the potential to incentivize an offender to kill a victim were "policy arguments" that were "not pertinent to the question whether the death penalty is 'cruel and unusual' punishment."[100] He also asserted that the risks of wrongful convictions were inadequate to

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[89] *See id.* (explaining that the Court has responded to the tensions inherent in judicial regulation of capital punishment by "insist[ing] upon confining the instances in which capital punishment may be imposed").

[90] *Id.* at 447 (Alito, J., dissenting).

[91] *See id.* at 449-50.

[92] *Id.* at 452.

[93] *Id.* at 454.

[94] *Id.*

[95] *Id.* at 455.

[96] *Id.* at 455-57 (discussing the "growing alarm about the sexual abuse of children" that has led many states to punish those offenses more severely).

[97] *See id.* at 456-57 (describing the dramatic increase in "reported instances of child abuse," enactment of registries for sexually violent predators, civil commitment laws, and laws restricting where people convicted of sex offenses can live).

[98] *Id.* at 461.

[99] *See id.* at 462 (describing the majority's arguments as "irrelevant" and asserting that "the Court has provided no coherent explanation for today's decision").

justify holding state laws unconstitutional.[101] These risks, he reasoned, were present in every case involving child victims, and states could **[*311]** overcome those obstacles.[102] Some crimes, such as the one in *Kennedy*, had medical evidence that linked the perpetrator to the offense.[103] Further, states might create heightened conviction requirements for death eligibility, such as requiring "independent evidence" to prove the elements of an offense or "special corroboration."[104]

Although the majority had questioned whether states could reliably develop criteria to meaningfully narrow the class of death-eligible offenders, Justice Alito argued that the laws could adequately limit sentencers' discretion, even if the victim's age was insufficient by itself.[105] For example, four states had identified a prior conviction for sexual offenses with minors as a condition for imposing the death penalty.[106] He also proposed other factors that states might utilize to narrow sentencers' discretion.[107] Such factors, he asserted, were arguably *more* "definite and clear cut" than some factors the Court had previously approved in capital murder cases.[108]

Justice Alito disagreed that such statutes would expand the death penalty because laws are "presumptively constitutional," and because the Court had not said that the death penalty for the rape of a child was unconstitutional earlier, upholding the laws would only "confirm the status of presumptive constitutionality that such laws have enjoyed up to this point."[109] He rejected the ratchet theory of the Eighth Amendment that the majority had embraced states should not be prevented from adopting new punishments if social **[*312]** conditions and standards changed.[110]

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[100] *Id.*

[101] *See id.* (asserting that the majority focused on policy arguments that are irrelevant to the constitutionality of the death penalty).

[102] *See* *id.* at 464-65.

[103] *See* *id.* at 464.

[104] *See* *id.* at 464-65. Corroboration requirements, however, rely on the sexist stereotype that women are likely to lie about rape. *See* Camille E. LeGrand, Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919, 936 (1973) (discussing stereotypes underpinning corroboration requirements); Janet E. Findlater, *Reexamining the Law of Rape*, 86 MICH. L. REV. 1356, 1363 (1988) (explaining that "evidentiary rules, such as those that require corroboration . . . were based on this inherent distrust of women"); Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 TULSA L. REV. 1, 9-10 (2017) (discussing the sexist origins of corroboration requirements).

[105] *Kennedy*, 554 U.S. at 463 (Alito, J., dissenting) (describing potential aggravating factors that might meaningfully narrow the category of death-eligible offenders).

[106] *See id.* (identifying Texas, Oklahoma, Montana and South Carolina as states that adopted "a concrete factor" for sentencing determinations in capital prosecutions for the rape of a child).

[107] *Id.* at 463-64 (identifying potential aggravating factors, such as: "whether the victim was kidnaped, whether the defendant inflicted severe physical injury on the victim, whether the victim was raped multiple times, whether the rapes occurred over a specified extended period, and whether there were multiple victims").

[108] *See* *id.* at 464.

[109] *Id.* at 465-66.

[110] *See id.* (citing Harmelin v. Michigan, 501 U.S. 957, 990 (1991)) ("The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.").

The dissent also questioned the majority's distinction between homicide and nonhomicide offenses against individuals as the dividing line of what the Eighth Amendment tolerated because, the dissent argued, some people who commit capital crimes may have demonstrated far *less* "moral depravity" than persons who were convicted of raping young children.[111] Nor was it clear to the dissent why crimes committed against the state were more morally blameworthy than the rape of a child.[112] Justice Alito asserted that the harms that children who had been victims of sexual violence experienced were potentially lifelong, devastating, and had significant social impacts.[113] States, the dissent reasoned, had a sufficient basis to conclude that such offenses justified the imposition of capital punishment.[114]

B. Critiques of Kennedy *and Parallels with* Roe *and* Casey

Kennedy was a controversial decision that received public, academic, and legislative criticism, including from then-presidential candidates John McCain and Barack Obama.[115] Critiques focused on the Court's methodology in evaluating a national consensus and the substantive justifications for its decision, particularly the way the Court addressed the moral question of imposing the death penalty for the rape of a child and whether the Court had overreached and interfered with state democratic processes.[116] Although the decision was criticized for its application of the ESD, substantive constitutional analysis (or lack thereof, depending on the source of criticism), **[*313]** and incoherence in discussing retributive and deterrent justifications for the penalty, critiques of *Kennedy* predominately centered on the argument that the individual justices' preferences dictated the analysis and results.[117] These critiques and the recent state legislative actions seeking to overturn *Kennedy* echo states' attempts to undo *Roe* and *Casey* and the Supreme Court's decision in *Dobbs*. Understanding these critiques and developments highlights the opinion's vulnerability to a post-*Dobbs* Court, as well as some of the vulnerabilities of the current Eighth Amendment approach.

Kennedy was criticized as an act of judicial hubris and overreach because it prevented states from making decisions about how to punish crime and stopped the development of a national consensus.[118] This critique was aimed at both prongs of the evolving standards analysis and the holding of *Kennedy*. Justice Alito's dissent reflects this complaint: by preventing states from making decisions about which kind of punishments they may deem most appropriate for an offense, even if the specific punishment was constitutionally acceptable, the Court had arrogated the role of a superlegislature.[119] Doing so was offensive to "the people" who may want to impose a particular

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[111] *See* *id.* at 466-67.

[112] *Id.* at 467 ("[T]he Court makes no effort to explain why the harm caused by such crimes is necessarily greater than the harm caused by the rape of young children.").

[113] *See* *id.* at 468-69 (describing evidence that victims of childhood sexual abuse often experience serious psychological harms).

[114] *Id.* at 469.

[115] *See* *McCain, Obama Disagree with Child Rape Ruling*, NBC NEWS (June 26, 2008, 2:22 AM), https://www.nbcnews.com/id/wbna25379987 (summarizing responses from McCain and Obama to the *Kennedy* decision).

[116] *See* Adam S. Goldstone, *The Death Penalty: How America's Highest Court is Narrowing its Application*, 4 CRIM. L. BRIEF 23, 32-34 (2009) (contending that the majority decided *Kennedy* based on Justices' "own judgment[s]" and not on "objective indicia" of national consensus).

[117] *See* *id.* at 33 (asserting that the Court "substituted its moral judgment and opinion for that of the people in an ongoing crusade to narrow the application of the death penalty in the United States").

[118] *See* Heidi M. Hurd, *Death to Rapists: A Comment on* Kennedy v. Louisiana, 6 OHIO ST. J. CRIM. L. 351, 353-54 (2008) (asserting that if the Court believed "community sentiment fixed the extension of the Eighth Amendment's prohibitions," it would have taken state arguments that legislation stalled because of doubts about constitutionality rather than moral beliefs more seriously).

punishment for an offense and disrespectful to the states.[120] Critics also faulted the breadth of the holding because *Kennedy* effectively barred states from imposing the death penalty for all nonhomicide offenses against individuals, regardless of the Court's refusal to decide the question about crimes against the state.[121] Some suggested that the Court was **[*314]** attempting to diminish the use of the death penalty, regardless of national consensus or state preference.[122]

Kennedy's application of the ESD was considered vulnerable after the discovery that the Justices had not considered a 2006 amendment to the Uniform Code of Military Justice that permitted the imposition of the death penalty for child rape that did not result in the death of the victim.[123] None of the parties' briefs or amici had raised the provision.[124] This oversight sparked immediate controversy academics, legislators, and the media asserted that the Court's decision that there was no national consensus relied on an inaccurate basis.[125] The Court denied Louisiana's request for rehearing and modified the opinion to reflect that the UCMJ provision "does not affect our reasoning or conclusions."[126] Justice Kennedy's statement on the denial of rehearing concluded that state law should receive greater weight over military law, which applies only to a limited subset of the population.[127] This oversight did not substantially weaken the consensus analysis the Court had rejected the death penalty for people with intellectual disabilities and for juveniles when twenty states still retained those penalties, rather than six.[128]

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[119] *See* Richard M. Re, *Can Congress Overturn* Kennedy v. Louisiana?, 33 HARV. J. L. & PUB. POL'Y 1031, 1051 (2010) [hereinafter Re, *Congress*] (asserting that the Court's decision effectively "denied individual states the authority to legislate in this area"); Hurd, *supra* note 118, at 354-55 (asserting that "nothing tabulates preferences better than democratic political institutions and free markets" and that Court's decision was arose from its belief that it was "a better barometer of social sentiments than are legislators and the enactments they pass").

[120] *See* J. Richard Broughton, Kennedy *and the Tail of Minos*, 69 LA. L. REV. 593, 597 (2009) (asserting that the Court's decision in *Kennedy* improperly undercut the public's role in determining the gravity of a crime); Jessica Cullivan, Comment, *Why the* Kennedy v. Louisiana *Holding Does Not Afford Missouri a Voice*, 44 NEW ENG. L. REV. 453, 463-64 (2010) (suggesting courts should look to society to determine a consensus on social issues).

[121] *See* Broughton, *supra* note 120, at 597; Hurd, *supra* note 118, at 363 ("[O]ne cannot help but suspect at the end of the day that it is the Court's core conviction that death is undeserved by anyone who does not cause death that best explains the Court's decision.").

[122] *See* Leary, *supra* note 4, at 101-02 (observing that the Court framed state laws as expanding the death penalty, suggesting judicial preference to reduce the use of capital punishment even if states preferred otherwise).

[123] *See* Douglas E. Abrams, Lochner v. New York *(1905) and* Kennedy v. Louisiana *(2008): Judicial Reliance on Adversary Argument*, 39 HASTINGS CONST. L. Q. 179, 185-86 (2011) (discussing the report of the military law blogger that brought the issue to light); Re, *Congress, supra* note 119, at 1034 (discussing the implications of the oversight on the Court's prior denial of a national consensus).

[124] *See* Abrams, *supra* note 123, at 186.

[125] *See id.* at 186-87 (discussing responses to *Kennedy*).

[126] Kennedy v. Louisiana, 554 U.S. 407, *reh'g denied*, **554 U.S. 945 (2008)**.

[127] *See id.*, 129 S. Ct. at 2-3 (describing the "civilian context" as separate from the "military sphere"); Re, *Congress, supra* note 119, at 1034-35 (discussing the denial of rehearing).

[128] *See* Roper v. Simmons, 543 U.S. 551, 564-65 (2005) (describing state consensus against the execution of people with intellectual disabilities and juveniles).

Despite the clear consensus, some commentators and state legislators felt that the Court had overlooked the significance of state trends toward adopting capital punishment for the rape of a child.[129] These critiques argued that the **[*315]** Court did not appropriately apply the ESD because it had ignored indicators that a new national consensus was developing in favor of judicial policymaking based on five Justices' preferences to reduce the use of capital punishment.[130] They argued that uncertainty over whether *Coker* would prohibit the imposition of the death penalty had influenced legislative deliberation over whether to adopt the death penalty for the rape of a child, creating artificial consensus.[131]

Morality complaints about *Kennedy* asserted that the Court improperly inserted its own judgment about morality in place of the judgment of the people through their elected representatives.[132] If the people and their representatives determine that it is moral to impose the death penalty on persons convicted of a crime that produces such serious public outrage, then, the argument goes, the Court oversteps its bounds by prohibiting that penalty.[133] These arguments emphasize the nature of the harm associated with sexual violence towards children and assert that the death penalty is a reasoned response to a crime considered to be extraordinarily outrageous and vile.[134] Professors Douglas Berman and Stephanos Bibas, who has since become a judge on the U.S. Court of Appeals for the Third Circuit, argued that imposing **[*316]** the most severe punishment for a crime as terrible as the rape of a child was appropriate to repair the "breach of trust" inflicted upon a child victim and that judges reviewing death decisions about child rape should "respect other actors' efforts to express society's outrage."[135] Other critiques argued that the decision undercut states' ability to respond to sexual violence against children.[136] This analysis focuses on social preference, but preference alone is not adequate to justify the imposition of any penalty.

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[129] *See* Goldstone, *supra* note 116, at 33 (contending that the Court should strive to enforce the states' legislation by viewing each case as a separate matter); Leary, *supra* note 4, at 100 (observing that six states had adopted the death penalty for the rape of a child in the years before *Kennedy*); Press Release, Jay Paul Gumm, Sen., Okla. Senate, Gumm "Deeply Disappointed" in U.S. Supreme Court (June 25, 2008, 1:32 AM), https://oksenate.gov/press-releases/gumm-deeply-disappointed-us-supreme-court (observing that Justice Kennedy recognized that multiple states had enacted statutes permitting the death penalty for the rape of a child and "interject[ed] his willingness to use the Court's power to stop that growing consensus with this decision"); Benjamin J. Flickinger, Kennedy v. Louisiana: *The Supreme Court Erroneously Finds a National Consensus Against the Use of the Death Penalty for the Crime of Child Rape*, 42 CREIGHTON L. REV. 655, 656 (2009) (describing recently enacted legislation in six states and pending legislation in five states).

[130] *See* Goldstone, *supra* note 116, at 33 (asserting that the Court relied on individual justices' moral judgment); Hurd, *supra* note 118, at 354-55; Leary, *supra* note 4, at 100-01.

[131] *See* Leary, *supra* note 4, at 100 (discussing the *Kennedy* majority's treatment of *Coker*); Monica C. Bell, *Grassroots Death Sentences?: The Social Movement for Capital Child Rape Laws*, 98 J. CRIM. L. & CRIMINOLOGY 1, 10-11 (2007) (explaining how debates over the constitutionality of capital child rape laws influenced legislative deliberations); *see also* Kennedy v. Louisiana, 554 U.S. 407, 453-54 (2008) (Alito, J., dissenting).

[132] *See* Hurd, *supra* note 118, at 353-54 (arguing that a substantial portion of the *Kennedy* majority opinion "outline[d] the Court's own views about the acceptability of the death penalty").

[133] *See* Goldstone, *supra* note 116, at 38-39 (asserting that society views rape of a child as the "worst of the worst," and thus the Court's restriction of the death penalty does not comport with the national consensus regarding its application).

[134] *See id.*; Press Release, Jay Paul Gumm, *supra* note 129 ("[W]e allow the death penalty for someone who has murdered a person; we should allow it for someone who has killed a child's soul."); *McCain, Obama Disagree with Child Rape Ruling, supra* note 115 (quoting then-Senator Obama's statement that "the community is justified in expressing the full measure of its outrage by meting out the ultimate punishment" for some crimes).

[135] Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 362 (2008).

[136] *See* Cullivan, *supra* note 120, at 464-66 ("In the absence of the *Kennedy* decision, it is likely that many more states would have enacted capital rape statutes once they were given an opportunity to examine the effects that the punishment was having

Professor Monica Bell writes that during the late 1990s and 2000s, when states passed these laws, "long-term social movements and short-term bursts of outrage . . . interact[ed] with the political environment for capital child rape laws."[137] She argues that "constitutional doctrine on the death penalty is contoured, and perhaps controlled, by 'the people themselves.'"[138] But this sort of strong public reaction, as she explains, is what made the capital child rape laws constitutionally problematic.[139]*Kennedy* recognized that emotional and social responses to sexual crimes against children created a heightened risk of arbitrariness, which was why the Court expressed doubt that states could develop a fair, non-arbitrary way to impose death consistently with the demands of the Eighth Amendment.[140] The narrative Professor Bell describes illustrates why these critiques arose in response to *Kennedy* and why constitutional limitations on punishment matter.

Professor Richard Re observed that "anti-*Kennedy* legislation would resemble existing state laws that purport to regulate abortion in the event that *Roe* or other abortion precedents are reversed."[141] His prediction has proved accurate. After *Kennedy*, legislatures intermittently undertook efforts to get the Court to reconsider its decision. Senator David Vitter of Louisiana **[*317]** introduced a resolution to express the Senate's belief that the Eighth Amendment should permit the death penalty for the rape of a child, that *Kennedy* was wrongly decided, and that the Court should rehear the case.[142] Representative Paul Broun introduced a constitutional amendment to specify that the death penalty was not a cruel and unusual punishment and that it could constitutionally apply to the rape of a child under the age of sixteen.[143] In 2010, a legislative subcommittee in Oklahoma approved a bill that would permit the imposition of death sentences against persons who were convicted of raping a child under the age of six if the offenders had a qualifying prior conviction.[144] In 2022, Tennessee enacted a "trigger law" permitting the imposition of death for "grave torture" if the Supreme Court overruled *Kennedy* or the Constitution was amended.[145] Current state legislative deliberations on this topic, which this Article discusses in greater detail in Section III.B *infra*, reflect some of the same social forces Professor Bell describes that supported the initial development of these laws in the 1990s and early 2000s.[146] The current attempts to pass new capital rape laws are comparable to state attempts to eradicate *Roe*, although these attempts have gained greater traction after *Dobbs*.

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on deterrence of child rape."); Press Release, Jay Paul Gumm, *supra* note 129 (asserting that "[t]his is a poor decision that will make America's children less safe").

[137] Bell, *supra* note 131, at 29.

[138] *Id.* at 2 (quoting LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)).

[139] *See id.* at 27 ("[I]t is precisely *because* these statutes are a tainted result of a charged and subjectivist political climate that they open the door for unconstitutional arbitrariness.").

[140] *See id.* at 29 (asserting that "capital child rape laws will almost certainly yield extreme arbitrariness" due to the "subjectivity and emotionalism" involved in their application).

[141] Re, *Congress, supra* note 119, at 1090-91.

[142] *See* S. Res. 4, 111th Cong. (2009).

[143] H.R.J. Res. 83, 110th Cong. (2008).

[144] *See* The Associated Press, *Oklahoma: Senate Panel OKs Death Penalty for Child Rapists*, THE JOPLIN GLOBE (Mar. 17, 2010), https://www.joplinglobe.com/archives/oklahoma-senate-panel-oks-death-penalty-for-child-rapists/article_762a06b5-9b2c-5dc8-9b8b-2e4a0d90f1ec.html (describing the progress of the Oklahoma bill); 2010 Okla. Sess. Law. Serv. Ch. 278 (H.B. 1741).

[145] *See* TENN. CODE ANN. § 39-13-117 (2022).

[146] *See infra* Section III.B; Bell, *supra* note 131, at 29 (suggesting that long-term social movements and short-term outrage may contribute to legislation).

For decades after *Roe* and *Casey*, state legislatures passed laws that were potentially inconsistent with those decisions with the hope that someday the Court would be willing to overrule those cases or at least continue to chip away at precedent.[147] States passed laws requiring informed consent, enacted **[*318]** Targeted Regulation of Abortion Providers (TRAP) laws without valid medical justifications to regulate facilities providing abortions, issued bans on abortion at various gestational ages, and implemented waiting periods, among other restrictions.[148] States also passed "trigger laws" that would ban abortion if *Roe* and *Casey* were overturned.[149] Pro-life activists strategized about ways to change the composition of the judiciary to get pro-life judges on the bench.[150] These strategies were influential in *Dobbs* Justice Kavanaugh's concurrence described these actions as "relevant" to the Court's evaluation of prior abortion precedent, supporting the claim that democracy-supporting norms required overruling *Roe*.[151] After the Court's composition changed, creating a solid conservative block in 2018, attacks on *Roe* and *Casey* intensified, with one commentator arguing that pro-life litigators needed to use bolder strategies and simply ask the Court to overturn *Roe*.[152]

One strategy to undermine the right to abortion was to attack the democratic legitimacy of the decision, a tactic that gradually developed after *Roe* and escalated after *Casey*.[153] Complaints about judicial activism **[*319]** facilitated the development of political messaging and legal strategies.[154] Attacks on *Roe* emphasized its lack of legitimacy,

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[147] *See, e.g.*, Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 591 (2016) (examining the constitutionality of a Texas statute that placed certain restrictions on access to abortion); June Med. Servs., LLC v. Russo, 591 U.S. 299, 342 (2020) (finding that a Louisiana statute placing a severe burden on abortion access was unconstitutional); David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 4-5 (2022) (asserting that the Court's approval of certain abortion restrictions in *Casey* led states to impose even stricter restrictions); Carliss Chatman, *We Shouldn't Need Roe*, 28 UCLA J. GENDER & L. 81, 92-94 (2022) (explaining that states "persist[ed] in trying to roll back abortion access" by passing laws imposing narrower restrictions than the constitutional limits set forth in *Roe*); JULIE F. KAY & KATHRYN KOLBERT, CONTROLLING WOMEN: WHAT WE MUST DO NOW TO SAVE REPRODUCTIVE FREEDOM 119-23, 127-28 (2021) (discussing Missouri's attempt to pass a "partial birth abortion" ban and its more recent restrictions); MICHELE MCKEEGAN, ABORTION POLITICS: MUTINY IN THE RANKS OF THE RIGHT 147-50 (1992) (discussing various state attempts to restrict abortion despite a dwindling pro-life movement); Michael J. New, *Analyzing the Effect of Anti-Abortion U.S. State Legislation in the Post*-Casey *Era*, 11(1) STATE POLS. & POL'Y Q. 28, 29-30 (2011) (explaining how *Casey* granted state legislators more leeway in regulating abortion); *Historical Abortion Law Timeline: 1850 to Today*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today (last visited Sept. 30, 2024) (illustrating the progression and regression of abortion law and detailing state legislators' responses to the *Roe* decision in 1973).

[148] *See* Cohen, Donley & Rebouché, *supra* note 147, at 4-5 (summarizing strategies to undo *Roe* and *Casey*).

[149] *See* Jesus Jiménez, *What is a Trigger Law? And Which States Have Them?*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html (explaining "trigger laws" and listing the thirteen states that signaled their readiness to implement them).

[150] *See* MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 53-56 (2015) (discussing the strategy behind the pro-life's focus on reshaping the judiciary); MCKEEGAN, *supra* note 147, at 130-38 (discussing the political circumstances that led to a more conservative judiciary).

[151] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 344 (2022) (Kavanaugh, J., concurring) (claiming that state laws restricting abortion reflected public sentiment).

[152] *See* Matthew J. Clark, *Go Big or Go Home: The Case for Boldness in Pro-Life Advocacy After* June Medical Services v. Russo, 33 REGENT U. L. REV. 239, 274-75 (2021).

[153] *See* Murray & Shaw, *supra* note 32, at 739-42 (describing the democratic deliberation argument and its emergence after *Roe*); ZIEGLER, *supra* note 150, at 227-28 (discussing the development of the "judicial overreaching" and the democratic legitimacy attacks on *Roe*).

claiming that the Court simply made up rights based on its policy preferences.[155] Professors Melissa Murray and Katherine Shaw argue that the "democratic deliberation" critique of *Roe* was central to *Dobbs*.[156] They explain that the democratic deliberation narrative asserts that "*Roe* was wrong because it imposed the Court's policy preferences on the country, wresting the abortion issue from state legislatures, which were in the process of resolving these disputes."[157] These accounts, they observe, "emerged as countermobilization to abortion rights gained prominence."[158] The democratic deliberation narrative they describe is, as this Section has described, reflected in some critiques of *Kennedy*.

The Supreme Court frequently faces critique for judicial hubris.[159] But the Court's growing emphasis on limiting judicial overreach into areas better left to state control, both for democratic deliberation and morality, reflects a significant trend in recent Supreme Court jurisprudence. Recognizing this trend is important to identify potential vulnerabilities the Court may seize upon if it addresses whether to overrule *Kennedy*. These issues will likely be recurring themes in future Eighth Amendment jurisprudence.

III. THE RISKS

The new laws in Florida and Tennessee and pending bills in other states **[*320]** violate the Eighth Amendment.[160] But states may pass unconstitutional laws to achieve political benefits or to make statements. The death penalty is and has always been political.[161] Political candidates have used their support for the death penalty to bolster their

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[154] *See* ZIEGLER, *supra* note 150, at 54 (asserting that the "New Right used the idea of judicial overreaching to help forge a coalition of right-leaning groups").

[155] *See* Clark, *supra* note 152, at 258-60 (setting out legitimacy arguments that might persuade Chief Justice Roberts to overturn *Roe*); Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) (asserting that the Court had "little proper business" answering the political questions at issue in the case); June Med. Servs., LLC v. Russo, 591 U.S. 299, 409-10 (2020) (Gorsuch J., dissenting) (suggesting that the majority's decision oversteps its "constitutionally assigned lane" by reviewing the law for "its wisdom," not "its constitutionality"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996-97 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (suggesting that the majority adhered to a "principle of *Realpolitik*" in choosing to reaffirm *Roe*); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 998-99 (2003) (asserting that the Court's prestige was at stake in *Roe*); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 310-11 (2009) (listing critiques of *Roe*).

[156] Murray & Shaw, *supra* note 32, at 731 (explaining that *Dobbs* claimed to repair *Roe* and *Casey*'s "short circuit[ing]" of the democratic process).

[157] *Id.* at 732.

[158] *Id.* at 746.

[159] *See* Wilkinson, *supra* note 155, at 302 (describing criticisms of the Court's hubris).

[160] *See* Tanner Stening, *Can Florida Legally Expand the Death Penalty to Convicted Child Rapists?*, NE. GLOB. NEWS (May 3, 2023), https://news.northeastern.edu/2023/05/03/florida-death-penalty-expansion/# (explaining that Florida's new law does not comport with *Kennedy*); Miles Cohen, *Gov. DeSantis Signs Controversial Death Penalty Legislation*, ABC NEWS (Apr. 20, 2023, 10:20 AM), https://abcnews.go.com/US/gov-desantis-signs-controversial-death-penalty-legislation/story?id=98699905 (same); *Death Penalty for Child Sexual Abuse that Does Not Result in Death*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/death-penalty-for-child-sexual-abuse-that-does-not-result-in-death (last visited Oct. 12, 2024) (listing laws and proposed legislation that are inconsistent with *Kennedy*).

[161] *See* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 334-36 (2008) (describing the U.S. death penalty system as "politicized" and used by politicians, prosecutors, and elected judges to show voters their toughness on crime); ROBIN M. MAHER & LEAH ROEMER, DEATH PENALTY INFO. CTR., HOW THE U.S. ELECTORAL PROCESS INCREASES THE ARBITRARINESS OF THE DEATH PENALTY 14-17 (2024) (addressing how politics can influence the imposition of, and judicial decisions to affirm, death sentences); *see also Why the Death Penalty is not an Issue in This*

"tough on crime" credentials or whip up support among their base.[162] In 1992, then-Governor Bill Clinton flew home to Arkansas while campaigning for the presidency to oversee the execution of Ricky Rector.[163] The public ridiculed Governor Michael Dukakis for admitting that he would not support capital punishment even if his wife were murdered.[164] Then-Senator Barack Obama expressed his support for capital punishment in some circumstances while running for president.[165] While President Biden publicly opposed the death penalty, in 2024 the Department of Justice decided to seek the death penalty for the man who murdered people in a hate crime in a Buffalo supermarket in 2022.[166] During the 2024 **[*321]** presidential campaign, President Donald Trump proposed the death penalty for drug dealers.[167] Governor DeSantis announced he was running for President after he signed the law authorizing the death penalty for child rape, as well as another law that reduced the number of jurors required to obtain a death sentence.[168]

Legal developments suggest, however, that passing laws that expand the reach of the death penalty may be more than just politics. In December 2023, Florida prosecutors announced that they intended to seek the death penalty against a man charged with violations of the state's new capital sexual battery law, although the defendant ultimately pleaded guilty in exchange for a life sentence.[169] While the death penalty is political, a decision to seek the death penalty demonstrates that the new law is more than a political stunt. The changes to the composition of the Supreme Court and its new approach to constitutional issues threaten settled Eighth Amendment jurisprudence.

Campaign, NBC CHI. (Oct. 1, 2012, 6:40 PM), https://www.nbcchicago.com/news/local/why-the-death-penalty-is-not-an-issue-in-this-campaign/1940643/ (discussing the role the death penalty played in political campaigns before 2012).

[162] *See* Smith, *supra* note 161, at 295-98 (discussing the political utility of the death penalty).

[163] Ron Fournier & National Journal, *The Time Bill Clinton and I Killed a Man*, THE ATL. (May 28, 2015), https://www.theatlantic.com/politics/archive/2015/05/the-time-bill-clinton-and-i-killed-a-man/460869/; Smith, *supra* note 161, at 317-18.

[164] *See* Roger Simon, *Questions That Kill Candidates' Careers*, POLITICO (Apr. 20, 2007, 6:09 PM), https://www.politico.com/story/2007/04/questions-that-kill-candidates-careers-003617 (detailing how Dukakis was "savaged" and labeled as "mean-spirited" after stating in a presidential debate that his wife's murder still would not change his opposition to the death penalty).

[165] *McCain, Obama Disagree with Child Rape Ruling, supra* note 115 ("[Obama] has long supported the death penalty while criticizing the way it is sometimes applied.").

[166] Minyvonne Burke & Brittany Kubicko, *DOJ to Seek Death Penalty Against White Supremacist who Killed 10 People at Buffalo Tops*, NBC NEWS (Jan. 12, 2024, 9:14 AM), https://www.nbcnews.com/news/us-news/doj-seek-death-penalty-buffalo-tops-shooter-rcna133698; *see* Elizabeth Bruenig, *A Chance for Biden to Make a Difference on the Death Penalty*, THE ATL. (Oct. 2, 2024), https://www.theatlantic.com/politics/archive/2024/10/biden-death-penalty-campaign-promise/680105/ (stating that "Biden ran partly on abolishing the federal death penalty" and that his election campaign promised to "work to pass legislation to eliminate the death penalty at the federal level").

[167] Dustin Jones & Devin Speak, *Trump Wants the Death Penalty for Drug Dealers. Here's Why that Probably Won't Happen*, NPR (May 10, 2023, 10:02 PM), https://www.npr.org/2023/05/10/1152847242/trump-campaign-execute-drug-dealers-smugglers-traffickers-death-row.

[168] *See* Anthony Izaguirre, *DeSantis Signs Death Penalty, Crime Bills as 2024 Run Looms*, AP NEWS (May 1, 2023, 1:56 PM), https://apnews.com/article/death-penalty-child-rape-desantis-florida-9b03e9cd5a96f68967c3e06a299ff2a7.

[169] Claire Farrow, *Florida Man Accused of Raping Child Faces Death Penalty, State Attorney Says*, WTSP (Dec. 18, 2023, 6:04 PM), https://www.wtsp.com/article/news/crime/florida-death-penalty-sought-child-rape-case-joseph-giampa/67-6224cb3a-203b-44b8-aa39-ce68c54d4f67; *Giampa Sentenced to Life in Prison for Sexual Battery*, OFF. OF THE STATE ATT'Y, FIFTH JUD. CIR., FLA. (Feb. 2, 2024), https://www.sao5.org/giampa-sentenced-to-life-in-prison-for-sexual-battery/.

This Part surveys the laws in Florida and Tennessee and analyzes their relationship to existing capital punishment schemes to illustrate how states have tailored their new laws in response to the *Kennedy* majority and dissent. It also describes the potential for state challenges to *Kennedy* to reach the Supreme Court.[170]

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A. The New Laws Permitting the Death Penalty for Sexual Offenses Against Children

In January 2023, Governor DeSantis encouraged lawmakers to adopt capital punishment for the rape of a child under the age of twelve, an invitation that Florida legislators quickly accepted.[171] The law passed the Florida House and Senate with bipartisan support.[172] In 2024, Tennessee passed a law authorizing the death penalty for child rape and aggravated child rape.[173] Although an in-depth analysis of new capital punishment statutes is beyond the scope of this Article, some discussion is helpful to understand possible constitutional challenges to *Kennedy*. This Section briefly summarizes these laws, which legislators fitted into extant state capital punishment schemes, and how these laws respond to the *Kennedy* majority and dissent. Redesigning capital punishment schemes for nonhomicide crimes may impact the Court's capital punishment jurisprudence, which has historically narrowed the categories of eligible capital offenses.[174] Assuming the Court were to overrule *Kennedy*, it would have to address whether the system is consistent with the constitutional procedures required to impose capital punishment.[175] Given the Court's recent approach to capital punishment, it may, unfortunately, be inclined to weaken these standards through increased deference to state policies if state laws are an imperfect fit with existing Eighth Amendment **[*323]** precedent.

Post-1976 capital punishment jurisprudence is intended to guide sentencers' discretion to ensure that the death penalty is not imposed arbitrarily.[176] The law in this area developed around homicide offenses.[177] Post-*Gregg*, it is

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[170] *See infra* Section III.B.

[171] Jeff Butera & Phillip Stucky, *Florida Lawmakers Propose Bill to Allow Death Penalty in Sexual Battery Cases*, SPECTRUM NEWS 13 (Mar. 2, 2023, 3:46 PM), https://mynews13.com/fl/orlando/news/2023/03/02/florida-lawmakers-propose-bill-to-allow-death-penalty-in-sexual-batterycases ("Florida Gov. Ron DeSantis mentioned . . . he wanted capital punishment in child rape cases to be considered by the Legislature and was hoping lawmakers would explore the law change.").

[172] *See* H.B. 1297, 2023 Leg. (Fla. 2023). Florida's House passed the bill with ninety-five votes in favor and fourteen against. *Id.* Florida's Senate passed it with thirty-four votes in favor and five against. *Id.* At the time the bill was passed, Florida's House had eighty-four Republicans and thirty-six Democrats. *Florida House of Representatives*, BALLOTPEDIA, https://ballotpedia.org/Florida_House_of_Representatives (last visited Oct. 13, 2024). Florida's Senate had twenty-eight Republicans and twelve Democrats. *Florida State Senate*, BALLOTPEDIA, https://ballotpedia.org/Florida_State_Senate (last visited Oct. 13, 2024).

[173] *See* Kruesi, *supra* note 23.

[174] *See infra* Part IV (discussing possible future directions of the Eighth Amendment).

[175] *See* CHARLES DOYLE, CONG. RSCH. SERV., R42085, FEDERAL CAPITAL OFFENSES: AN OVERVIEW OF SUBSTANTIVE AND PROCEDURAL LAW (2023) (explaining that current constitutional procedures require that capital sentencing systems must "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime").

[176] *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). Those intentions have not been realized. *See* Glossip v. Gross, 576 U.S. 863, 908-09 (2015) (Breyer, J., dissenting) (finding that arbitrariness in application is one of three major fundamental constitutional defects of the death penalty today); Chad Flanders, *What Makes the Death Penalty Arbitrary? (And Does it Matter if it is?)*, 2019 WISC. L. REV. 55, 56 (2019) (analyzing various factors that influence the arbitrary application of the death penalty).

exceedingly rare for capital sentences to be based on a nonhomicide offense.[178] Because *Kennedy* decided that the Eighth Amendment categorically barred the imposition of the death penalty, it did not address whether the Louisiana statute satisfied core constitutional requirements for capital punishment statutes. Louisiana narrows eligibility for capital offenses at the legislative stage rather than the sentencing stage.[179]*Kennedy* hinted that the Court had concerns about whether the Louisiana statute meaningfully narrowed the class of death-eligible offenders, and the **[*324]** parties had briefed that question.[180]

The new state laws appear responsive to those concerns because they track the guided discretion model the Court has approved in numerous cases. The *Kennedy* majority and dissent diverged on the question of whether modifying that model to encompass nonhomicide crimes might increase the imposition of arbitrary and unjustified death sentences.[181] The majority was concerned that states would be unable to develop a system of aggravators that could meaningfully narrow a sentencer's discretion to impose death for nonhomicide crimes without risking unjustified death sentences and executions.[182] The dissent argued that state statutes presented adequate guidance and was willing to allow states to experiment with applying the capital punishment system of guided discretion to nonhomicide crimes.[183] This position is consistent with the Court's growing preference for deference to state legislative judgments in capital cases.

The laws in Florida and Tennessee appear responsive to this debate because they rely on the guided discretion model, and the states attempted to either develop new aggravators or modify extant aggravators to cover

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[177] *See* *Gregg*, 428 U.S. at 168 (evaluating whether "the punishment of death for the crime of murder is, under all circumstances, 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments of the Constitution"); Kennedy v. Louisiana, 554 U.S. 407, 440-41 (2008) (explaining that the Court has spent over thirty-two years "develop[ing] a foundational jurisprudence in the case of capital murder" to guide the imposition of the death penalty).

[178] Several states have adopted capital punishment for a range of nonhomicide crimes, including drug trafficking, aircraft hijacking, treason, espionage, and aggravated kidnapping, but have not imposed death sentences for those offenses. *See Death Penalty for Offenses Other Than Murder*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/death-penalty-for-offenses-other-than-murder (last visited Oct. 13, 2024).

[179] *See* Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) (explaining that "the narrowing function required for a regime of capital punishment" may be accomplished if the legislature "narrow[s] the definition of capital offenses"); *Kennedy*, 554 U.S. at 416-17 (identifying the aggravating circumstances that the Louisiana statute uses to narrow the class of death-eligible defendants); Brief in Opposition to Petition for Certiorari at 22-23, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343), 2007 WL 4104370 (arguing that Louisiana's statute limits the class of offenders eligible for the death penalty by defining capital offenses narrowly). Capital sentencing schemes "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). "The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield*, 484 U.S. at 246.

[180] *Kennedy*, 554 U.S. at 423 ("Under the current statute, any anal, vaginal, or oral intercourse with a child under the age of 13 constitutes aggravated rape and is punishable by death. Mistake of age is not a defense, so the statute imposes strict liability in this regard." (citation omitted)); Brief for Petitioner at 41-42, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343), 2008 WL 466093 (arguing that Louisiana's capital rape statute violates the Eighth Amendment because it does not narrow the class of offenders eligible for the death penalty).

[181] *See* *Kennedy*, 554 U.S. at 439 (discussing the complexities of developing aggravating factors for nonhomicide crimes).

[182] *Id.* at 440-41.

[183] *See* *id.* at 463-64 (Alito, J., dissenting) (asserting that the child rape laws in Texas, Oklahoma, Montana, and South Carolina "limit quite drastically the number of cases in which the death penalty may be imposed," and that concerns about limiting sentencing discretion do not justify the Court's "blanket condemnation" of all state capital child rape statutes).

nonhomicide crimes. If states develop their laws consistently with current capital punishment procedures, the current Court may be more inclined to lift the prohibition on the imposition of death for the rape of a child and let matters play out at the state level.

Tennessee and Florida have approached the problem of narrowing in different ways. Florida's law appears to cover a wider range of offenses and requires at least some injury.[184] Tennessee, however, relies on the victim's age to narrow the category of death-eligible offenses.[185] This Section **[*325]** summarizes each law in turn.

Florida's capital sexual battery statute provides "[a] person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony[.]"[186] Sexual battery means "means oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose."[187] The language of this statute is similar to the 1977 Florida statute that the Supreme Court of Florida held unconstitutional in *Buford v. State* in 1981.[188] While capital sexual battery (or an attempt) requires injury to the victim before it becomes a death-eligible offense, the statute does not indicate how severe the injury must be. Florida's sexual battery statute defines "serious personal injury" as "great bodily harm or pain, permanent disability, or permanent disfigurement."[189] The statute, however, does not use "serious personal injury" in the provision making the offense death-eligible instead, the term appears in other sexual offense provisions, suggesting that the legislature did not intend that the injuries associated with the capital sexual battery provision to be "serious personal injur[ies]."[190] Permitting the imposition of the death penalty for an attempted offense, even one that caused injury, would be a significant expansion of the death penalty.[191]

Tennessee permits the imposition of the death penalty for the rape and **[*326]** aggravated rape of a child.[192] "Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the

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[184] FLA. STAT. § 794.011(2)(a) (2023).

[185] TENN. CODE ANN. § 39-13-522 (2023); TENN. CODE ANN. § 39-13-531 (2024).

[186] FLA. STAT. § 794.011(2)(a) (2023).

[187] *Id.* § 794.011(1)(j).

[188] *See* Buford v. State, 403 So. 2d 943, 950 (Fla. 1981) (summarizing the statute); E. Sue Bernie, Note, *Florida's Sexual Battery Statute: Significant Reform but Bias Against the Victim Still Prevails*, 30 FLA. L. REV. 419, 422 (1978) (describing the Florida statute at issue in *Buford*).

[189] FLA. STAT. § 794.011(1)(i) (2023).

[190] *See id.* §§ 794.011(3)(b), (5)(a) (d) (using the term "serious personal injury" for certain sexual offenses).

[191] One capital rape statute that *Kennedy* invalidated appeared to permit the imposition of the death penalty for attempted offenses. *See, e.g.*, MONT. CODE ANN. § 45-5-503(7) (2019) (specifying that sexual offenses against minors under the age of sixteen include "an attempt to commit the offense"). Others did not. *See, e.g.*, GA. CODE ANN. §§ 16-6-1(a) (b) (2023) (permitting the death penalty for "the offense of rape"); **OKLA. STAT. tit. 21 § 843.5(K)** (2024) (authorizing death or life without parole for the offenses of "forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age"); S.C. CODE ANN. §§ 16-3-655(A) & (D)(1) (2012) (requiring a conviction of criminal sexual conduct with a minor in the first degree, which does not include attempted sexual conduct, to impose the death penalty); TEX. PENAL CODE § 22.021 (2021) (defining aggravated sexual assault); TEX. PENAL CODE § 12.42(c)(3) (2017) (authorizing punishment for a "capital felony" for certain defendants convicted of aggravated sexual assault).

[192] *See* TENN. CODE ANN. § 39-13-522 (2024) (stating that an adult found guilty of child rape must be punished with death or imprisonment for life); *id.* § 39-13-531 (2024) (stating that an adult found guilty of aggravated rape of a child must be sentenced to death or imprisonment for life without the possibility of parole).

victim is more than eight (8) years of age but less than thirteen (13) years of age."[193] If the victim is eight or under, the offense is aggravated rape of a child.[194] "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body."[195]

Florida and Tennessee apply their existing capital punishment procedures to determine whether a defendant shall be sentenced to death for the rape of a child.[196] Both states use bifurcated procedures; after a determination of guilt is made, the sentencer must find aggravating and mitigating circumstances before imposing a sentence of death.[197] This means that, although the legislature defines which offenses are death-eligible, sentencing procedures are used to narrow the category of offenders who receive death sentences.[198]

During sentencing in Florida, the jury must unanimously find that at least *two* aggravating factors exist before the jury may recommend a death sentence for capital sexual battery.[199] Florida's existing capital sentencing statute only requires the jury to unanimously find *one* aggravating factor before imposing a sentence of death for capital murder.[200] Some of the aggravating factors for capital sexual battery are identical to the aggravating factors Florida already uses.[201] Two aggravating factors in the capital sexual battery scheme are **[*327]** substantially similar to existing aggravating factors, although they have been modified to relate to that offense.[202] The capital sexual battery statute has three unique aggravating factors: (1) "[t]he capital felony was committed by a sexual offender who is required to register pursuant to s. 943.0435 or a person previously required to register as a sexual offender who had such requirement removed";[203] (2) "[t]he defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person in committing the offense or in furtherance of the offense";[204] and (3) "[t]he victim of the capital felony sustained serious bodily

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[193] *Id.* § 39-13-522(a).

[194] *Id.* § 39-13-531(a).

[195] *Id.* § 39-13-501(7); *see also* State v. Marcum, 109 S.W.3d 300, 303-04 (Tenn. 2003) (confirming that Tennessee's definition of "sexual penetration" includes fellatio).

[196] FLA. STAT. § 794.011(2)(a) (2023); **TENN. CODE ANN. § 39-13-204** (2024).

[197] **TENN. CODE ANN. § 39-13-204(a)** (2024); FLA. STAT. § 921.1425 (2023).

[198] *See* Brief in Opposition to Petition for Certiorari, *supra* note 179, at 22-23 (discussing how state capital punishment procedures can conform to constitutional requirements).

[199] FLA. STAT. § 921.1425(3)(a) (2023).

[200] *Id.* § 921.141(2)(a).

[201] *Compare id.* § 921.141(6)(b) (prior capital felony or violent felony conviction), (f) ("pecuniary gain"), (h) ("especially heinous, atrocious, or cruel"), (m) (vulnerable victim), (o) (sexual predator designation), *and* (p) (offender subject to protection order), *with id.* § 921.1425(7)(b), (c), (g), (h), (i), (j) (listing aggravating factors identical to those listed in § 921.141 for capital sexual battery).

[202] *Compare id.* § 921.141(6)(a) ("The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation."), *with id.* § 921.1425(7)(a) ("The capital felony was committed by a person previously convicted of a felony violation of s. 794.011, and under sentence of imprisonment or placed on community control or on felony probation."); *compare id.* § 921.141(6)(c) ("The defendant knowingly created a great risk of death to many persons."), *with id.* § 921.1425(7)(e) ("The defendant knowingly created a great risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life.").

[203] *Id.* § 921.1425(7)(d). In Florida, a person is required to register as a sexual offender if they have been "convicted of committing, or attempting, soliciting, or conspiring to commit" a specific offense included in the extensive list of proscribed state offenses and similar offenses in other jurisdictions. *Id.* § 943.0435(h)(1)(a)(I).

injury."[205] The statute also permits prosecutors to introduce and argue victim impact evidence.[206] The mitigating circumstances identified in the statute are substantially the same.[207]

After the jury finds aggravating and mitigating factors, it must determine whether the aggravating factors outweigh any mitigating circumstances it has found.[208] In Florida, a death sentence may now be imposed upon a supermajority jury recommendation of at least eight jurors.[209] If the jury recommends a death sentence, after considering the aggravating factors the **[*328]** jury unanimously found, the court may impose a sentence of life without parole or death.[210] Death sentences receive automatic review by the Supreme Court of Florida.[211]

Tennessee's sentencing procedures for the rape of a child also track the state's procedures for capital murder prosecutions. The jury must unanimously find that the state has proved at least *one* aggravating circumstance beyond a reasonable doubt and that the circumstance(s) "have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt."[212] Tennessee uses the same aggravating and mitigating circumstances for both capital homicide and nonhomicide crimes.[213] When Tennessee enacted the statute, it modified the language of several aggravating circumstances to refer to "the offense," rather than "murder."[214] Some of the aggravating circumstances are probably inapplicable in the penalty phase of a capital trial for the rape of a child either because they are unlikely to apply, or they expressly contemplate that the offense was a homicide.[215] Others are less likely, though could still apply.[216] Tennessee did not make a person's status as a sexual offender

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[204] *Id.* § 921.1425(f).

[205] *Id.* § 921.1425(k).

[206] *Id.* § 921.1425(9).

[207] *Compare id.* § 921.141(7) (identifying mitigating circumstances such as: (1) defendant has "no significant history of prior criminal activity," (2) defendant committed the capital felony "under the influence of extreme mental or emotional disturbance," and (3) "defendant acted under extreme duress or under the substantial domination of another person"), *with id.* § 921.1425(8) (identifying similar mitigating factors as those listed above for capital felonies).

[208] *Id.* § 921.1425(3)(b)(2)(b).

[209] *Id.* §§ 921.141(2)(c), 921.1425(3)(c); *see also* Melanie Kalmanson, *The Eighth Amendment's Time to Shine: Previewing Florida's Imminent Constitutional Crisis in Capital Punishment*, 74 FLA. L. REV. F. 31, 32 (2023) ("The new law lowered the requirement of a jury's unanimous recommendation for death to requiring a jury's vote of only 8-4.").

[210] FLA. STAT. § 921.1425(4)(a)(2) (2023).

[211] *Id.* § 921.1425(6).

[212] **TENN. CODE ANN. § 39-13-204(g)(1)(A) (B)** (2024).

[213] *Id.* § 39-13-204(i) (j).

[214] *See* S.B. 1834, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024) (replacing the original aggravating factors in § 39-13-204 with nineteen factors, fourteen of which use the term "the offense" in lieu of "murder").

[215] *See* **TENN. CODE ANN. § 39-13-204(i)(1)** (murder of a person less than twelve years old by a person who is eighteen or older); *id.* § 39-13-204(i)(9) (offense committed against certain public employees while engaged in performance of their duties); *id.* § 39-13-204(i)(10) (offense committed against judges or attorneys for the state based on their status); *id.* § 39-13-204 (11) (offense committed against "national, state, or local popularly elected official[s]" based on their status); *id.* § 39-13-204(i)(12) (mass murder); *id.* § 39-13-204(i)(14) (victim over seventy); *id.* § 39-13-204(i)(18) (defendant knowingly sold of opiates "with the intent and premeditation to commit murder").

[216] *Id.* § 39-13-204(i)(6) (offense committed to avoid or prevent lawful arrest or prosecution); *id.* § 39-13-204(i)(15) (offense committed "in the course of an act of terrorism"); *id.* § 39-13-204(i)(16) (defendant intentionally committed an offense against a pregnant victim with knowledge of the pregnancy); *id.* § 39-13-204(i)(19) (victim was a Good Samaritan).

an aggravating factor, although one aggravating factor is that "the defendant was previously been convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person."[217] Aggravating factors that are more likely to apply include "knowingly creat[ing] a great risk of death" to at least two persons other than the victim, committing an offense for remuneration, an offense that **[*329]** was "especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death," escaping from custody, "knowingly mutilat[ing] the body of the victim," and that the victim was "particularly vulnerable due to a significant disability."[218] Tennessee also has a "felony murder" type aggravator that includes "rape of a child" and "aggravated rape of a child."[219]

The state may present victim impact testimony.[220] The mitigating circumstances identified in the statute have not changed significantly.[221] Both the capital conviction and death sentence are subject to automatic review by the Tennessee Supreme Court.[222]

These statutes operate within existing frameworks, rather than significantly altering the structure of modern capital punishment procedures. Both laws may encourage the Court to further water down existing standards or to defer to state legislative expertise and moral judgments in capital cases. Both states relied on existing aggravating factors associated with capital murder prosecutions, although Florida, at least, created some new ones. This may present interpretive difficulties for a court tasked with assessing whether the statutes meaningfully narrow the class of offenders who committed sexual crimes against children. That task is a challenge even in capital homicide prosecutions.[223] And some factors may not meaningfully narrow at all Tennessee, for example, uses the defendant's involvement in the rape of a child as an aggravating factor in itself.[224]

[*330] Florida's decision to require two aggravating factors suggests that the legislature thought that multiple aggravators were more likely to assuage any judicial concerns about the risks of an arbitrary or unjustified death sentence, particularly concerns that the terrible nature of sexual crimes against children might "overwhelm a decent person's judgment."[225] But Florida's new supermajority death sentence requirement presents a substantial risk of arbitrariness in imposing a death sentence because it does not require a unanimous jury recommendation.[226]

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[217] *Id.* § 39-13-204(i)(2).

[218] *Id.* § 39-13-204(i).

[219] *Id.* § 39-13-204(i)(7).

[220] *Id.* § 39-13-204(c) ("The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the [offense] on the family of the victim and other relevant persons. The evidence may be considered by the jury in determining which sentence to impose.").

[221] *See* S.B. 1834, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024) (identifying the changes made to Tennessee Code).

[222] **TENN. CODE ANN. § 39-13-204(a)(1)** (2021); *id.* § 39-13-206(c)(1) (listing criteria for review).

[223] Kennedy v. Louisiana, 554 U.S. 407, 440 (2008) (acknowledging the problem of inconsistent application of aggravating factors in capital murder prosecutions).

[224] **TENN. CODE ANN. § 39-13-204(i)(7)** (2024); *see* State v. Boyd, 959 S.W.2d 557, 559-60 (Tenn. 1998) (holding that "it violates Art. 1 § 16 of the Tennessee Constitution to use the felony murder aggravating circumstance" to impose the death penalty for a felony murder conviction); *cf.* Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) (concluding that if a capital statute was narrowed at the legislative stage, then "[t]he fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm").

[225] *Kennedy*, 554 U.S. at 439.

Relying on a supermajority instead of a unanimous jury does not adequately reflect a community's convictions; it permits some community members to silence or ignore others.[227] Requiring the jury to find two aggravating factors unanimously is unlikely to balance out the effect of permitting a death sentence upon a recommendation of eight jurors instead of twelve. While new death sentences continue to decline nationally in recent years, Florida is still imposing more new death sentences than other jurisdictions.[228]

Shifting the structure of capital punishment schemes to include nonhomicide offenses may produce instability in an already shaky system. This is akin to the way states sought to weaken *Roe* and *Casey* by creating additional burdens on abortion access.[229] Despite layers of procedure, the death penalty is still infected with the same arbitrariness at issue in *Furman*.[230] Capital punishment continues to be plagued by geographic disparity, racial bias, and inadequate assistance of counsel.[231] Imposing the death penalty for **[*331]** nonhomicide crimes is likely to exacerbate these problems, particularly because the death penalty can be a source of political gain for legislators, prosecutors, and judges.[232] By relying on existing structures for capital punishment, states may be betting that the Court would conclude that the current requirements for a constitutional capital conviction are sufficient to address concerns about arbitrariness, even under changed circumstances, or that the Court might be willing to soften some of its procedural restraints to allow state experimentation. This may threaten hard-won legal victories that have curbed some of the worst excesses of capital punishment.

B. Lining Up a Constitutional Challenge to Kennedy

Changes to the Supreme Court and its willingness to undo precedent have signaled to legislators that the Court might be willing to revisit other constitutional precedents, including capital punishment. Following Florida's lead, other state legislators introduced similar bills in 2023 and 2024.[233] A Missouri state senator introduced a bill that

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[226] *See* Kalmanson, *supra* note 209, at 6-7 ("Without unanimity, Florida's statute is now without sufficient procedural safeguards to ensure the reliability required under the Eighth Amendment.").

[227] *See* Alexandra L. Klein, *The 2022 Alabama Executions and the Crisis of American Capital Punishment*, 24 NEV. L.J. 1, 38 (2023) ("[N]onunanimous verdicts suggest that the representative slice of the community is *not* united in its conclusion that death is the just response to a particular crime.").

[228] *Death Sentences in the United States Since 1973*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/data/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year (last visited Feb. 19, 2025).

[229] *See supra* notes 141-152 and accompanying text (discussing the parallels between state attempts to undo *Roe* and *Casey* and state attempts to undo *Kennedy*).

[230] *See* **Callins v. Collins, 510 U.S. 1141, 1147-48 (1994)** (Blackmun, J., dissenting) ("*Furman* demanded that the sentencer's discretion be directed and limited by procedural rules and objective standards in order to minimize the risk of arbitrary and capricious sentences of death."); Glossip v. Gross, 576 U.S. 863, 945 (2015) (Breyer, J., dissenting) (discussing the "lack of reliability" and the "arbitrary application" of death penalty sentences).

[231] *See* *Glossip*, 576 U.S. at 916-20 (Breyer, J., dissenting) (discussing the role that race plays in death sentences); John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 ST. LOUIS U. L.J. 781, 781-95 (2018) (critiquing the death penalty by describing its problems with wrongful convictions, discrimination, lack of due process, arbitrariness, and tyranny).

[232] *See* MAHER & ROEMER, *supra* note 161, at 7 ("Unlike other countries that use the death penalty, American electoral contests in state and local jurisdictions determine key decision-makers in the death penalty system. The behaviors of these powerful elected decision-makers are, unsurprisingly, influenced by the realities of politics: the need to fundraise, to campaign, to be held accountable by constituents, and to win votes.").

[233] In New Mexico, which does not have the death penalty, a legislator introduced a bill to permit the death penalty for criminal sexual penetration of a child or sex trafficking of a child. H.B. 109, 56th Legis., 2d Sess. (N.M. 2024). Action on the bill was "[p]ostponed [i]ndefinitely." *Id.* South Dakota legislators introduced a similar bill, but it was amended to set a mandatory penalty of life in prison. John Hult, *Mandatory Life Without Parole for Raping Children Passes House, Moves to Senate*, S.D.

would permit the imposition of the death penalty for first-degree statutory rape and first-degree sexual trafficking of a child.[234] South Carolina legislators introduced a law that authorized the death penalty for criminal sexual conduct with a victim under **[*332]** eleven.[235] An Arizona legislator introduced a bill seeking to permit the death penalty for sexual conduct with a minor but later amended it to require a life sentence.[236] Idaho legislators tried to amend the state's law prohibiting lewd conduct with a minor to permit the imposition of the death penalty if the victim was under twelve.[237] In early 2025, Alabama's legislature began considering similar legislation.[238]

These laws are direct challenges to *Kennedy v. Louisiana*.[239] Florida's legislative findings assert that *Buford* and *Kennedy* were "wrongly decided" and describe *Kennedy* as "an egregious infringement of the states' power to punish the most heinous of crimes."[240] Florida legislators expressed hope that the bill would result in the Court overruling *Kennedy*.[241] Governor Ron DeSantis remarked that the bill "sets up a procedure to be able to challenge that precedent."[242] One of the sponsors of the Florida bill, Senator Jonathan Martin, asserted that new composition of the Supreme Court was significant, explaining, "I think the current makeup of the U.S. Supreme Court believes that states should have more of a say in decisions like criminal justice that **[*333]** were originally left to the states

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SEARCHLIGHT (Feb. 6, 2024, 4:01 PM), https://southdakotasearchlight.com/briefs/mandatory-life-without-parole-for-raping-children-passes-house-moves-to-senate/.

[234] *See* S.B. 951, 102d Gen. Assemb., 2d Reg. Sess. (Mo. 2024) (authorizing the death penalty for certain sexual offenses); Jack Suntrup, *Missouri Could Follow Florida in Allowing Death Penalty in Some Child Rape Cases*, ST. LOUIS POST-DISPATCH (Mar. 11, 2024), https://www.stltoday.com/news/local/crime-courts/missouri-could-follow-florida-in-allowing-death-penalty-in-some-child-rape-cases/article_42c286aa-dfcc-11ee-800e-df8f4133b51f.html (discussing the Missouri Senate bill). A person commits first-degree statutory rape in Missouri "if he or she has sexual intercourse with another person who is less than fourteen years of age." MO. REV. STAT. § 566.032 (2017).

[235] *See* H.B. 4669, 2023-24 Gen. Assemb., 125th Sess. (S.C. 2023-24); Shaquira Speaks, *South Carolina Bill Would Allow Death Penalty for Some Child Sex Offenders*, FOX 8 (Jan. 12, 2024, 6:00 AM), https://myfox8.com/news/south-carolina/south-carolina-bill-would-allow-death-penalty-for-some-child-sex-offenders/ (discussing the South Carolina bill sponsored by State Representative Jordan Pace).

[236] *See* S.B. 1232, 56th Legis., 2d Reg. Sess. (Ariz. 2024).

[237] *See* H.B. 405, 67th Legis., 2d Reg. Sess. (Idaho 2024).

[238] Anna Barrett, *Alabama House Passes Bill Expanding Death Penalty to Child Sexual Assault*, ALA. REFLECTOR (Feb. 11, 2025, 6:04 PM), https://alabamareflector.com/2025/02/11/alabama-house-passes-bill-expanding-death-penalty-to-child-sexual-assault/.

[239] *See* Kruesi, *supra* note 23 (describing the conflicts between Tennessee's new capital punishment law and Supreme Court precedent); Jack Johnson, *Child Rapists Should be Sentenced to Death. That's why I Backed this Tennessee Senate Bill*, THE TENNESSEAN (Apr. 22, 2024, 11:30 AM), https://www.tennessean.com/story/opinion/contributors/2024/04/22/capital-punishment-child-rapists-tennessee-death-penalty/73413094007/ (discussing the possibility that the Supreme Court could overturn *Kennedy v. Louisiana*); Maher, *supra* note 20 and accompanying text (describing Florida's law as a challenge to *Kennedy*).

[240] FLA. STAT. § 921.1425(1)(a) (2023).

[241] *See* Maria DeLiberato & Melanie Kalmanson, *Ron DeSantis is Luring the Supreme Court to Overturn Landmark Precedent Again*, SLATE (Apr. 10, 2023, 5:50 AM), https://slate.com/news-and-politics/2023/04/ron-desantis-supreme-court-conservatives-attack-precedent.html (explaining that the Florida legislators' "goal is to provide the Supreme Court with the opportunity to review *Kennedy*, at which point both Gov. DeSantis and Florida legislators are confident the court, 'in its current iteration,' would overturn *Kennedy*").

[242] *See* Maher, *supra* note 20.

under the U.S. Constitution."[243] A Tennessee senator echoed these sentiments, noting that because of changes to the Court's composition, "there is a strong possibility that *Kennedy v. Louisiana* could be overturned."[244]

At least one Florida judge has taken the position that *Kennedy* and *Coker* were wrongly decided. In *Bicking v. State*, the First District Court of Appeal of Florida summarily affirmed the denial of habeas relief to Kenneth Bicking, who had been convicted of aggravated armed rape and kidnapping.[245] Judge Bradford Thomas wrote a lengthy concurrence arguing that states should be able to impose capital punishment for "aggravated armed sexual battery or the sexual battery of a child."[246] He asserted that should a state pass such a law, the Supreme Court should "reconsider its erroneous non-unanimous plurality decision in *Coker* . . . and the five-to-four decision in *Kennedy.*"[247] In *Lainhart v. State*, the court summarily affirmed Dean Lainhart's life sentence.[248] Judge Thomas complained that *Lainhart* "is just another sad example of why [*Coker* and *Kennedy]* are also wrong based on any moral theory of punishment and justice, especially where a perpetrator destroys the innocence of a young child and violates all standards of decency held by any civilized society."[249] Judge Thomas's concurrences assert that *Coker* and *Kennedy* are inconsistent with the text and historical understandings of the Eighth Amendment.[250] Although *Lainhart* focuses on Florida's six-person jury system and *Bicking* relies predominately on Chief Justice Burger's dissent in *Coker*, the assertion that the text and history of the Eighth Amendment compel reversal of *Kennedy* may illustrate a path forward for challengers and courts, particularly in light of the Court's recent approach in **[*334]** Eighth Amendment cases.[251]

A defendant facing the death penalty for the rape of a child is likely to assert that such a sentence violates both the U.S. Constitution and state constitutions. Florida's Supreme Court has addressed this issue. In 1981, that court held that "[t]he reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[252]*Buford's* reasoning is sparse. The court quoted lengthy portions of *Coker* and rested its judgment on the Eighth Amendment, rather than § 17 of the Florida Constitution, which

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[243] Romy Ellenbogen, *Death Penalty for Child Rapists Bill Gets Bipartisan Support in Florida Legislature*, TAMPA BAY TIMES (Mar. 21, 2023), https://www.tampabay.com/news/florida-politics/2023/03/20/death-penalty-child-rape-desantis-florida/.

[244] Johnson, *supra* note 239.

[245] *See* Bicking v. State, 348 So. 3d 35, 35 (Fla. Dist. Ct. App. 2022) (per curiam).

[246] *Id.* at 36 (Thomas, J., concurring).

[247] *Id.*

[248] *See* **Lainhart v. State, 351 So. 3d 1282, 1282-83 (Fla. Dist. Ct. App. 2022)** (per curiam).

[249] ***Id.* at 1283** (Thomas, J., concurring).

[250] *See id.* (observing that "historically the states were permitted to execute such offenders"); *Bicking*, 348 So. 3d at 43 (Thomas, J., concurring) ("[B]efore the Eighth Amendment was adopted and after its ratification, the sovereign states had the unquestioned power to punish rapists such as Coker with the ultimate criminal penalty.").

[251] *See* ***Lainhart*, 351 So. 3d at 1284-88**; *Bicking*, 348 So. 3d at 44-48.

[252] Buford v. State, 403 So. 2d 943, 951 (Fla. 1981). The Supreme Court of Florida had previously considered the imposition of the death penalty for sexual battery of a child in *Purdy v. State*, 343 So. 2d 4, 4-5 (Fla. 1977). There, the court reduced the sentence to life imprisonment because it found the "vileness" aggravator did not adequately distinguish the crime from other offenses. *Id.* at 6-7. In *Huckaby v. State*, the court reduced a death sentence to life imprisonment because the trial judge failed to adequately consider mitigating circumstances. 343 So. 2d 29, 33-34 (Fla. 1977).

prohibits "cruel and unusual punishment."[253] Although the Florida legislature did not alter the statute after *Buford*, "Florida state courts have understood *Buford* to bind their sentencing discretion in child rape cases."[254]

The text of the Florida Constitution presents a potential barrier to a challenge to *Kennedy*.[255] Section 17 of the Florida Constitution contains a "Conformity Clause," which states that "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."[256] The Conformity Clause prevents the Supreme Court of Florida from undertaking more liberal approaches to state constitutional **[*335]** construction than the United States Supreme Court has approved. But it also means that the Supreme Court of Florida cannot decide that the Florida Constitution permits the death penalty for the rape of a child. Thus, even if the state seeks the death penalty against a particular defendant for capital sexual battery, that defendant should be able to move to bar the state from seeking the death penalty or would certainly have ample grounds for an appeal on state and federal constitutional grounds if he were sentenced to death.[257] Assuming a case *did* make its way to the appellate level, the Conformity Clause would bar appellate courts and the Supreme Court of Florida from holding that the imposition of the death penalty for child rape is consistent with Florida's Constitution.[258]*Kennedy* is, at least for now, binding Supreme Court precedent.[259]

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[253] *Buford*, 403 So. 2d at 951; *see also* FLA. CONST., art. I, § 17 ("Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature.").

[254] Kennedy v. Louisiana, 554 U.S. 407, 424 (2008).

[255] *See* Robert Dunham, *Why Two Recent Executions Toll the Death Knell for Florida's Attempt to Expand its Death Penalty to Non-Lethal Child Sex Offenses . . . if the Rule of Law Means Anything in Florida*, DEATH PENALTY POL'Y PROJECT SUBSTACK (Oct. 23, 2023), https://dppolicy.substack.com/p/why-two-recent-executions-toll-the (discussing whether the Conformity Clause in the Florida Constitution might impact Florida courts' analysis of the new capital sexual battery law).

[256] FLA. CONST. art. I, § 17.

[257] *See* Re, *Congress, supra* note 119, at 1094-95 (discussing obstacles to capital prosecutions for the rape of a child); Jonathan F. Mitchell, *Modernization, Moderation, and Political Minorities: A Response to Professor Strauss*, U. CHI. L. REV. LEGAL WORKSHOP, May 4, 2009, at 4 (arguing that the Supreme Court's capital punishment jurisprudence is binding on lower courts, potentially blocking opportunities for the Justices to reconsider *Kennedy)*. But changes to Supreme Court jurisprudence may well signal to lower courts that they can risk imposing unconstitutional sentences. *See* Smith, *supra* note 13, at 44 (explaining that recent Supreme Court decisions "heralded major changes to the Court's jurisprudence [by] overruling longstanding law and precedent"). Professor Re has made this observation, noting that "new trends in state or federal law" may lead a trial judge to conclude that *Kennedy's* holding has been weakened. Re, *Congress, supra* note 119, at 1094 n.271. For a discussion of how such challenges may reach the Supreme Court, see Douglas A. Berman, *With New Florida Law Authorizing Death Penalty for Child Rape, How Might SCOTUS Get to Reconsider* Kennedy?, SENT'G L. & POL'Y BLOG (May 1, 2023), https://sentencing.typepad.com/sentencing_law_and_policy/2023/05/with-new-florida-law-authorizing-death-penalty-for-child-rape-how-might-scotus-get-to-reconsider-ken.html.

[258] *See* Zack v. State, 371 So. 3d 335, 348 (Fla. 2023) (declining to extend *Atkins* because "Florida Courts lack the authority"); Barwick v. State, 361 So. 3d 785, 794-95 (Fla. 2023) (declining to extend *Roper* and *Atkins* because the Florida Supreme Court "must interpret Florida's prohibition on cruel and unusual punishment in conformity with decisions of the Supreme Court"); Dunham, *supra* note 255 (discussing the application of the Conformity Clause in *Zack* and *Barwick)*.

[259] *But see* Ryan, *Stare Decisis, supra* note 30, at 872 (suggesting that "lower courts should apply Supreme Court rationale as precedent instead of Supreme Court outcomes in Eighth Amendment death penalty cases").

Professor Wayne Logan observes, however, that the new Florida law directs courts to impose a death sentence, even if that sentence violates the U.S. Constitution or the Florida Constitution.[260] Florida law now permits an appeal from "any trial court's prohibition of a capital child rape prosecution, providing a potential path to the U.S. Supreme Court."[261] Florida courts may, **[*336]** therefore, conclude that they are required to allow a capital punishment prosecution to go forward or uphold a death sentence. What may be more likely, however, is that the Supreme Court of Florida might author an opinion indicating that although its hands are tied as to the constitutionality of the law under the Conformity Clause and Supreme Court precedent it would be willing to hold the death penalty for the rape of a child constitutional should the Supreme Court decide to overrule *Kennedy*.[262]

Tennessee's Constitution does not have a conformity clause, so the Supreme Court of Tennessee could interpret the state constitution to either permit or forbid the death penalty for nonhomicide sexual offenses against children.[263] The Supreme Court of Tennessee has interpreted Article I, § 16 of its constitution, which prohibits cruel and unusual punishments, more broadly than the Eighth Amendment.[264] Those interpretations have been more protective of defendants.[265] Although Tennessee did authorize the death penalty for child rape post-*Gregg*, that law was invalidated because the death penalty was mandatory, and the Supreme Court of Tennessee has not yet addressed the substantive question of whether the state's constitution permits the imposition of death in such circumstances.[266] That court would not be able to affirm a death sentence because, although the state supreme court has the final say in interpreting the Tennessee Constitution, *Kennedy's* interpretation **[*337]** of the Eighth Amendment would bar a death sentence.[267] But justices of the Supreme Court of Tennessee could also author opinions inviting the Supreme Court to reverse *Kennedy*.

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[260] Wayne A. Logan, *The "Alito Hypothesis" in an Era of Emboldened One-Party State Rule*, 18 HARV. L. & POL'Y REV. 395, 400 (2024) (citing FLA. STAT. § 921.1425(1)(a) (West 2023)).

[261] *Id.* at 401-02 (footnotes omitted) (citing FLA. STAT. § 924.07(1)(n) (West 2023)).

[262] *See* Dunham, *supra* note 255 (discussing the Supreme Court of Florida's cases that have undermined constitutional standards in capital cases); Jordan Smith, *The Florida Supreme Court is Radically Reshaping Death Penalty Law*, THE INTERCEPT (Dec. 30, 2020, 7:00 AM), https:// theintercept.com/2020/12/30/florida-supreme-court-death-penalty-law/ (observing that changes to the composition of the Supreme Court of Florida has resulted in rulings that limit constitutional protections in capital cases).

[263] *See* TENN. CONST. art. I, § 16 ("[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[264] *See* State v. Harris, 844 S.W.2d 601, 602-03 (Tenn. 1992) ("Although the language of Article I, Section 16, of the Tennessee Constitution is virtually identical to that of the Eighth Amendment, this does not foreclose a more expansive interpretation of the Tennessee constitutional provision."); *see also* State v. Smith, 48 S.W.3d 159, 170-71 (Tenn. Crim. App. 2000) (asserting that the Tennessee Constitution is "subject to a more expansive interpretation than the Eighth Amendment" of the U.S. Constitution).

[265] *See* *Smith*, 48 S.W.3d at 170-71 (acknowledging that, although Supreme Court precedent is unclear over whether the Eighth Amendment requires proportionality review of sentences in noncapital cases, the Tennessee Constitution requires such an inquiry).

[266] TENNESSEE STATE ATTORNEY GENERAL, OP. NO. 07-67 3 (2007), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2007/op07-067.pdf (observing that the Tennessee Supreme Court had not addressed the constitutionality of the death penalty for child rape or "any reasonably analogous issue"); **Collins v. State, 550 S.W.2d 643, 646 (Tenn. 1977)** (noting that the Tennessee General Assembly "provided a mandatory death penalty" in an amended 1974 statute).

[267] *See* Mitchell, *supra* note 257, at 4 (explaining that state judges must apply Supreme Court precedent); Logan, *supra* note 260, at 401 (discussing potential limitations on seeking capital punishment for the rape of a child in state prosecutions).

The most likely effect of these new laws is to encourage defendants to seek and accept guilty pleas of life without parole. That is what happened in the first case brought under Florida's new statute.[268] In a statement touting the plea deal, the State Attorney for the Fifth Judicial Circuit emphasized that the quick resolution proved the effectiveness of the new statute.[269] The threat of capital punishment motivates defendants to negotiate pleas to life without parole to avoid the death penalty.[270] Prosecutors recognize the value of the ultimate sanction in plea negotiations. When Colorado abolished the death penalty in 2020, some prosecutors expressed concern over the loss of leverage, while others pointed out that the threat of capital punishment discouraged defendants from exercising their constitutional rights out of fear of the penalty.[271] Defendants may be likely to accept pleas both to avoid a death sentence and to avoid becoming a test case for the constitutionality of these laws.[272]

The Supreme Court could deny certiorari if the issue of the constitutionality of these laws reaches it, leaving *Kennedy* in place. It is possible that the Court might wait to see if other states start building consensus. Several states have pending legislation or have considered similar **[*338]** legislation.[273] These events could indicate to the Court that a new national consensus is building.[274] But the Court may not wait to see if a new consensus develops. The Court's current composition, a conservative bloc that includes three of the four *Kennedy* dissenters; its willingness to disregard stare decisis; and its developing approach to the Eighth Amendment all suggest that the Court may be willing to act.

IV. THE UNCERTAIN FUTURE OF THE EIGHTH AMENDMENT

States have been encouraging the Supreme Court to alter its Eighth Amendment jurisprudence.[275] The current composition of the Supreme Court and the trajectory of its decisions suggest that the conservative Justices may

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[268] *See* Farrow, *supra* note 169 (discussing the first case brought under Florida's new capital sexual battery law).

[269] *Id.*

[270] *See* William W. Berry III, *The Problem With Capital Pleas*, 20 OHIO ST. J. CRIM. L. 213, 225 (2023) (explaining that the death penalty "serves as a powerful deterrent for defendants exercising their Fifth and Sixth Amendment rights in many cases" and this threat gives prosecutors "powerful leverage"); Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29(3) JUST. SYS. J. 313, 323 (2008) ("Given the punishment at stake and the expense of a trial, the incentives for defendants to plead guilty are greater in death-eligible cases than in in noncapital murder cases."); Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV. 671, 676 (2009) (describing the tactics of a district attorney who always sought the death penalty if the defendant was eligible but also always agreed to a lesser plea deal even in the "most egregious cases").

[271] Andrew Kenney, *Colorado Death Penalty Abolished, Polis Commutes Sentences of Death Row Inmates*, COLO. PUB. RADIO (Mar. 23, 2020, 4:02 PM), https://www.cpr.org/2020/03/23/polis-signs-death-penalty-repeal-commutes-sentences-of-death-row-inmates/.

[272] *See* Berry, *supra* note 270, at 224 ("The prosecutor can impose a sort of Hobson's choice a take it or leave it proposition that causes the defendant to decide whether to risk a greater sentence.").

[273] *See* Ardman, *supra* note 38 (manuscript at 23) (discussing state developments); *supra* notes 233-237 and accompanying text (discussing proposed or pending bills in state legislatures).

[274] *See* Shawn Musgrave, *Can Conservatives Expand the Death Penalty Using the "Trigger Law" Playbook?*, THE INTERCEPT (June 21, 2024, 11:35 AM), https://theintercept.com/2024/06/21/project-2025-death-penalty-supreme-court-kennedy/ (asserting that "Republican legislators are laying the groundwork to expand the death penalty to crimes beyond murder" if *Kennedy v. Louisiana* is overturned).

[275] *See* Brief for Idaho, Montana and 18 Other States as *Amici Curiae* in Support of Petitioner at 3, **City of Grants Pass v. Johnson, 554 U.S. 945 (2024)** (No. 23-175) [hereinafter State *Grants Pass* Amicus] (arguing that the ESD lacks "textual, historical, or structural support" and the Court "should put that troublesome jurisprudence to bed once and for all"); Brief for Idaho and 13 Other States as *Amici Curiae* in Support of Petitioner at 3, Hamm v. Smith, 604 U.S. 1 (2023) (No. 23-167)

welcome an opportunity to revisit the Court's Eighth Amendment jurisprudence.[276] Litigants have recognized this. In *City of Grants Pass v. Johnson*, twenty states signed on to a heavy-handed amicus brief asking the Supreme Court to use the case to reject the ESD, a question that was not before the Court.[277] Most of the same states have signed onto a similar amicus, attached to a petition for writ of certiorari, in another case that asks the Court to reconsider how it evaluates intellectual disability in capital cases.[278] These **[*339]** briefs emphasize (in near-identical wording) that the ESD had been used to "overturn precedent after precedent" and provide a list of those cases, including *Kennedy, Roper*, and *Atkins*.[279] "Each of [those] decisions," amici observe, "were 5-vote majorities with sharp dissents."[280]

This Part describes the contemporary arc of the Supreme Court's Eighth Amendment jurisprudence, which is currently in "stealth overruling" mode. But when the Court finds the right opportunity, there is a real risk that it might eliminate the ESD, as other legal scholars have warned.[281] Scholars have rightfully focused on threats to rights protected under substantive due process post-*Dobbs*,[282] but the Eighth Amendment is equally vulnerable and deserves similar scrutiny. This Part discusses the possible directions the Court might take and how it might rely on the reasoning supporting *Dobbs* to reject *Kennedy* and other Eighth Amendment jurisprudence. It concludes that the Court's current trajectory is a significant threat to the Eighth Amendment.

A. Stealth Overruling

[hereinafter State *Hamm* Amicus] ("It is time for the Court to ground its Eighth Amendment jurisprudence in the Constitution's text, history, and structure.").

[276] *See* Ryan, *Death, supra* note 18, at 298 ("The Court's willingness to disregard deeply rooted precedent, along with its adherence to originalism, which is at odds with the ESD, may result in the eradication of broad swaths of Eighth Amendment jurisprudence.").

[277] *See* State *Grants Pass* Amicus, *supra* note 275, at 2 ("Granting certiorari will also allow this Court to course-correct its errant Eighth Amendment holdings. The Ninth Circuit relied on this Court's 'evolving standards of decency' jurisprudence, and this case is the unfortunate fruit of that standardless approach."); *id.* at 1 (listing state signatories to the amicus).

[278] *See* State *Hamm* Amicus, *supra* note 275, at 4 (arguing for greater deference to state determinations about intellectual disability); *id.* at 1 (listing signatories to the amicus). The Court vacated the Eleventh Circuit's judgment and remanded so that court could clarify the basis for its decision. *See Hamm*, 604 U.S. at 1.

[279] State *Grants Pass* Amicus, *supra* note 275, at 21-23; State *Hamm* Amicus, *supra* note 275, at 11-14.

[280] State *Grants Pass* Amicus, *supra* note 275, at 23; State *Hamm* Amicus, *supra* note 275, at 14.

[281] *See* Miller, *Decency, supra* note 16, at 119-20 ("The test has never been a favorite of conservative justices, who have long contended that it reeks of functionalism. Recently, they have renewed calls for its abandonment. Justices Alito and Thomas have repeatedly authored dissents criticizing the test and proposing a replacement based on originalism."'); Ryan, *Death, supra* note 18, at 298 ("The Court's dramatic turn toward originalism and its ready willingness to disregard entrenched precedent leave the Eighth Amendment's ESD in question.").

[282] *See* Murray & Shaw, *supra* note 32, at 756-60 (explaining that a reformulation of stare decisis could implicate other cases, such as *Heller, Bruen*, and *Obergefell)*; Linda C. McClain & James E. Fleming, *Ordered Liberty After* Dobbs, 35 J. AM. ACAD. OF MATRIM. LAWS. 623, 636 (2023) ("Beyond *Dobbs*, what approach(es) might we expect the Court and, in particular, the two most recent justices, to take to interpreting the Due Process Clause generally? Are they likely to vote to overrule the substantive due process cases at the core of Justice Kennedy's legacy such as *Lawrence* and *Obergefell?*"); Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs *And How History Can Help Overrule It*, 133 YALE L.J. F. 65, 67 (2023) ("If Dobbs represents a repeat of *Bowers's* reliance on disputed history, the question moving forward is whether history will also repeat itself in the form of a course correction.").

The Court has already limited the reach of extant Eighth Amendment precedent by ignoring it and gradually exploring new directions without **[*340]** expressly rejecting the ESD. This is one form of "stealth overruling."[283] "[R]educing a precedent to nothing," Professor Barry Friedman writes, "involves no explicit distinction; the court by sleight of hand or fiat simply chops the precedent to a stub."[284] He posits that stealth overruling permits the Court to evade "anticipated negative publicity attendant [to] explicit overruling."[285] The Court can insist that it is operating consistently within institutional norms while engaging in other projects.[286] Gradual erosion of precedent permits the Court to eventually discard that precedent altogether.[287]

Professor Ryan explains that the Court is already doing this in Eighth Amendment cases it did not apply the ESD in *Baze v. Rees*, a 2008 decision that addressed lethal injection practices, even though lower courts had used that standard in pre-*Baze* method-of-execution cases.[288] She observes that the Court has continued to pivot away from the ESD and has "infuse[d] its Eighth **[*341]** Amendment analyses with threads of originalism."[289] This, Professor Ryan explains, puts the future of the ESD and existing Eighth Amendment precedent at serious risk.[290]

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[283] Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 12 (2010); *see* Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. OF BOOKS 3 (Sept. 27, 2007), https://www.nybooks.com/articles/2007/09/27/the-supreme-court-phalanx/ ("Roberts and his right-wing colleagues voted to overrule the recent *Grutter* decision by stealth without conceding that they were overruling anything.").

[284] Friedman, *supra* note 283, at 12; *see* Bill Watson, *Did the Court in* SFAA *Overrule* Grutter?, 99 NOTRE DAME L. REV. REFL. 113, 131 (2023) ("Stealth overruling (in one form) involves 'reducing a precedent to essentially nothing' while 'dissembling' about doing so." (quoting Barry Friedman, *The Wages of Stealth Overruling (with particular attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 15-16 (2010))).

[285] Friedman, *supra* note 283, at 29.

[286] *See* Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 58 U.C. DAVIS L. REV. 1323, 1330-31 (2025) ("Stealth reversals embrace the analytic and rhetorical hallmarks suggestive of principled legal reasoning rather than political and ideological judicial activism. The functional outcome of a stealth reversal may be just as unpopular or sweeping as an express reversal, but its difference in form gives the appearance of the Court operating as bona fide judicial body."); Miller, *Purpose and Practice, supra* note 14, at 280 ("Roberts often insisted on formally leaving precedent intact while nonetheless recasting the rules or standards announced by controlling cases so that they would permit his desired substantive outcome.").

[287] *See, e.g.*, Edwards v. Vannoy, 593 U.S. 255, 271-72 (2021) (explaining that retaining the watershed exception, which the Court had refused to apply, "offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts" and therefore must be abolished); Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 49 (2019) (rejecting the *Lemon* test in part because the Court has "either expressly declined to apply the test or has simply ignored it"); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 375 (2024) (observing that the Court "has not deferred to an agency interpretation under *Chevron* since 2016" before concluding that the stare decisis factors "all weigh in favor of letting *Chevron* go").

[288] *See* Ryan, *Death, supra* note 18, at 258 (describing the Court's recent shift away from the ESD); Klein, *The Eighth Amendment's Paper Tiger, supra* note 15 (manuscript at 19) (explaining that in *Baze*, the Supreme Court declined to use the ESD even though some lower courts had applied it to evaluate methods of execution in favor of a new test).

[289] Ryan, *Death, supra* note 18, at 286.

[290] *See id.* at 287 ("Not only are most of the Justices now originalists, but the Justices have shown their willingness to dispense with important and long-standing precedents. This leaves the ESD on very shaky ground.").

Grants Pass illustrates that litigants recognize that stealth overruling is one of the Court's preferred strategies, and they are adopting it.[291] The state amicus argued that the Court should reject the ESD and adopt a new standard that applies solely to methods of punishment, which it claims is better grounded in the "text, history, and structure" of the Constitution.[292] The city of Grants Pass did not go as far, but it argued that the Eighth Amendment only sets limits on bail, fines, and punishment, rather than the conduct a government may criminalize.[293] It advocated for a historic understanding of the Eighth Amendment, emphasizing that the types of punishments it imposed for violations of its ban on public camping were not cruel or unusual.[294]

The Court agreed with Grants Pass and concluded that the Eighth Amendment is directed at punishments rather than prohibiting states from criminalizing certain conduct.[295] The Court focused on history and tradition, explaining that barbaric punishments were cruel "because they were calculated to 'superad[d]' 'terror, pain, or disgrace'" and "'unusual' because, **[*342]** by the time of the Amendment's adoption, they had 'long fallen out of use.'"[296] The "superadded" standard, which had previously been used to assess state execution practices, now appears to be a way to determine whether a state's chosen punishment for any offense violates the Eighth Amendment and offers limited protection.[297] Under that analysis, if a punishment does not appear to a court to be "designed to 'superad[d]' 'terror, pain, or disgrace,'" then it is not cruel, and if "similar punishments have been and remain among 'the usual mode[s]' for punishing offenses throughout the country," then it is not unusual.[298]

It is true that the Court did not need to address the ESD in *Grants Pass* because it focused on the status and conduct distinctions but it also did not need to expand the reach of the "superadded" analysis.[299] The Court's

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[291] *See* Maurice Chammah, Shannon Heffernan, & Beth Schwartzapfel, *This Supreme Court Case on Homelessness May Limit Prisoner Rights and Expand Executions*, THE MARSHALL PROJECT (Apr. 10, 2024, 6:00 AM), https://www.themarshallproject.org/2024/04/10/supreme-court-homeless-grants-pass-originalism (reporting that 20 states' Republican attorneys general advocate for complete elimination of the "evolving standards interpretation").

[292] State *Grants Pass* Amicus, *supra* note 275, at 2.

[293] Brief for Petitioner at 2-3, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175), 2024 WL 891258, at *2-3.

[294] *Id.* at 13 ("Fines and jail terms remain constitutional today because they do not cruelly 'superadd terror, pain, or disgrace' to the sentence and, far from having 'long fallen out of use,' appear in the criminal codes of all 50 states and the federal government." (quoting Bucklew v. Precythe, 139 S. Ct. 1112, 1123-24 (2019))).

[295] *See* City of Grants Pass v. Johnson, 603 U.S. 520, 521 (2024) (explaining that the "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.'" (quoting Powell v. Texas, 392 U.S. 514, 531-532 (1968) (plurality opinion))). The Court did not reconsider *Robinson v. California*, 370 U.S. 660 (1962), although it narrowed the holding in that case: "The Court held only that a State may not criminalize the 'status' of being an addict." *Id.* at 546 (quoting *Robinson*, 370 U.S. at 666). The Court decided that *Robinson* did not apply because the public camping ordinances did not criminalize the status of being homeless. *Id.* at 546-47.

[296] *Id.* at 542 (quoting *Bucklew*, 587 U.S. at 130).

[297] *See* Ryan, *Death, supra* note 18, at 303 ("Judges would presumably look to whether the punishment superadds terror, pain, or disgrace. And once the Court finds a new punishment to be constitutional, it has suggested that this determination should endure in perpetuity.").

[298] *Grants Pass*, 603 U.S. at 543 (quoting Pervear v. Commonwealth, 72 U.S. 475, 480 (1866)); Bucklew v. Precythe, 587 U.S. 119, 130 (2019)).

[299] *See* Meghan J. Ryan, *The Miserly Message of* Grants Pass, OHIO ST. J. CRIM. L. (forthcoming 2025) (manuscript at 7) [hereinafter Ryan, *Miserly]*. As Professor Ryan writes, *Grants Pass* was an odd vehicle for the Court unless it was interested in limiting the reach of the Eighth Amendment. *Id.*

reframing of the Eighth Amendment assessment and its subsequent application of that analysis indicates that future Eighth Amendment cases could lead to additional narrowing of constitutional protections. This is consistent with the Court's analysis in other cases. In *Jones v. Mississippi*, which addressed how to evaluate juvenile incorrigibility, the Court did not give prior precedent the substantive weight it deserved and decided that "perfunctory consideration of youth" complied with the Eighth Amendment.[300] Professor Cara Drinan observes that "in its refusal to follow the substantive rule of *Miller* and in its denial of what it has done, the Court undermined its own credibility."[301] Modifying Eighth Amendment jurisprudence while simultaneously insisting that this is just how the Court has always done it allows the Court to engage in stealth overruling while pretending it is not.[302] It is true that ESD cases do not rest on the "superadded" foundation. The Court might be willing to maintain this doctrinal distinction. **[*343]** It is, however, plausible that the differing approaches could give lower courts, and ultimately the Supreme Court, the opportunity to weaken or reject existing constitutional standards.

The Court is in the process of modifying the Eighth Amendment and rejecting the approaches it has used for decades. This may allow the Court to reject the ESD entirely when the right vehicle appears. Then the Court can rely on its disuse of that standard as a reason to do something different.[303] And as in *Loper Bright Enterprises v. Raimondo*, when the Court rejected *Chevron* deference, the Court may not immediately eliminate all ESD-derived precedent;[304] but that precedent will become considerably weaker, inviting additional litigation to eradicate it. Recognizing this pattern of doctrinal manipulation is essential to countering it.

B. A Receptive Supreme Court

Kennedy v. Louisiana is especially vulnerable for three reasons: (1) changes to the Court's membership; (2) new laws and legislative deliberations that are directly contrary to *Kennedy*; and (3) the analytical path and reasoning the Court has relied on to overturn other precedent, especially *Dobbs*, echo critiques in the *Kennedy* dissent. This section addresses each of these issues in turn.

First, every member of the *Kennedy* majority Justices Anthony Kennedy, John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer is no longer on the Court.[305] Alterations to the membership of the Supreme Court affect both the decisions the Court makes and the reasoning it applies.[306] In his dissent in *Payne v. Tennessee*, Justice Thurgood **[*344]** Marshall challenged the Court's decision to overrule cases decided only a

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[300] *See* Drinan, *supra* note 16, at 188.

[301] *Id.*

[302] *See* Friedman, *supra* note 283, at 14 ("The hallmark of stealth overruling is that the Justices are perfectly aware that they are overruling but hide the fact that they are doing so.").

[303] *See* Ryan, *Death, supra* note 18, at 303-04 (contending that the Court has gradually been eradicating the ESD and moving toward an originalist approach); *see supra* note 287 and accompanying text.

[304] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) (explaining that, although the Court was overruling *Chevron*, "we do not call into question prior cases that relied on the *Chevron* framework").

[305] *See About the Court: Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Nov. 3, 2024) (listing the current Justices of the U.S. Supreme Court, none of whom joined the *Kennedy* majority decision).

[306] *See* South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("Overrulings of precedent rarely occur without a change in the Court's personnel."); Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 842 (2023) [hereinafter Re, *Personal Precedent]* (agreeing with Justice Scalia that institutional precedent is deeply rooted in the power of personal precedent); *see also* Ryan, *Death, supra* note 18, at 290 (observing that the current Court's majority votes are "regularly conservative" and "couched in originalism").

few years earlier, asserting that "[n]either the law nor the facts . . . underwent any change in the last four years. Only the personnel of this Court did."[307] This opportunism, he argued, threatened the stability of the law.[308]

Membership changes have impacted the Court's recent decisions.[309] Just two years before *Dobbs*, a plurality of the Court reaffirmed the functionality of the undue burden test.[310] In *Dobbs*, the Court did not grant certiorari to address whether to overturn *Roe v. Wade* it agreed to decide "whether all pre-viability prohibitions on elective abortions are unconstitutional."[311] During briefing and oral argument, the Solicitor General of Mississippi invited the Court's new conservative majority to overrule *Roe* and *Casey*.[312] The "gambit" paid off.[313] Chief Justice Roberts concurred in the judgment in *Dobbs*, although he wrote a lengthy (if somewhat disingenuous) tribute to judicial restraint.[314] While the *Dobbs* majority promised that the decision would not threaten other substantive due process precedent, that promise is hollow.[315]

[*345] Professor Re argues that personal precedent, which he defines as "a judge's presumptive adherence to her own personally expressed legal views," explains why the Court overrules cases after the Court's membership changes.[316] If Justices who voted for a case remain on the Court, then "institutional precedent is generally secure. But when new Justices arrive, institutional precedent rests only on its own authority and is consequently far more vulnerable."[317] This is especially likely when dissenters from institutional precedent remain on the Court, and new Justices' personal precedent makes them amenable to adopting the dissenters' perspectives.[318] This is likely the

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[307] Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

[308] *Id.* at 845 ("The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case.").

[309] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 414 (2022) (Breyer, J., dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking." (quoting *Payne*, 501 U.S. at 844 (1991) (Marshall, J., dissenting))); Re, *Personal Precedent, supra* note 306, at 843 ("Justice Blackmun knew that individuals, not any formal rule or the Court as an institution, had made the difference and would continue to do so. As we have seen, events in *Dobbs* bear out that conclusion.").

[310] *See* June Med. Servs., LLC v. Russo, 591 U.S. 299, 307-08 (2020). Chief Justice Roberts concurred in the judgment based on stare decisis. *Id.* at 344.

[311] Petition for a Writ of Certiorari at i, *Dobbs*, 597 U.S. 215 (No. 19-1392).

[312] Transcript of Oral Argument at 4-6, *Dobbs*, 597 U.S. 215 (No. 19-132); *Dobbs*, 597 U.S. at 352 (Roberts, C.J., concurring in the judgment).

[313] *See* *Dobbs*, 597 U.S. at 352 ("The Court now rewards that gambit, noting three times that the parties presented 'no half-measures' and argued that 'we must either reaffirm or overrule *Roe* and *Casey.'*").

[314] *See* *id.* at 348-49 ("Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis.*").

[315] *See* *id.* at 290 (majority opinion) ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."). *But see* *id.* at 332 (Thomas, J., concurring) (arguing that the Court "should reconsider all of [its] substantive due process precedents, including *Griswold, Lawrence*, and *Obergefell*"); Murray & Shaw, *supra* note 32, at 756-60 (identifying precedent that is vulnerable post-*Dobbs)*.

[316] Re, *Personal Precedent, supra* note 306, at 828, 842.

[317] *Id.* at 842.

[318] *See* *id.* at 832 ("So the campaigning dissenter, whose arguments are rooted in consistent personal precedent, often has a unique ability to offer a coherent, comprehensive alternative to the doctrinal status quo.").

case with *Kennedy*. Three dissenters, Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito, are still on the bench. Newer appointees Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett may be willing to modify Eighth Amendment doctrine.[319]

Second, as in the lead-up to *Dobbs*, legislatures are aware that the Court's membership changes offer new opportunities and are acting accordingly. Legislators who introduced or supported laws expanding the death penalty have expressed hope that, because the Court's composition has changed, they will be able to convince the Court to overrule *Kennedy*.[320] State amici filed in the Eighth Amendment cases rely on the Justices' personal precedent critiquing the Eighth Amendment and emphasize the undesirable nature of ESD precedent.[321] States that want to modify the Eighth Amendment appear **[*346]** to be relying on the same playbook used in *Dobbs*.[322] Although states have asked the Court to reject the ESD, they are also probably aware that legislative actions can directly influence the national consensus portion of the ESD analysis and give the Court another "relevant" factor when reevaluating *Kennedy*.[323]

Third, the Court's stare decisis analysis in *Dobbs*, particularly its reliance on "democratic deliberation," makes *Kennedy* especially vulnerable. Professors Murray and Shaw argue that "democratic deliberation" impacts stare decisis, either as an additional justification for overturning precedent or because the Court can "bypass conventional stare decisis analysis altogether if it views a precedent as so contentious and divisive that the underlying question should be decided through the political process, rather than through judicial resolution."[324] Reliance on democratic deliberation as justification for overturning cases, they write, is troubling, both because the Court can "reshape the public's understanding of its actions as democracy-enhancing, as opposed to a bald exercise of judicial power," and because it "has the broader potential to reshape, however subtly, the understanding of *who* is in the polity and the identity of those 'discrete and insular minorities' whom the Court is obliged to protect."[325]

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[319] *See* Bucklew v. Precythe, 587 U.S. 119 (2019) (opinion by Justice Gorsuch, joined by Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh); City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (opinion by Justice Gorsuch, joined by Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, and Barrett).

[320] *See supra* notes 20-24 and accompanying text (discussing new laws in Florida and Tennessee that set up constitutional challenges to *Kennedy v. Louisiana)*.

[321] *See supra* notes 277-280 and accompanying text (discussing recent amicus briefs in Eighth Amendment cases); Re, *Personal Precedent, supra* note 306, at 845-46 (asserting that litigants use personal precedent to encourage the Court to reach a desired result).

[322] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 345 n.5 (2022) (Kavanaugh, J., concurring) ("The continued and significant opposition to *Roe*, as reflected in the laws and positions of numerous States, is relevant to assessing *Casey* on its own terms."); *id.* at 414-15 (Breyer, J., dissenting) (describing state opportunism in response to a new conservative majority on the Supreme Court); *see supra* Section II.B (discussing parallels between state responses to the Court's abortion jurisprudence and *Kennedy)*; *see also* Re, *Congress, supra* note 119, at 1090-91 (predicting that legislation challenging *Kennedy* would be similar to states' abortion trigger laws).

[323] *See* Logan, *supra* note 260, at 404 ("Moreover, if Florida's new law spurs enactment of similar laws nationally, it will lend support to the Court's prioritization of 'the consistency of the direction of [legislative] change,' such that eventually the national consensus identified and relied upon in *Kennedy* is 'no longer controlling.'" (quoting Atkins v. Virginia, 536 U.S. 304, 315 (2002); and then quoting Roper v. Simmons, 543 U.S. 551, 574 (2005))) (footnotes omitted). *But see* Berry, *supra* note 19 (manuscript at 14) (asserting that it is unlikely that the actions of a few states are sufficient to "create a consensus to allow that kind of punishment again").

[324] Murray & Shaw, *supra* note 32, at 732.

[325] *Id.* at 802-03 (quoting United States v. Carolene Prods. Co, 304 U.S. 144, 153 n.4 (1938)).

Democratic deliberation arguments are especially salient because *Kennedy* received significant criticism for its lack of respect for state democratic processes. Justice Alito expressly critiqued the Court for being "willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape" because the Court substituted its **[*347]** own judgment, rather than letting democracy work the issue out.[326] The death penalty is a controversial and divisive topic, and when the Court acts under the ESD to categorically bar a class of offenders or class of offenses from capital punishment, it has been assumed that those issues are settled absent a constitutional amendment.[327] The precedent that Professors Murray and Shaw identify as especially vulnerable post-*Dobbs* include dissents with similar complaints about taking "divisive" issues away from "the people" and cutting democratic debate short.[328]*Dobbs* is a particularly salient comparison because its author, Justice Alito, also authored the dissent in *Kennedy*.[329]*Dobbs* used the five stare decisis factors the Court had used in *Casey* and other decisions to overturn *Roe* and *Casey*: (1) the nature of the Court's error; (2) the quality of reasoning; (3) workability; (4) disruption to other areas of law; and (5) reliance.[330] Applying the stare decisis analysis the Court used in *Dobbs* by drawing on the *Kennedy* dissent and other dissents by Justice Alito in Eighth Amendment cases demonstrates *Kennedy's* vulnerability, particularly when factoring in complaints that the Court circumvents democratic deliberation through its application of the ESD.[331]

The Nature of the Court's Error. In *Dobbs*, Justice Alito argued that *Roe* erred by "short-circuit[ing] the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe."*[332] He claimed that instead of settling the issue of abortion, *Roe* and *Casey* produced more controversy, blocking people from "seek[ing] to persuade their elected representatives to adopt policies consistent with their views."[333]*Dobbs* asserted that the nature of the errors in *Roe* and *Casey* were antidemocratic because this "question of profound moral and social importance" was one that **[*348]** "the Constitution unequivocally leaves for the people."[334] Professors Murray and Shaw argue that, under this approach, "courts are justified in overruling extant precedents in circumstances where the precedent involves important or sensitive subject matter, and where the Court's earlier intervention halted or thwarted democratic deliberation."[335] This assessment is, as Professors Murray and Shaw point out, "almost entirely *subjective."*[336]

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[326] Kennedy v. Louisiana, 554 U.S. 407, 461-62 (2008) (Alito, J., dissenting).

[327] *See supra* note 30 and accompanying text (discussing the "one-way ratchet" approach of the ESD).

[328] Murray & Shaw, *supra* note 32, at 756-58.

[329] *See* Re, *Personal Precedent, supra* note 306, at 842-45 (discussing the impact of personal precedent on stare decisis and institutional precedent).

[330] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 267-68 (2022); Murray & Shaw, *supra* note 32, at 750 (discussing *Dobbs's* application of the traditional stare decisis factors).

[331] *See* State *Grants Pass* Amicus, *supra* note 226, at 18 ("Courts should not be tasked with judging the changing winds of society's evolving morals. Their job is to declare what the law says not what they think society would like it to say."); State *Hamm* Amicus, *supra* note 226, at 8 (asserting that rejecting the ESD "will protect the sovereign role States have over criminal sanctions"); *see also* Murray & Shaw, *supra* note 32, at 751-53 (discussing the stare decisis precedent *Dobbs* relied on).

[332] *Dobbs*, 597 U.S. at 269.

[333] *Id.*

[334] *Id.*

[335] Murray & Shaw, *supra* note 32, at 754.

[336] *Id.* (emphasis in original).

Justice Alito discussed the same concern in his *Kennedy* dissent, in which he argued that the Court had improperly prevented states from developing a national consensus and statutory schemes that would permit the imposition of the death penalty for child rape.[337] Although he had to admit that six states was not a consensus, Justice Alito was preoccupied by what he perceived as the Court's antidemocratic action on a matter of social and moral importance.[338] He has raised this argument before in Eighth Amendment cases. In his *Miller v. Alabama* dissent, Justice Alito argued that the Court's holding, that juveniles who committed homicide may not receive mandatory life without parole, "countermand[ed]" legislatures' "democratic decision."[339] This deference toward legislatures arises from his restrictive view of the Eighth Amendment, which "leaves questions of sentencing policy to be determined by Congress and the state legislatures."[340]

Justice Alito also argued that states' misperceptions of *Coker* led them to avoid adopting capital punishment for the rape of a child based on the mistaken belief that *Coker* barred them from doing so.[341] Under this argument, *Kennedy* capitalized on *state* mistakes and misunderstandings of **[*349]** the Court's precedent that squashed the development of a new national consensus.[342] The dissent viewed the absence of a national consensus as irrelevant because states were artificially influenced by the Court's allegedly overbroad language in *Coker*.[343] From this perspective, states' inaction was not *their* fault it was the Court's, which permitted the dissent to cast its arguments as vindicating important democratic interests.[344] The "chilling" critique seems to boil down to a back-channel attempt to define *Coker* as an exercise in judicial overreach despite Georgia's outlier status as the sole jurisdiction authorizing the death penalty for the rape of an adult woman. *Coker* may have influenced states' willingness to authorize capital punishment for child rape, but states had enacted other death penalty statutes that covered nonhomicide crimes, even if they were not using them.[345] And the way states approach capital punishment

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[337] *See* Kennedy v. Louisiana, 554 U.S. 407, 461 (2008) (Alito, J., dissenting) (arguing that states enacting new child rape laws may have contributed to evolution of a national consensus on the issue but the Court's ruling "snuffs out the line in its incipient stage").

[338] *See id.* at 461-62 (conceding that six state laws are not a national consensus, but insisting that the Court's ruling improperly relies on its "own judgment" of the death penalty).

[339] Miller v. Alabama, 567 U.S. 460, 515 (2012) (Alito, J., dissenting) ("When a legislature prescribes that a category of killers must be sentenced to life imprisonment, the legislature, which presumably reflects the views of the electorate, is taking the position that the risk that these offenders will kill again outweighs any countervailing consideration, including reduced culpability due to immaturity or the possibility of rehabilitation. When the majority of this Court countermands that democratic decision, what the majority is saying is that members of society must be exposed to the risk that these convicted *murderers*, if released from custody, will murder again.") (emphasis added).

[340] *Id.*

[341] *See supra* notes 90-97 and accompanying text (analyzing Justice Alito's dissent in *Kennedy)*.

[342] *See Kennedy*, 554 U.S. at 452 (Alito, J., dissenting) (arguing that "*Coker* dicta gave state legislators a strong incentive not to push for the enactment of new capital child-rape laws").

[343] *See supra* notes 90-100 and accompanying text.

[344] *See* Kennedy, 554 U.S. at 451-52 (2008) (Alito, J., dissenting) (arguing that the various interpretations of *Coker* dicta "posed a very high hurdle for state legislatures" in "considering the passage of new laws" for the death penalty related to the rape of a child); *cf*. Murray & Shaw, *supra* note 32, at 800-01 (describing how the "appeal to democracy" lets the Court cast itself in heroic terms); City of Grants Pass v. Johnson, 603 U.S. 520, 560 (2024) ("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. 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 . . . ." (quoting Robinson v. California, 370 U.S. 660, 689 (1962) (White, J., dissenting)); Graham v. Florida, 560 U.S. 48, 120 (2010) (Thomas, J., dissenting) ("The question of what acts are 'deserving' of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution.").

matters: the number of states that adopted capital punishment laws for murder was significant to the outcome in *Gregg v. Georgia*.[346] The states that had adopted capital punishment for child rape were outliers in comparison to most capital punishment jurisdictions.[347]

Running counter to the Court's insistence on democratic narratives, the objective component of the ESD, which evaluates national consensus, arguably is consistent with democratic approaches because it evaluates **[*350]** national practices in setting national constitutional standards.[348] The *Kennedy* dissent, however, was willing to fold social trends into the ESD analysis, arguing that more severe punishments for persons convicted of sexual offenses against children were equally relevant in weighing the nature of a consensus, even though, as Professor Bell observes, reactive and emotion-driven legislation in response to criminal conduct creates a greater risk of arbitrariness and unfairness.[349] The *Kennedy* dissent rejected the Eighth Amendment's counter-majoritarian status in favor of greater flexibility for states in deciding who to punish and how much, regardless of those risks.[350]

The Quality of Reasoning. In *Dobbs*, the Court argued that *Roe* "failed to ground its decision in text, history, or precedent."[351] It faulted *Roe* for its overbreadth, for taking on legislative responsibilities, for considering "irrelevant" historical details and ignoring others, for brushing past the "overwhelming consensus" of state laws, and for its reliance on irrelevant precedent that did not adequately consider a state's interest in fetal life.[352] Justice Alito's *Kennedy* dissent identified a similar litany of flaws in the majority opinion, including reliance on policy arguments that it deemed irrelevant to the Eighth Amendment analysis, including the risk of wrongful convictions and the moral impact on child victims who participate in a capital sentencing proceeding.[353] These, Justice Alito argued, were entirely proper **[*351]** for a *legislature* to consider, but not the Supreme Court.[354] Likewise, the dissent and

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[345] *See supra* note 178 and accompanying text (discussing state statutes authorizing capital punishment for various nonhomicide crimes).

[346] *See* Gregg v. Georgia, 428 U.S. 153, 179 (1976) ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman."*).

[347] *See supra* note 178 and accompanying text; Berry, *supra* note 19 (manuscript at 42) (asserting that *Kennedy* correctly evaluated the national consensus).

[348] *See* Michael J. Zydeny Mannheimer, *Eighth Amendment Federalism, in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 42, 43 (Meghan J. Ryan & William W. Berry III eds., 2020) ("Thus, 'evolving standards' should be closely tethered to local, accountable, democratic institutions, not left to the normative judgments formed by transient Court majorities.").

[349] *See Kennedy*, 554 U.S. at 455-57 (Alito, J., dissenting) (discussing changes in state laws that punish persons convicted of sexual offenses against children); Bell, *supra* note 131, at 29 ("The subjectivity and emotionalism likely to inhere in widespread application of capital child rape laws will almost certainly yield extreme arbitrariness and inadequate process for many defendants.").

[350] *See* Miller v. Alabama, 567 U.S. 460, 515 (2012) (Alito, J., dissenting). The ESD has been criticized for being explicitly majoritarian in its analysis of whether a punishment is cruel and unusual by assessing a national consensus. *See* Miller, *Decency, supra* note 16, at 130-32. On the other hand, this assessment may be useful in arguing that democratic implications do matter if the Court decides to reconsider the ESD. *See infra* note 497 and accompanying text.

[351] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 270 (2022).

[352] *See id.* at 269-80. For discussions of what *Dobbs* got wrong, see Aaron Tang, *After* Dobbs*:History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, **75 STAN. L. REV. 1091 (2023)** and Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *onAbortion's Nineteenth Century Criminalization*, 60 HOUS. L. REV. 901 (2023).

[353] *See* Kennedy v. Louisiana, 554 U.S. 407, 462 (2008) (Alito, J., dissenting).

majority debated the historical record of state perceptions about the precedential effect of *Coker*.[355]*Kennedy*, under the dissent's analysis and some academic critiques, is an exercise of *ipse dixit* the death penalty does not apply to non-homicide crimes against individuals because the Court said so.[356]

Both *Dobbs* and the *Kennedy* dissent disagreed with the way that *Roe* and the *Kennedy* majority had assessed countervailing interests in their reasoning. *Dobbs* argued that *Roe*'s reasoning was faulty because it failed to explain why the state interest in fetal life was important after viability but not before, an "arbitrary line" that, it claimed, undermined the reasoning of *Roe*.[357] In his *Kennedy* dissent, Justice Alito argued that the Court had not explained *why* the "moral depravity" of murder was worse than the rape of a young child such that one crime was death-eligible and the other was not.[358] Judicial perception that past opinions were not sufficiently deferential to legislative determinations and judgments about important moral issues may render past precedent increasingly vulnerable.[359]

Workability. The rule from *Kennedy* is straightforward for legislatures to apply because it categorically bars a class of crimes from capital punishment. **[*352]** The purported ambiguity from *Roe* and *Casey* that *Dobbs* complained about is not present, at least in *Kennedy*'s holding. But there are a few possible areas of ambiguity that a motivated Justice might exploit.

The first is the *Kennedy* majority's decision to leave open the possibility that some nonhomicide crimes against the state may permit the imposition of capital punishment.[360] The dissent complained that the majority had arbitrarily defined this category and failed to justify why it drew this moral boundary.[361] This complaint connects to another possible area of ambiguity: making moral determinations about who is the worst of the worst. This is one of the most challenging issues of capital punishment and an area subject to intense criticism.[362] The Court's decision to

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[354] *Id*. ("The Court's policy arguments concern matters that legislators should and presumably do take into account in deciding whether to enact a capital child-rape statute, but these arguments are irrelevant to the question that is before us in this case.").

[355] *See* *id*. at 448-54 (criticizing the majority's understanding of "a national consensus" and the scope of *Coker*).

[356] *See* *id*. at 466 ("The Court's final and, it appears, principal justification for its holding is that murder, the only crime for which defendants have been executed since this Court's 1976 death penalty decisions, is unique in its moral depravity and in the severity of the injury that it inflicts on the victim and the public."); Miller v. Alabama, 567 U.S. 460, 512 (2012) (Alito, J., dissenting) ("And despite the argument that the rape of a young child may involve greater depravity than some murders, the Court proclaimed that homicide is categorically different from all (or maybe almost all) other offenses."); *supra* Section II.B (discussing critiques of the *Kennedy* majority's restriction on the applicability of the death penalty).

[357] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 274-76 (2022) ("What *Roe* did not provide was any cogent justification for the lines it drew.").

[358] *See* *Kennedy*, 554 U.S. at 466-67 (Alito, J., dissenting).

[359] *See* *id*. at 469 ("The Court provides no cogent explanation why this legislative judgment should be overridden."); *see also* Murray & Shaw, *supra* note 32, at 749 (suggesting that "an earlier decision's arguable interruption of democratic deliberation qualifies as a 'special justification' that blunts the stare decisis force of a prior opinion"). *But see* Berry, *supra* note 19 (manuscript at 44) (arguing that the objective consensus "served as a mechanism to reduce judicial activism and the aggressive substitute of the Court's normative views for those of state legislatures and juries").

[360] Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) ("We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State.").

[361] *See* *id*. at 467-68 (Alito, J., dissenting) (criticizing the Court's failure to explain why "offenses against the State" cause greater harm than the rape of a child).

[362] *See* David Dolinko, *How to Criticize the Death Penalty*, 77 J. CRIM. L. & CRIMINOLOGY 546, 571-79 (1986) (summarizing arguments about the arbitrariness of the death penalty); *see also* Corinna Barrett Lain, *Three Observations About the Worst of*

draw the line at nonhomicide crimes in *Kennedy* rested on proportionality.[363] Because the crime of murder is so serious, the Court has concluded that it justifies the most severe sanction in certain cases. But, as Justice Alito pointed, out if capital punishment is assessed by culpability, then there is a question of whether a person who intends to commit a robbery and acts with reckless indifference toward human life is less morally depraved than a person who intentionally rapes and harms a young child and if so, why is the person who participates in the robbery eligible for the death penalty when the person who harms the child is not.[364] Death, however, offers a clearer line.

[*353] One area of workability that counsels against overruling *Kennedy* is the challenge of developing aggravating factors for nonhomicide crimes of sexual violence that could guide a sentencer's discretion in imposing a death sentence.[365] The Court admitted that factors it had approved in capital murder cases had "the potential to result in some inconsistency of application" but concluded that, although that "imprecision" had been "tolerated" for homicide offenses, it was not acceptable for nonhomicide offenses.[366]*Kennedy* concluded that developing aggravating factors for capital prosecutions in child rape cases might unsettle established capital punishment law, producing more complexity.[367] The dissent, by contrast, thought that states could develop these factors.[368] The new state statutes, however, tend to rely on modified homicide aggravators, rather than independent legislative determinations about the circumstances that could make a sexual assault morally depraved enough to justify the imposition of death in a given case.[369] But the Court might, were it to reject *Kennedy*, argue that it is more workable to give states discretion to make the moral calculation about which aggravators to adopt and how to apply them, increasing ambiguity by weakening Eighth Amendment jurisprudence.[370]

Finally, the greatest risk in the ambiguity calculus arises from the ESD's methodology and application. Justices who disagree with the application of the ESD and other critics point out that it is unworkable because the Court changes the methodology in each analysis, and evidence of consensus can be manipulated.[371] Likewise, Justice Alito

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the Worst, Virginia-Style, 77 WASH. & LEE L. REV. ONLINE 469, 469-71 (2021) (discussing the arbitrary imposition of the death penalty on vulnerable defendants who have "the exceptionally bad luck of having poor representation, or being in a county where the prosecutor has a proclivity for capital charges, or committing Black-on-White crime"). *Compare* Glossip v. Gross, 576 U.S. 863, 896 (2015) (Scalia, J., concurring) ("It is because these questions are contextual and admit of no easy answers that we rely on juries to make judgments about the people and crimes before them. The fact that these judgments may vary across cases is an inevitable consequence of the jury trial, that cornerstone of Anglo-American judicial procedure."), *with id.* at 917-19 (Breyer, J., dissenting) (arguing that the death penalty is arbitrary and therefore cruel because "factors that most clearly ought to affect application of the death penalty" such as "egregiousness" often do not, and factors that should not such as "race, gender, or geography" often do).

[363] *See Kennedy*, 554 U.S. at 441-42 ("[I]t is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape.").

[364] *See id.* at 466-67 (Alito, J., dissenting).

[365] *See id.* at 439-40 (majority opinion) (arguing that the challenges of developing aggravating factors to determine whether to impose death for nonhomicide crimes could lead to unconstitutional death sentences).

[366] *Id.* at 440.

[367] *See id.* at 441 ("Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure.").

[368] *See id.* at 462-64 (Alito, J., dissenting).

[369] *See supra* notes 199-205, 213-219, 223-227 and accompanying text (discussing aggravating factors in states' new capital punishment laws).

[370] *See Kennedy*, 554 U.S. at 462-63 (Alito, J., dissenting) (discussing aggravating factors that states could adopt to guide sentencers' discretion in imposing capital punishment); Miller v. Alabama, 567 U.S. 460, 515 (2012) (Alito, J., dissenting) (asserting that the Eighth Amendment leaves sentencing policy to legislatures).

identified ambiguity in the Court's **[*354]** death penalty decisions that prevented state legislatures from passing laws that they thought represented the appropriate community standard of decency and this "ambiguity" may be exploited to demonstrate that the Court's past decisions and the ESD itself, are not workable.[372]

Effect on Other Areas of Law. In *Dobbs*, the Court produced a lengthy list of areas that the majority thought had been distorted by *Roe* and *Casey*, including standards for facial constitutional challenges, standing, res judicata, and the First Amendment.[373] The Court complained that *Roe* and *Casey* had led the Court to "engineer exceptions to longstanding background rules," and thus stare decisis justified overruling.[374]

Kennedy has had less of a measurable impact than *Roe*. Instead, the Court may be inclined to focus on a broader litany of complaints about the ESD. Until recently, the ESD cases had been moving in a consistent direction to narrow use of the death penalty and reduce some of the most severe punishments.[375] When the Court used the ESD analysis in *Graham* to assess whether juveniles who committed nonhomicide crimes could receive life without parole, dissenters argued that the Court was distorting its proportionality jurisprudence.[376] Critics of the ESD complain that there does not seem to be an evolutionary endpoint.[377] Dissenting Justices have argued **[*355]** that the ESD jurisprudential line has abandoned the original understanding of the Eighth Amendment in favor of legislating from the bench to instill the Court's moral understandings into the law.[378]

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[371] *See* *Miller*, 567 U.S. at 511-12 (complaining about the Court's inconsistent approach towards determining a national consensus); *see also* Robert J. Smith, Bidish J. Sarma & Sophie Cull, *The Waythe Court Gauges Consensus (and How to Do it Better*), 35 CARDOZO L. REV. 2397, 2415-16 (2014) (identifying weaknesses in the Court's national consensus analysis). *But see* Berry, *supra* note 19 (manuscript at 45) (explaining that the ESD "is a simple two-part test that requires the Court to assess readily available information and then make its own determination, applying criminal law theory to criminal sentences").

[372] *See* *Kennedy*, 554 U.S. at 453-54 (Alito, J., dissenting).

[373] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 286-87 (2022).

[374] *Id*. at 287.

[375] *See* Corinna Barrett Lain, *The Power, Problems, and Potential of "Evolving Standards ofDecency," in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT, *supra* note 348, at 76, 87-88 (asserting that the "driving force behind the doctrine the notion that the Eighth Amendment should do more than protect against something that no one was doing anymore anyway was what saved the Eighth Amendment from being a dead letter in constitutional law and made it relevant to a variety of punishment practices over time"); *see also* Drinan, *supra* note 16, at 182-84 (describing the development of the Supreme Court's ESD jurisprudence that limited life without parole sentences for juvenile offenders).

[376] *See* Graham v. Florida, 560 U.S. 48, 104-05 (2010) (Thomas, J., dissenting) (complaining that the Court's proportionality precedent does not justify the imposition of a categorical ban on life without parole sentences for juveniles).

[377] *See* *id*. at 120 ("Its willingness to cross that well-established boundary raises the question whether any democratic choice regarding appropriate punishment is safe from the Court's ever-expanding constitutional veto."); Miller v. Alabama, 567 U.S. 460, 501 (2012) (Roberts, C.J., dissenting) ("This process has no discernible end point or at least none consistent with our Nation's legal traditions.").

[378] *See* *Miller*, 567 U.S. at 512 (Alito, J., dissenting) ("The Court felt no need to see whether this trend developed further perhaps because true moral evolution can lead in only one direction."); *Graham*, 560 U.S. at 97 (Thomas, J., dissenting) (arguing that the Court's ruling "rejects the judgments" of legislatures in order to answer a "moral" question); Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) ("The Court thus proclaims itself sole arbiter of our Nation's moral standards and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures."); Atkins v. Virginia, 536 U.S. 304, 352-53 (2002) (Scalia, J., dissenting) (arguing that the constitutional requirements for the imposition of capital punishment are not justified by historical practice and "some of them were not even supported by current moral consensus"). *But see* Stinneford, *Unusual, supra* note 30, at 1745-46 (explaining that the original meaning of "unusual" is to prevent the imposition of new, harsher punishments or the reintroduction of punishments that had been abandoned).

In reevaluating *Kennedy*, the new conservative majority Court may argue that *Kennedy* and the other ESD cases are evidence of judicial hubris, undermining legislatures' ability to respond to violent crimes and make decisions about punishment. This is consistent with Justice Alito's claims about the nature of the error in *Kennedy*: judicial overreach in the Eighth Amendment distorted the organic democratic development of state law. This critique ignores, however, that the Court itself distorts that development through manipulation and weakening of democratic processes.[379] The Court's more recent decisions aggregate its own power at the expense of other political branches and actors, which make its claims that it acts with restraint when overruling precedent difficult to credit.[380]

Reliance. Dobbs dismissed the reliance interests *Casey* emphasized: the ability to make choices about reproductive care in ordering their lives.[381]*Dobbs* asserted that it was better to leave the matter to legislative deliberation **[*356]** because this reliance interest was "novel and intangible."[382]

Whether capital punishment deters remains a contested issue, so assessing an offender's reliance on existing death penalty law is not a useful metric.[383] Reliance, however, may play a more significant role in assessing the viability of capital prosecutions and states' interest in stable capital punishment law. Death penalty prosecutions may take a year or more of planning and are complex and expensive.[384] Idaho's debate over a bill permitting the death penalty for child rape illustrates this issue. Idaho prosecutors were hesitant to embrace a capital child rape statute because of the complexity of prosecutions and the expense required to hire additional staff and prepare prosecutions.[385] States would have to be prepared to fund additional capital defense attorneys and investigators.[386] Courts would face significant increases in both direct and collateral appeals at a time when they already complain about delays.[387] One way the Court could evade dealing with this problem is to disclaim responsibility because, it might argue, states do not have to pass those laws.[388] And the Court has increasingly

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[379] *See* Murray & Shaw, *supra* note 32, at 763-74 (discussing the Supreme Court's "limited vision of democracy").

[380] *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 113 (2022) (arguing that the Supreme Court "is consolidating its power, systematically undercutting any branch of government, federal or state, that might threaten that power, while at the same time undercutting individual rights").

[381] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 288-89 (2022) ("*Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests . . . .").

[382] *Id*.

[383] *Compare* Glossip v. Gross, 576 U.S. 863, 897-98 (2015) (Scalia, J., concurring) (arguing that the death penalty deters and that even if its effect is uncertain, "the People" should "decide how much incremental deterrence is appropriate"), *with id*. at 930-32 (Breyer, J., dissenting) (discussing studies that suggest there is no deterrent effect).

[384] *See State Studies on Monetary Costs*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/costs/summary-of-states-death-penalty (last visited July 15, 2024) (discussing various studies on the cost of imposing the death penalty); *see also Parkland ShooterTrial: $ 2.5M Spent on Housing Nikolas Cruz Since 2018, Sheriff's Office Says*, FOX 13 (Oct. 13, 2022, 3:22 PM), https://www.fox13news.com/news/parkland-shooter-trial-2-5m-spent-on-housing-nikolas-cruz-since-2018-sheriffs-office-says (identifying costs of a capital prosecution, which included over two million dollars to house a high-profile defendant and over two million dollars to prosecute the penalty phase).

[385] Ruth Brown, *Senate Committee Holds Bill to Make Child Rape Punishable by Death*, IDAHO REPS. (Mar. 15, 2024), https://blog.idahoreports.idahoptv.org/2024/03/15/senate-committee-holds-bill-to-make-child-rape-punishable-by-death/ (discussing the logistical challenges of additional capital prosecutions).

[386] *See id*. (quoting the Idaho State Appellate Public Defender's estimate of needing to hire fourteen new employees if the law changed).

[387] *See id*. (discussing the length of capital cases and appeals); Lee Kovarsky, *Delay in the Shadowof Death*, 95 N.Y.U. L. REV. 1319, 1321 (2020) (discussing judicial skepticism of constitutional claims filed by prisoners).

tried to streamline and restrict those delays by imposing procedural restrictions on collateral appeals, a pattern that is likely **[*357]** to continue.[389]

States have an important interest in stable capital punishment law, and the rule from *Kennedy* offers clear guidelines for states. But complaints about the ESD may creep into reassessments of *Kennedy*, such as dissenters' concerns that the Court's flexibility in capital cases means that states cannot rely on capital punishment jurisprudence because the Court had historically pushed the standards of decency to evolve. That approach, however, as Professor William Berry explains, is consistent with Eighth Amendment stare decisis because "the premise of the underlying doctrine is that the meaning of the Amendment will change over time."[390] In other words, a stable Eighth Amendment is an evolving Eighth Amendment, a reading that is consistent with the original meaning of the text.[391]

In *Dobbs*, the Solicitor General argued that overturning *Roe* and *Casey* might damage other precedent that relied on the Due Process Clause.[392] The Court dismissed this argument because it claimed that abortion was unique, and it promised its decision *only* implicated abortion.[393] Upending *Kennedy* presents significant threats to other capital cases and the stability of criminal procedure and substantive criminal law. If the Court begins modifying its existing capital punishment jurisprudence, it is not likely to stop, especially because conservative Justices have heavily criticized the nature of the process and complained about how far it has strayed from the original understanding of the Eighth Amendment.

Dobbs recast its decision to eliminate a constitutional right as "exercis[ing] 'judgment'" to decide what the plain text of the Constitution meant.[394] The Court insisted that, rather than ending a controversy, its prior decisions about abortion had produced greater conflict.[395]*Dobbs* claimed the moral high ground because, it insisted, it was not bowing to public pressure, **[*358]** it was fixing an error.[396] The Court was, in reality, waiting for an opportunity to do the thing it wanted to do. And some states were happy to oblige they asked the Court to overrule *Roe* and *Casey*.[397] Those states had spent decades passing constitutionally questionable laws to bring a constitutional challenge to *Roe*.[398] This defiance weighed in favor of reconsideration, at least for some members of the Court.[399]

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[388] *See, e.g.*, City of Grants Pass v. Johnson, 603 U.S. 520, 557 (2024) ("As we have stressed, cities and States are not bound to adopt public-camping laws.").

[389] *See* Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739, 1752-64 (2022) (discussing the procedural restrictions that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposed).

[390] Berry, *supra* note 19 (manuscript at 5).

[391] *Id*. (arguing that Eighth Amendment stare decisis requires progressive change over time).

[392] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 289-90 (2022).

[393] *Id*. at 290. Nobody should believe this claim.

[394] *See* *Dobbs*, 597 U.S. at 291 ("The *Casey* plurality . . . claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. That unprecedented claim exceeded the power vested in us by the Constitution.") (citation omitted).

[395] *Id*. at 291-92.

[396] *Id*. at 291 ("[W]e cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work.").

[397] *Id*. at 230 ("26 States have expressly asked this Court to overrule *Roe* and *Casey* . . . .").

[398] *See supra* notes 147-152 and accompanying text (discussing "trigger laws" and other bans passed by states to restrict access to abortion).

Professors Murray and Shaw explain that the "fundamental problem with the Court's conception of democracy" is that "it appears to equate democracy with simple majoritarianism."[400] As long as the Court can plausibly claim that it is letting "the People" act, it can justify all sorts of changes to constitutional and criminal jurisprudence.

This approach is particularly concerning for capital punishment. The Court regularly refuses to act or waters down legal standards in death penalty appeals because, as it explained recently, federal intervention in state cases is somehow offensive to "the People," no matter how serious the issue.[401] Giving states greater control over capital sentencing, even at the expense of extant Eighth Amendment jurisprudence, is plausible under a democratic deliberation approach to stare decisis. State defiance of *Kennedy* may serve as an argument in favor of reconsideration, especially because the ESD expressly requires the Court to evaluate the national consensus and the direction of change.

Litigants challenging *Kennedy* may find a receptive audience at the Supreme Court, especially if that challenge was broad enough to attack the ESD. And because the Court has been engaged in stealth overruling and increasingly relying on assessments of history and tradition, major alterations to the Eighth Amendment are likely.[402]

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C. The Future of the Eighth Amendment

In 2015, Justice Scalia wrote in his *Glossip v. Gross* concurrence that, should the Court reassess the constitutionality of the death penalty as Justice Breyer suggested in dissent, he would "ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled."[403] Justice Thomas joined the concurrence *and* expressed his willingness to "revisit" *Woodson v. North Carolina*,[404] which prohibited the mandatory imposition of the death penalty for first-degree murder.[405] Justice Thomas asserted that much of the Court's significant Eighth Amendment jurisprudence was "unfounded" and "misinterpreted."[406] Justice Alito complained in *Miller* that the Court had "long ago abandoned the original meaning of the Eighth Amendment" when it adopted the ESD.[407] Professor Ryan explains that *Bucklew v. Precythe*, which addressed methods of execution, indicates that the Court is adopting a historic perspective on the

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[399] *Dobbs*, 597 U.S. at 345 n.5 (Kavanaugh, J., concurring) (discussing public opposition to *Roe*).

[400] Murray & Shaw, *supra* note 32, at 760.

[401] *See* Shinn v. Ramirez, 596 U.S. 366, 376-77 (2022). "Because federal habeas review overrides the States' core power to enforce criminal law, it 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Id*. (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)). "That intrusion 'imposes special costs on our federal system.'" *Id*. (quoting Engle v. Isaac, 456 U.S. 107, 108 (1982)).

[402] Ryan, *Death, supra* note 18, at 298 ("It seems the Court has been silently discarding the ESD in favor of a new originalist approach to the Eighth Amendment."); City of Grants Pass v. Johnson, 603 U.S. 520, 541-43 (2024) (discussing the origins of the Cruel and Unusual Punishments Clause).

[403] Glossip v. Gross, 576 U.S. 863, 899 (2015) (Scalia, J., concurring).

[404] 428 U.S. 280 (1976).

[405] *Glossip*, 576 U.S. at 893; *id*. at 908 n.4 (Thomas, J., concurring) ("I agree that *Woodson* eliminated one reliable legislative response to concerns about arbitrariness. . . . I would be willing to revisit it in a future case." (citation omitted)).

[406] *Id*. at 905-08; *see also* Miller v. Alabama, 567 U.S. 460, 506 (2012) (Thomas, J., dissenting) (arguing that "*Woodson* and its progeny were wrongly decided" and that the Eighth Amendment "is not concerned with whether a particular lawful method of punishment whether capital or noncapital is imposed pursuant to a mandatory or discretionary sentencing regime").

[407] *Miller*, 567 U.S. at 510 (Alito, J., dissenting).

Eighth Amendment that is likely to restrict its scope.[408] The discussion of the Eighth Amendment in *Grants Pass*, which incorporates *Bucklew*, bears out her prediction.[409]

There are different approaches the Court might take if it were to Eighth Amendment ESD precedent. The Court could undo the "one-way ratchet" of the ESD or entirely reject the ESD in favor of the Court's perception of the **[*360]** original meaning of the Eighth Amendment. Each is troublesome for distinct reasons.

1. Undoing the One-Way Ratchet

Historically, the ESD has been understood to evolve only in one direction.[410] The Court recognized the impact of such decisions, observing that its Eighth Amendment decisions block "normal democratic processes."[411] This means that although states have enacted, or may want to enact, legislation that is inconsistent with the Supreme Court's Eighth Amendment precedent, they cannot, something Chief Justice Roberts fretted about during oral arguments in *Kennedy*.[412] This makes Eighth Amendment jurisprudence vulnerable because the Court has described decisions to overrule precedent as restoring democratic deliberation.[413] A greater emphasis on state sovereignty and power also appears in the current Court's approach to punishment, especially capital punishment.[414]

In lieu of abandoning the ESD altogether, the Court might reject the one-way ratchet of the ESD, reasoning that state decisions to adopt the death penalty for the rape of a child mean that the ESD have changed.[415] The Court could overrule *Kennedy*, while leaving other ESD-based precedent intact. This approach might satisfy some Justices' desire for institutional consistency and legitimacy while creating opportunities for states to undo additional Eighth Amendment precedent through legislation. This more gradual **[*361]** approach would eventually give the Court an opening to reject the ESD because it has become unworkable.[416] This would be consistent with the

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[408] Ryan, *Death, supra* note 18, at 298-99 (suggesting that the analysis in *Bucklew* "may provide some insight" into the future directions of the Eighth Amendment); Bucklew v. Precythe, 587 U.S. 119, 130-33 (2019) (summarizing historical execution practices to establish the "original understanding" of the Eighth Amendment); *see also* *Miller*, 567 U.S. at 506 (Thomas, J., dissenting) ("[T]he Cruel and Unusual Punishments Clause, as originally understood, prohibits 'torturous *methods* of punishment.'" (quoting Graham v. Florida, 560 U.S. 48, 99 (2010))).

[409] *See supra* notes 295-298 and accompanying text (discussing *Grants Pass*); Ryan, *Miserly*, *supra* note 299 (manuscript at 11) (explaining that *Grants Pass* "narrowed the Eighth Amendment through its understandings of 'cruel and unusual,' and, in particular, 'punishments.'").

[410] *See supra* note 30 and accompanying text (discussing the implications of the Supreme Court's decisions in Eighth Amendment cases).

[411] Gregg v. Georgia, 428 U.S. 153, 176 (1976) ("The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience.").

[412] Transcript of Oral Argument at 10-11, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343).

[413] *See supra* notes 324-328 and accompanying text (discussing democratic deliberation in the context of capital punishment jurisprudence and the associated risks with overruling precedent). *Butsee* Berry, *supra* note 19 (manuscript at 47) (arguing that the evolving standards of decency or death penalty for child rapists do not trigger democratic deliberation concerns).

[414] *See* Klein, *The Eighth Amendment's Paper Tiger, supra* note 15 (manuscript at 51) (arguing that greater deference to state practices "is 'democratizing' insofar as it provides states, legislatures, and courts unrestrained authority in direct contrast to the constitutional values underpinning the Eighth Amendment").

[415] *See* Logan, *supra* note 260, at 402, 402 n.62 (discussing the possible impact on state legislation in the wake of Florida's change to its capital punishment statutes).

[416] *See supra* Section IV.A (discussing stealth overruling).

Court's claim in *Dobbs* that it is most appropriate to leave certain moral questions to the people.[417] The Court has made similar claims when discussing capital punishment.[418] Conservative members of the Court have focused on majoritarian rationales in insisting that judicial decisions have wrongly removed control over capital punishment from the states and the people.[419]

Undoing the ESD's one-way ratchet would lead to chaos. First, the application of the ESD would become even more complex. The Court lacks a uniform approach in evaluating the objective consensus portion of the ESD.[420] For example, sometimes the Court counts states that have abolished the death penalty when assessing capital punishment but not all the time.[421] The Court has also relied on the "consistency of change" or pace of change, rather than on a majority count.[422] The objective consensus also evaluates other factors, including jury verdicts and sentences, which may provoke **[*362]** heated debate among Justices.[423] While this may suggest that the current approach is not predictable, disputes over how to gauge consensus could be better resolved by clarifying that process, rather than rejecting it wholesale. To do otherwise would be inconsistent with the original meaning of the Eighth Amendment, which rejects harsher punishments.[424]

If the Court were to eliminate the one-way ratchet, its consensus analysis would be far weaker than the one in the original majority opinion; fewer states have enacted new capital punishment laws than when *Kennedy* was decided. At that time, Georgia, Montana, Oklahoma, South Carolina, and Texas had similar laws to Louisiana, as did the UCMJ.[425] Some of those states have retained the statutory language even though it is not currently enforceable.[426]

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[417] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

[418] Glossip v. Gross, 576 U.S. 863, 897-98 (2015) (Scalia, J., concurring) ("The suggestion that the incremental deterrent effect of capital punishment does not seem 'significant' reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental deterrence is appropriate."); Bucklew v. Precythe, 587 U.S. 119, 150 (2019) ("Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve.").

[419] *See* Baze v. Rees, 553 U.S. 35, 92 (2008) (Scalia, J., concurring) (asserting that the Justices who oppose to capital punishment are out of step with the Constitution and the preferences of the American people).

[420] *See supra* note 371 and accompanying text (discussing the national consensus portion of the ESD); John F. Stinneford, *Evolving away from Evolving Standards of Decency*, 23 FED. SENT'G REP. 87, 88 (2010) (comparing the Court's applications of the ESD in *Roper* and *Kennedy*).

[421] *See* Enmund v. Florida, 458 U.S. 782, 819-23 (1982) (O'Connor, J., dissenting) (criticizing the Court's method of counting states that authorize the death penalty for felony murder); Tison v. Arizona, 481 U.S. 137, 152-54 (1987) (counting states that permit the death penalty for a defendant who does not kill, but is a major participant in a felony and demonstrated reckless indifference to human life); *id.* at 175-76 (Brennan, J., dissenting) (complaining that the Court improperly excluded jurisdictions that abolished the death penalty in assessing consensus); *see also* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 90 (2005) (stating that *Roper* "concocted" a national consensus); Ryan, *Stare Decisis, supra* note 30, at 858 n.64 (identifying factors relevant to consensus that the Court considered in various cases).

[422] *See supra* notes 51-66 and accompanying text (discussing *Kennedy*'s application of the national consensus component of the ESD); Re, *Congress, supra* note 119, at 1043 (describing the Court's attention to "trend lines" in its ESD jurisprudence).

[423] *Compare* *Enmund*, 458 U.S. at 795-96 (analyzing the number of people on death row for felony murders "where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder"), *with* *id.* at 818-19 (O'Connor, J., dissenting) (responding that the majority "cannot know the fraction of cases in which juries rejected the death penalty for accomplice felony murder"); *compare* Kennedy v. Louisiana, 554 U.S. 407, 433-34 (2008) (analyzing whether there was a national consensus based on state legislation and execution statistics), *with* *id.* at 459-60 (Alito, J., dissenting) (stating that the majority's analysis is "misleading").

[424] *See* Berry, *supra* note 19 (manuscript at 15).

At present, only Florida and Tennessee have enacted new statutes.[427] Other states are considering these laws but have not enacted them.[428] A decision overruling *Kennedy* could point to the continued existence of unenforceable statutes, the new laws in Florida and Tennessee, and other states' deliberations to insist that the evidence of consensus used in *Kennedy* was questionable and to conclude, albeit with weak support, that the current direction of change cuts in favor of overruling *Kennedy*.[429] If the Court were inclined to follow this approach, then it is more likely to wait and see if a stronger consensus **[*363]** develops.

The Court would find limited support in state sentencing practices because nobody has been sentenced to death for that offense, let alone executed, for over twenty years.[430] Advocates in favor of rejecting *Kennedy* might argue that, like state legislatures responding to *Coker*, states recognized that the Supreme Court had forbidden them from undertaking such prosecutions.[431] Thus, they might reason, state inaction in this space does not provide indicia of consensus because the Court stifled it. This argument is weak because, historically speaking, such prosecutions were infrequent, and plea bargaining is also likely to limit death sentences.[432] But it is an argument that the Court would probably be willing to accept after *Dobbs*.[433]

A reassessment of the presence or absence of consensus would likely evaluate, as Justice Alito's dissent did, social and legislative sentiments regarding how to punish people who commit sexual offenses against children.[434] Sex offender laws have grown increasingly restrictive since 2008.[435] States unquestionably have a valid and important interest in protecting children from sexual abuse and prosecuting and punishing people who have been convicted of such offenses. But an evaluation of the broader picture of recent Florida legislation about children illustrates how states have weaponized this legitimate interest with limited grounding in evidence to weaken

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[425] *See* *Kennedy*, 554 U.S. at 423 (identifying which states had adopted the death penalty for the rape of a child); *supra* notes 123-127 and accompanying text (discussing the UCMJ provision).

[426] *See supra* note 191 and accompanying text (discussing state capital punishment provisions).

[427] *See supra* notes 171-173 and accompanying text (discussing the new laws in Florida and Tennessee).

[428] *See supra* notes 233-237 and accompanying text (discussing death penalty legislation pending in Missouri, South Carolina, Arizona, Alabama, and Idaho).

[429] *See* *Kennedy*, 554 U.S. at 431 ("Consistent change might counterbalance an otherwise weak demonstration of consensus."); *see also* Atkins v. Virginia, 536 U.S. 304, 315 (2002) (assessing consistency of change); Roper v. Simmons, 543 U.S. 551, 565 (2005) (same); Ryan, *Stare Decisis*, *supra* note 30, at 878 ("Another possibility is that the Court could impart that lower courts are to overturn Supreme Court outcomes only if the external facts of the case meaning the number of states that have adopted contrary legislation, how frequently the practice is actually used, and the like have *significantly* changed since the last time the issue was addressed by the Supreme Court.").

[430] *Kennedy*, 554 U.S. at 433 ("[N]o individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963.").

[431] *Id.* at 431.

[432] *See supra* notes 269-272 and accompanying text (discussing capital punishment and plea bargaining); Logan, *supra* note 260, at 409, 409 n.106 (observing that new capital punishment statutes are likely to provide leverage for prosecutors).

[433] *See* Ryan, *Death, supra* note 18, at 259 (arguing that the Court's willingness to overturn precedent in *Dobbs* could result "in the Court disregarding large swaths of Eighth Amendment jurisprudence").

[434] *Kennedy*, 554 U.S. at 455-57 (Alito, J., dissenting) (arguing that the passage of capital child-rape laws is consistent with legislation providing harsher punishments and registration requirements for persons convicted of sexually abusing children).

[435] *See* Erin Miller, Comment, *Let the Burden Fit the Crime: Extending Proportionality Reviewto Sex Offenders*, 123 YALE L.J. 1607, 1607-08 (2014) (discussing the expansion of laws restricting activities of persons convicted of sexual offenses).

individual liberties. Florida's legislature enacted the new capital punishment law during a larger moral panic about children, gender identity, and sexual orientation that draws on unjustified, antiquated stereotypes and **[*364]** suspicions about LGBT people.[436] To be clear, *the new capital punishment laws have nothing to do with LGBT people*. But contextualizing these laws in legislative trends illuminates the potential harm that may arise from enhanced judicial deference to state preferences.[437] These laws are part of a broader effort to afford greater control to states and state preferences at the expense of individual rights.

Indeed, state legislation of morality an issue the Justices disagreed on in *Lawrence v. Texas*[438] overlaps with capital punishment insofar as **[*365]** conservative Justices have suggested the death penalty is a reasoned, moral response to crime.[439] State legislative action ostensibly aimed at protecting children might serve as a basis for the Court to find consensus, or permit an opportunity to reject *Kennedy*'s assertion of consensus, even if the Court does not overtly embrace the animus underlying some of Florida's legislation.

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[436] *See* Jonathon J. Booth, *A New Satanic Panic*, YALE J.L. & FEMINISM (forthcoming) (manuscript at 47-63) (describing the backlash to LGBTQ progress); Allyn Walker, *TransphobicDiscourse and Moral Panic Convergence: A Content Analysis of my Hate Mail*, 61 CRIMINOLOGY 994, 995 (2023) (asserting that the current "moral panic" about trans individuals "seems to be merging with oft-repeated social fears about pedophilia and child abuse"); S. Lisa Washington, *WeaponizingFear*, 132 YALE L.J. F. 163, 166-69 (2022) (discussing the government's use of "criminalization as a tool of social control" and its impact on marginalized communities); *American Library AssociationReleases Preliminary Data on 2022 Book Bans*, AM. LIBR. ASS'N (Sept. 16, 2022), https://www.ala.org/news/press-releases/2022/09/ala-releases-preliminary-data-2022-book-bans (arguing that state efforts to censor books arises from a moral panic driven by political agendas, rather than the protection of children); Beau Bilinovich, *Bilinovich: Florida Lawmakers are Resurrecting aDecades-Old Moral Panic*, THE CASE W. RSRV. OBSERVER (Apr. 1, 2022), https://observer.case.edu/bilinovich-florida-lawmakers-are-resurrecting-a-decades-old-moral-panic/ (discussing the moral panic triggering the "Don't Say Gay Bill" in Florida); Aja Romano, *The Right's Moral Panic Over"Grooming" Invokes Age-Old Homophobia*, VOX (Apr. 21, 2022, 10:30 AM), https://www.vox.com/culture/23025505/leftist-groomers-homophobia-satanic-panic-explained ("Framing homosexuality as a wicked specter and queer people as pedophiles is one of the oldest narratives in the homophobic playbook; proponents of the 'Don't Say Gay' bill and other recent anti-gay and anti-trans legal actions across the US have been all too happy to recycle it."); Chris Pepin-Neff, *Anti-Trans Moral PanicsEndanger All Young People*, SCIENTIFIC AM. (May 19, 2023), https://www.scientificamerican.com/article/anti-trans-moral-panics-endanger-all-young-people/ (describing the effect of current moral panic on U.S. legislation); Kaitlyn Tiffany, *The Great (Fake) Child-Sex-Trafficking Epidemic*, THE ATL. (Dec. 9, 2021), https://www.theatlantic.com/magazine/archive/2022/01/children-sex-trafficking-conspiracy-epidemic/620845/ (discussing the moral panic that developed around online misinformation about child trafficking); Rebecca Jennings, *What We Can Learn About QAnon Fromthe Satanic Panic*, VOX (Sept. 25, 2020, 5:00 AM), https://www.vox.com/the-goods/2020/9/25/21453036/save-the-children-qanon-human-trafficking-satantic-panic (discussing the spread of misinformation about child trafficking).

[437] *See* Christian Paz, *Old-School Homophobia is Back*, VOX (Apr. 13, 2022, 6:00 AM), (discussing conservative claims that "Don't Say Gay" laws are intended to protect children from "grooming"); Bilinovich, *supra* note 436 (asserting that moral panic acted as the "main driving force" behind legislation of the Parental Rights in Education bill in Florida); Romano, *supra* note 436 (discussing moral panic in the context of Florida's "Don't Say Gay" law); Bell, *supra* note 131, at 27 (arguing that the expansion of capital punishment laws driven by fear and politics increase the risk of arbitrary punishment).

[438] *Compare* Lawrence v. Texas, 539 U.S. 558, 5778 (2003) ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."), *with id.* at 582 (O'Connor, J., concurring) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."), *and id.* at 589 (Scalia, J., dissenting) ("Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation.").

[439] *See* Kennedy v. Louisiana, 554 U.S. 407, 466-67 (2008) (Alito, J., dissenting) (discussing degrees of moral depravity to justify the death penalty); Atkins v. Virginia, 536 U.S. 304, 351 (2002) (Scalia, J., dissenting) (discussing jury perspectives on moral blameworthiness in capital cases); Glossip v. Gross, 576 U.S. 863, 899 (2015) (Scalia, J., concurring) (arguing that capital punishment should be left to "the People" to decide); *id.* at 903-06 (Thomas, J., concurring) (asserting that the majority arbitrarily quantified moral depravity).

Professor Re asserts that "[t]he most fundamental question raised by *Kennedy* is whether democratically reversible Eighth Amendment jurisprudence is legitimate and desirable."[440] Greater flexibility in the Eighth Amendment may reflect democratic norms insofar as it leaves states free to make decisions about how best to address punishment, an area traditionally within state control.[441] This outcome would, however, threaten the stability of existing Eighth Amendment jurisprudence.[442] States could, for example, legislatively challenge *Roper, Atkins*, or the Court's other categorical Eighth Amendment cases. Giving the states a freer hand to undo Eighth Amendment precedent would afford the Court opportunities to reshape the direction of its jurisprudence while claiming that it is just returning important questions to the people.[443] It may also prove unworkable because litigants would be able **[*366]** to ask the Court to revisit questions whenever enough states had changed their laws.[444]

The Court should not do this, but given its current approach to constitutional questions, modifying the ESD analysis to permit the standards of decency to "devolve" may be the least harmful approach the Court could take other than affirming its existing Eighth Amendment jurisprudence. Retaining the ESD, even without the one-way ratchet, would at least require courts to assess national consensus and permit independent judgments that might rein in outlier state legislatures.[445] A reliance on the democratic process, however, may be illusory because, as scholars point out, the Roberts Court has a poor track record when it comes to keeping state and federal electoral processes free, open, and democratic.[446] Given the Court's current approach to the Eighth Amendment, it is more likely that, rather than keeping the ESD, the Court would reject it in favor of an Eighth Amendment centered on history and tradition.

2. Original Understandings

In recent years, the Supreme Court has taken a sharp turn towards history and tradition and placed greater emphasis on what it perceives as the original meaning of constitutional provisions.[447] Litigants and jurists have encouraged the Court to turn its attention to the Eighth Amendment.[448] The relationship **[*367]** between

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[440] Re, *Congress, supra* note 119, at 1089.

[441] *See* Gregg v. Georgia, 428 U.S. 153, 176 (1976) ("The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" (quoting Gore v. United States, 357 U.S. 386, 393 (1958))).

[442] *See* Logan, *supra* note 260, at 408 (arguing that state laws that "plainly flout[] a constitutional holding of the Court" may contribute to uncertainty in the law, which is "especially problematic in the death penalty context"); Berry, *supra* note 19 (manuscript at 47) (arguing that upholding Florida's law "would not only undermine the rule of law, it would encourage state legislatures to disregard the Court's decisions and the evolving standards").

[443] *See* Lemley, *supra* note 380, at 113 (asserting that the Court consolidates power at the expense of other entities and individual rights); Murray & Shaw, *supra* note 32, at 800-01 (observing that the Court's "appeal to democracy" both "confers a patina of neutrality on a majority opinion laying waste to almost fifty years' worth of precedent" and allows the Court to paint itself as "vindicating the historic *injustices* that *Roe* and *Casey* wrought").

[444] *See* Logan, *supra* note 260, at 409 (arguing that "state defiance" of constitutional rulings might encourage states to "enact laws allowing other capital punishment practices outlawed by the Court").

[445] *But see* Miller, *Decency, supra* note 16, at 132-34 (questioning whether the ESD truly represents the polity).

[446] *See* Murray & Shaw, *supra* note 32, at 776 ("*Dobbs*'s hollow commitment to democracy is even more pronounced when considered alongside the Court's active interventions to distort and disrupt the functioning of the electoral process."); Lynn Adelman, *The Roberts Court's Assault onDemocracy*, 14 HARV. L. & POL'Y REV. 131, 140-47 (2019) (describing how the Roberts Court has "aided and abetted" anti-democratic initiatives); Eric J. Segall, *Chief Justice John Roberts:Institutionalist or Hubris-in-Chief*?, 78 WASH. & LEE L. REV. ONLINE 107, 113-19 (2021) (discussing the Roberts Court's negative impact on voting rights).

[447] *See* Ryan, *Death, supra* note 18, at 277 (describing the Supreme Court's doctrinal shift towards an originalist approach in capital cases); *supra* note 13 and accompanying text (discussing the Court's recent focus on history and tradition).

originalism, history, and tradition is not entirely clear from the Court's rulings.[449] The Court has not settled on a coherent approach to the application of history and tradition to understand what the Constitution means.[450] The Eighth Amendment is a challenging arena in which to deploy an analysis of history and tradition. Information about its drafting and ratification is limited in comparison with other constitutional amendments.[451] Further, in evaluating punishments, courts evince a presentist bias that assumes that historical practice dictated contemporaneous perceptions.[452] Changes to the way the Court approaches constitutional analysis may weaken or substantially undermine existing Eighth Amendment jurisprudence. While the Court may purport to be returning to the original understanding of the Eighth Amendment, its analysis appears inconsistent with scholarship that has evaluated the historical evidence.

State amici urging the Court to overrule the ESD admit that the Eighth Amendment is not static but insist that "pinning an 'evolving' standards **[*368]** approach to the Amendment is not the only way to protect it from becoming 'little more than a dead letter today.'"[453] Relying on the English Bill of Rights, which is the origin point of the Eighth Amendment, state amicus briefs urging the Court to reject the ESD argue that the Eighth Amendment definitely prohibits torture and barbaric punishments.[454] Amici also agree that the Eighth Amendment prohibits the imposition of punishments that are not authorized by statute and are disproportionate.[455] They claim that the ESD is flawed because it takes a majoritarian approach, "which is exactly what the Bill of Rights protects against."[456] But amici

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[448] *See supra* notes 275-280 and accompanying text; Nate Raymond, *US Appeals Judge UrgesNew Standard on 'Cruel and Unusual' Punishment*, REUTERS (Oct. 19, 2023, 1:55 AM), https://www.reuters.com/legal/government/us-appeals-judge-urges-new-standard-cruel-unusual-punishment-2023-10-18/ (describing a speech by U.S. Circuit Judge Thomas Hardiman at Harvard Law School, during which he urged the Court to reject the ESD in favor of a focus on historical text and original meaning).

[449] *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*:The Role of History and Tradition*, 118 NW. UNIV. L. REV. 433, 476-77 (2023) (discussing the different uses of history and tradition in recent Supreme Court opinions).

[450] *Compare* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022) (holding that the government must prove its firearm regulation aligns with the Second Amendment's historical tradition), *with* United States v. Rahimi, 602 U.S. 680, 692 (2024) (explaining that in the Second Amendment context, "[a] court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances'" (quoting *Bruen*, 597 U.S. at 29, 29 n.7) (alteration in the original)). *See also* Amy Howe, *Supreme Court Upholds Bar on Guns Under Domestic-ViolenceRestraining Orders*, SCOTUSBLOG (June 21, 2024, 11:42 AM), https://www.scotusblog.com/2024/06/supreme-court-upholds-bar-on-guns-with-domestic-violence-restraining-orders/ (discussing the shift in the analysis from *Bruen* to *Rahimi*); Bianca Corgan, *Conundrums of Constraint:* United States v. Rahimi *and the Future of the Bruen Test*, HARV. L. REV. BLOG ESSAY (July 21, 2024), https://harvardlawreview.org/blog/2024/07/conundrums-of-constraint-united-states-v-rahimi-and-the-future-of-the-bruen-test/).

[451] *See* Ryan, *Death, supra* note 18, at 260 (explaining that the lack of information surrounding the Eighth Amendment's drafting and ratification provides little guidance in determining which punishments are unconstitutional); Baze v. Rees, 553 U.S. 35, 97 (2008) (Thomas, J., concurring) (admitting that "the Eighth Amendment was not the subject of extensive discussion during the debates on the Bill of Rights" before turning to the dictionary to predict what the Framers probably meant).

[452] *See* Klein, *The Eighth Amendment's Paper Tiger, supra* note 15 (manuscript at 27-28) (discussing presentist bias in Eighth Amendment method-of-execution cases).

[453] State *Hamm* Amicus, *supra* note 275, at 15-16 (quoting Roper v. Simmons, 543 U.S. 551, 589 (2005) (O'Connor, J., dissenting)).

[454] *See* State *Grants Pass* Amicus, *supra* note 275, at 26 (describing the relationship between the English Bill of Rights and the Eighth Amendment).

[455] *See id.* (citing Gregg v. Georgia, 428 U.S. 153, 169 (1976)).

then complain that the ESD improperly "substitutes 'judicial preferences' about all aspects of penological policy for the will of the People" expressly relying on majoritarian arguments.[457]

> Redirecting judges from a targeted inquiry guided by fixed principles and commissioning them to make vague determinations about society's evolving sense of decency is contrary to the very premise of civil society: punishment for crimes has been removed from the hands of the few and committed to society judges are no exception.[458]

This is not a meaningful standard. It is an argument for the Court to reject existing Eighth Amendment precedent in favor of an interpretation guided by the Court's preferences, which allows it to claim the mantle of a democratic protector.[459]

Justice Thomas's separate opinions in Eighth Amendment cases set out a roadmap for the Court to narrow the Eighth Amendment. Under his analysis, the Eighth Amendment "leaves the unavoidably moral question of who 'deserves' a particular nonprohibited method of punishment to the judgment **[*369]** of the legislatures that authorize the penalty."[460] He argues that the Eighth Amendment prohibits "torturous '*methods* of punishment' specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted."[461] Justice Thomas has suggested that because the "more violent modes of execution" were not regularly used when the Bill of Rights was debated, they would "have been 'unusual' in the sense that they were no longer 'regularly or customarily employed.'"[462] He has critiqued the Court for assessing proportionality in punishment, arguing that "there is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing."[463] Thus, so long as a method of punishment is not prohibited, legislatures have the discretion to decide who should receive it.[464] This approach would severely weaken constitutional protections against cruel and unusual punishment.

Grants Pass has shifted the Eighth Amendment analysis. A punishment is not cruel if it is not "designed to 'superad[d]' 'terror, pain, or disgrace,'" and it is not unusual if it is similar to existing punishments.[465] Under this standard, the Court would probably decide that imposing the death penalty for child rape is constitutional because it

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[456] *Id.* at 27.

[457] *Id.* (quoting United States v. Grant, 9 F.4th 186, 205 (3d Cir. 2021)).

[458] *Id.* at 28.

[459] *See* Murray & Shaw, *supra* note 32, at 800 ("The invocation of democracy allowed the majority to claim that it had not 'taken sides in the culture war,' but rather merely performed its constitutional role as a 'neutral observer' ensuring 'that the democratic rules of engagement are observed.'" (quoting Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting))).

[460] Graham v. Florida, 560 U.S. 48, 101 (2010) (Thomas, J., dissenting).

[461] *Id.* at 99 (internal quotation marks omitted) (citing Harmelin v. Michigan, 501 U.S. 957, 979 (1991) (opinion of Scalia, J.); *see* Baze v. Rees, 553 U.S. 35, 99 (2008) (Thomas, J., concurring in the judgment) ("[T]he Framers intended to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment.").

[462] *Baze*, 553 U.S. at 97 (quoting Harmelin v. Michigan, 501 U.S. 957, 976 (1991) (opinion of Scalia, J.)).

[463] *Graham*, 560 U.S. at 99 (Thomas, J., dissenting); *see also* Ewing v. California, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in the judgment) ("In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle."); Miller v. Alabama, 567 U.S. 460, 503-04 (2012) (Thomas, J., dissenting) (same).

[464] *See Miller*, 567 U.S. at 504 (Thomas, J., dissenting) (asserting that the Cruel and Unusual Punishments Clause accords legislatures significant discretion in determining appropriate punishments).

[465] City of Grants Pass v. Johnson, 603 U.S. 520, 543 (2024) (quoting Bucklew v. Precythe, 587 U.S.119, 130 (2019)).

is not intended to superadd terror, pain, or disgrace. It is not clear what "designed" to superadd means. In separate opinions discussing execution practices, Justice Thomas has asserted that "[t]he evil the Eighth Amendment targets is intentional infliction of gratuitous pain."[466] *Bucklew v. Precythe*, which further narrowed the application of the Eighth Amendment to state execution practices, drew on this language and **[*370]** hinted that the Court might be open to considering whether this standard should apply.[467] There does not appear to be much daylight between "intentional infliction" of pain and "designed" to superadd "terror, pain, or disgrace."[468] When the Court evaluated the constitutionality of execution practices, it emphasized that legislatures intended to make executions more humane by adopting new methods, a claim that weighed in favor of retaining questionable state execution practices.[469] The *Grants Pass* majority discussed the possible legislative motives behind the challenged law, thus *what* legislators say about a law appears more relevant than the actual effect of a punishment.[470]

Scholarship evaluating historic usage of the terms of "cruel" and "unusual" contradicts this approach. Professor John Stinneford has demonstrated that "[t]he linguistic and historical evidence indicates that the word 'cruel' in the Cruel and Unusual Punishments Clause originally referred to the effect of the punishment, not the intent underlying it."[471] A punishment is "unusual" if it is "contrary to long usage."[472] He argues that "a punishment is cruel and unusual if it is unjustly harsh in light of longstanding prior punishment practice."[473] He explains that, applying this analysis, punishments that "have fallen out of usage for multiple generations can appropriately be declared cruel and unusual."[474]

[*371] Judicial dismantling of Eighth Amendment precedent, even relying on original meaning, is not inevitable. Professor Berry asserts that, even applying the *Dobbs* approach to stare decisis, the Court can retain both *Kennedy* and the progressive approach to the ESD.[475] This, he demonstrates, is because Eighth Amendment stare decisis contemplates, and in some cases, necessitates overruling precedent to reject more severe punishment.[476] As he

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[466] *Baze*, 553 U.S. at 102 (Thomas, J., concurring in the judgment).

[467] *Bucklew*, 587 U.S. at 135; *see* Ryan, *Death, supra* note 18, at 299 (discussing the application of the "superadded" test).

[468] *Baze*, 553 U.S. at 102 (Thomas, J., concurring in the judgment); *Grants Pass*, 603 U.S. at 543 ("None of the city's sanctions qualifies as cruel because none is designed to 'superad[d]' 'terror, pain, or disgrace.'" (quoting *Bucklew*, 587 U.S. at 130)). *But see Bucklew*, 587 U.S. at 167 (Breyer, J., dissenting) ("To the prisoner who faces the prospect of a torturous execution, the intent of the person inflicting the punishment makes no difference.").

[469] *See Bucklew*, 587 U.S. at 133 ("Far from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite . . . ."); Glossip v. Gross, 576 U.S. 863, 868 (2015) (discussing state experiments intended to find more humane execution methods); *Baze*, 553 U.S. at 51 (claiming that states have adopted new methods of execution with an "earnest desire to provide for a progressively more humane manner of death").

[470] *See Grants Pass*, 603 U.S. at 538 n.1 (discussing legislative proceedings leading up to the camping ban). The majority emphasized that community meetings were intended to find positive and supportive solutions for the homeless population of Grants Pass. *Id.* But as the dissent pointed out, before settling on the anti-camping ordinance, the Grants Pass City Council floated several options, including banishment and denial of basic services, with the goal of making the homeless population of Grants Pass miserable enough to leave. *See id.* at 575-76 (Sotomayor, J., dissenting).

[471] John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 493 (2017).

[472] Stinneford, *Unusual, supra* note 30, at 1815.

[473] Stinneford, supra note 471, at 497.

[474] *Id.* at 498.

[475] Berry supra note 19 (manuscript at 41).

[476] *Id.* (manuscript at 14-15).

explains, permitting the ESD to "devolve" would "invert the entire Eighth Amendment and its basic meaning" by "authoriz[ing] cruel and unusual punishments, the very thing it proscribes."[477] *Grants Pass*, however, seems to offer a way for the Court to avoid the claim that it is authorizing cruelty by relying on intentionality and customary punishments.

Punishing the rape of a child with death is unusual, but the Court might frame the inquiry as whether the *death penalty* itself is unusual, not whether the *death penalty for the rape of a child* is unusual. *Grants Pass* suggests that the Eighth Amendment inquiry is a broad one because the Court did not evaluate whether it is unusual to punish an unhoused person for sleeping in a public park with fines and jail time, but rather whether fines and jail time are common punishments.[478] This analytic approach would permit the Court to evade the proportionality inquiry, even though scholarship has demonstrated that proportionality is part of the Eighth Amendment.[479]

Professor Ryan warns that Justice Thomas's preferred analysis "would drastically limit the viability of an Eighth Amendment challenge to any emerging punishment technique."[480] She explains that adopting this standard would eliminate the use of the "gross disproportionality standard" and cast other lines of important precedent into doubt.[481] Further, she recognizes that adopting this perspective would make certain punishments permanently constitutional.[482] The analysis in *Grants Pass* supports her arguments and **[*372]** forecasts a bleak future for the Eighth Amendment under the Roberts Court.

Following the approach in *Grants Pass* may lead to other serious consequences. Various members of the Supreme Court have suggested that the *Furman-Gregg* line of cases is unworkable, either because the cases continued to produce arbitrary and capricious capital punishments[483] or because the precedent that developed from those cases has produced other problems.[484] Given the changes to the Court's composition and analytical approach, re-evaluating an existing categorical bar on capital punishment could undermine the entire structure of U.S. capital punishment jurisprudence. The Court's preference for history and tradition means that if the case somewhat plausibly raises the issue, the Court could decide that, provided states comply with constitutional criminal procedure

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[477] *Id.* (manuscript at 44).

[478] *See* *Grants Pass*, 603 U.S. at 543 (concluding that the punishments that Grant Pass imposed did not qualify as cruel and unusual).

[479] *See* John F. Stinneford, *Back to the Future: Originalism and the Eighth Amendment, in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT, *supra* note 348, at 28, 36.

[480] Ryan, *Death, supra* note 18, at 299.

[481] *Id.* at 301.

[482] *See* *id.* at 301-02 ("Such an originalist focus on the Amendment could also suggest that punishments acceptable at the time of the Founding would be grandfathered in; their status of constitutionality would be unmovable.").

[483] *See* **Callins v. Collins, 510 U.S. 1141, 1149 (1994)** (Blackmun, J., dissenting) ("Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death."); Glossip v. Gross, 576 U.S. 863, 945 (2015) (Breyer, J., dissenting) (criticizing capital punishment as "the arbitrary application of a serious and irreversible punishment").

[484] *See* Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring) (complaining that *Furman* is inconsistent with principles prohibiting mandatory death sentences and prohibiting states from barring sentencers from considering any mitigating evidence); Graham v. Collins, 506 U.S. 461, 488 (1993) (Thomas, J., concurring) (complaining that guided discretion has put the Court "in the seemingly permanent business of supervising capital sentencing procedures"); Roberts v. Louisiana, 428 U.S. 325, 358 (1976) (White, J., dissenting) ("Implicit in the plurality's holding . . . is the proposition that States are constitutionally prohibited from considering any crime, no matter how defined, so serious that every person who commits it should be put to death regardless of extraneous factors related to his character.").

requirements, states should have more discretion in shaping their capital sentencing schemes, risking a return to pre-1972 death penalty procedures.

The Court is not likely to immediately dismantle this precedent because of its complexity, but if given the opportunity, it can weaken it. If the Court were to evaluate the new statutes from Florida or Tennessee and hold that the Eighth Amendment does not prohibit the death penalty for the rape of a child, it would be necessary to address whether those capital punishment schemes comply with existing Eighth Amendment precedent intended to limit the arbitrariness of the death penalty, affording the Court an opportunity to begin altering that precedent.[485]

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D. Death, Democracy, and Judicial Power

Adopting a hands-off approach to the Eighth Amendment, rooted in the Court's understanding of history and tradition as described in *Grants Pass*, would give states significant flexibility over implementation of the death penalty. The Court might argue that taking either of these approaches would return democratic control over punishment decisions to the states, an action that the Court might view as consistent with traditional norms. But the judicial adoption of history and tradition rationales in search of an original understanding does not necessarily represent democratic values.[486] Instead, it is more likely to furnish the interpreters of the Constitution (the Supreme Court) with significant policy control over how the law develops, even as the Court insists it acts with restraint.[487] This is because the Court *is* willing to check how state law develops if it does not care for a particular policy and because the Court has undercut democratic processes.[488] Reliance on history and tradition is less respectful of democratic norms because it keeps the United States locked into a historic project that does not reflect substantial changes to the country's policies, norms, and culture.[489]

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[485] Other recent legislation from Florida may present the opportunity to undo Eighth Amendment precedent. The Florida Legislature passed a bill that features a mandatory death penalty provision for undocumented immigrants who have been convicted of a capital offense. *See* Greg Allen, *On a Second Try, Florida Republicans Agree on a Law to Assist Trump's Deportations*, NPR (Feb. 13, 2025, 7:11 PM ET), https://www.npr.org/2025/02/13/nx-s1-5294991/trump-deportations-florida-desantis. This law is unconstitutional. *See* Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976).

[486] *See* Lemley, *supra* note 380, at 11 ("[T]he Court's recent history has been one of withdrawing rights from the public."); Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99, 129-30 (2023) (explaining that assessing state practice as value-neutral interpretation actually "entrenched the statusbased assumptions of the past" through restricting "the meaning of the great principles enunciated in the Fourteenth Amendment's text" and is thus "neither neutral nor impersonal"); Siegel, *supra* note 352, at 901 ("The tradition-entrenching methods the Court employed to decide *Bruen* and *Dobbs* elevate the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law.").

[487] *See* Siegel, *supra* note 486, at 132 (describing responses to claims that originalism avoids adopting a particular judge's preference because "rather than tethering the Constitution to seemingly impersonal historical standards, appeals to original intent expressed the interpreters' values and amounted to a disguised practice of living constitutionalism").

[488] *See* Murray & Shaw, *supra* note 32, at 777-85 (discussing the Court's democracy-undermining interventions); Lemley, *supra* note 378, at 111 ("Nor can these changes be explained by a particular judicial philosophy, whether originalism, textualism, dictionary fetishism, stare decisis, or anything else. Conservative Justices regularly recite fidelity to each of those methodologies. And sometimes they apply them. But they are just as happy to depart from them when it serves their interests to do so."); *see also* Brandon Hasbrouck, *1983*, 124 COLUM. L. REV. F. 1, 24 (2024) ("We are in a position to see the beginnings of a potential slide into an authoritarian jurisprudence that minimizes the promise of constitutional rights.").

[489] *See* Siegel, *supra* note 352, at 906 ("The methods the Court employs are gendered in the simple sense that they tie the Constitution's meaning to lawmaking from which women were excluded and in the deeper sense that the turn to the past provides the Court resources for expressing identity and value drawn from a culture whose laws and mores were more hierarchical than our own.").

[*374] Expanding the death penalty would permit populist desire for retribution to fuel punishment. While a desire for retribution is inherent to the human condition, as Justice Marshall recognized, the Eighth Amendment checks that impulse.[490] If the Eighth Amendment is directed at limiting raw exercises of arbitrary sovereign power, then it should permit restraints on the imposition of certain punishments for certain crimes.[491] Popular desire to see despised wrongdoers punished, and punished severely, is not a sufficient justification to impose punishment.

One response to this is that democracy serves as a check. *Dobbs* claimed it was returning the question to "the people" through their legislatures.[492] But legislatures are not as representative as the Court claims they are.[493] In some conservative states, abortion ended up on the ballot, and the people voted to protect access to abortion.[494] In response to these efforts, legislatures and state **[*375]** officials tried to limit and restrict ballot initiatives.[495] The Roberts Court has also undermined significant voting rights law and precedent, making it more difficult for the people to elect legislators who represent their interests.[496] The Court is not a more representative body than a

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[490] *See* Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) ("The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing. . . . Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.").

[491] *See* Klein, *The Eighth Amendment's Paper Tiger, supra* note 15 (manuscript at 51) (arguing that the Eighth Amendment checks state power over executions).

[492] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

[493] *See* Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 68-69 (2024) (Kagan, J., dissenting) (explaining how the majority altered the law to make it more difficult to bring and prove racial gerrymandering claims); Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 982 (2020) (criticizing the Court for allowing legislatures to participate in racial gerrymandering); Janai Nelson, *Parsing Partisanship and Punishment: An Approach to Partisan Gerrymandering and Race*, 96 N.Y.U. L. REV. 1088, 1089 (2021) (explaining that partisan gerrymandering can undermine the fair functioning of the electoral process and disproportionately harm minority groups); Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 603 (2007) (scrutinizing the Court's decisions regarding the justiciability of partisan gerrymandering in light of its detrimental impact on political representation); Michael J. Klarman, *The Degradation of American Democracy And the Court*, 134 HARV. L. REV. 1, 8 (2020) (discussing the Supreme Court's contribution to the "recent degradation of American democracy").

[494] *See* Adam Edelman, *Florida Supreme Court Allows 6-Week Abortion Ban to Take Effect, But Voters Will Have the Final Say*, NBC NEWS (Apr. 2, 2024, 9:20 AM), https://www.nbcnews.com/politics/florida-supreme-court-abortion-rights-ballot-measure-rcna142568 (discussing the proposed amendment to the Florida Constitution to protect the right to an abortion); Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment ("Voters in Kansas rejected a proposed state constitutional amendment Tuesday that would have said there was no right to an abortion in the state . . . ."); Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, AP NEWS (Nov. 7, 2023, 8:31 PM), https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270 ("Ohio voters approved a constitutional amendment on Tuesday that ensures access to abortion and other forms of reproductive health care . . . .").

[495] *See* Amy Beth Hanson, *Backers of Ballot Initiative to Preserve Right to Abortions in Montana Sue Over Signature Rules*, AP NEWS (July 11, 2024, 1:16 PM), https://apnews.com/article/montana-ballot-petitions-signature-rules-e860b93eb3044d6e464b742b33a6319c (describing changes in signature collection laws intended to impede the proposed constitutional amendment protecting abortion in Montana); Julie Carr Smyth, *GOP State Lawmakers Try to Restrict Ballot Initiatives, Partly to Thwart Abortion Protections*, AP NEWS (May 14, 2023, 9:05 PM), https://apnews.com/article/democracy-ballot-initiatives-abortion-republicans-ohio-missouric48033311370f071ccece0da975818cb (discussing attempts to change Ohio law to require a sixty percent vote for state constitutional amendments instead of a simple majority to prevent Ohioans from restoring abortion rights via constitutional amendment).

legislature, but it is disingenuous to insist that "the people" get to have a say when the Court is busily engaged in a project of reducing democratic access.

If the Court returns the question of whether the death penalty can be imposed for nonhomicide crimes, including sexual crimes against children, to the people, there will be states that will not enact new death penalty schemes. The states that abolished the death penalty are not likely to reenact it. But people in states that retain capital punishment will lose access to extant Eighth Amendment protections.

Despite their flaws, the ESD are more consistent with democracy than the **[*376]** Court's focus on history and tradition. Evaluating the current national consensus, despite disagreement in how to determine that consensus, provides some understanding of whether a punishment is, in fact, unusual.[497] If most jurisdictions have rejected a punishment practice for a particular offense, then it is not consistent with the national consensus, even if a few states would like to undo Supreme Court jurisprudence. Current assessments of national consensus, albeit imperfect ones, given the problems with electoral participation in this country, at least include constituencies that did not have the franchise at the time the Eighth Amendment was adopted.

The independent judgment portion of the ESD is highly critiqued for arbitrariness, but it is at its heart, an exercise of judgment, and that is what judges do. Courts are expected to bring their independent legal judgment to bear on legal problems. When courts pretend that they are not doing that, or suggest that this is somehow illegitimate, they do themselves and the rest of us a disservice that threatens the long-term stability of the judicial system. Untethering the death penalty from independent judgment is consistent with the constant desire to shift responsibility for executions and capital punishment, even if the Court pretends it is restoring the decision to the people. Instead, the Court will keep the power to undo policies and decisions it does not like, while undermining substantive constitutional guarantees against the raw exercise of state power in punishment.

The death penalty is an especially concerning topic for political engagement because it is increasingly disused, reducing pressure on legislatures to respond to problems with the penalty. People who receive death sentences are disliked, despised, and dehumanized. This is also true of people who commit crimes against children. The politics of the death penalty are risky because adding aggravating factors or capital crimes allows legislators to signal that they are tough on crime without necessarily engaging with the viability of such prosecutions or the consequences of death sentences.[498] While people who have committed capital crimes deserve some **[*377]** form of punishment,

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[496] *See* Shelby County v. Holder, 570 U.S. 529, 557 (2013) (invalidating key provisions of the Voting Rights Act); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 211 (2009) (allowing a Texas utility district to seek exemption from federal preclearance requirements under the Voting Rights Act); Rucho v. Common Cause, 588 U.S. 684, 718 (2019) (holding that partisan gerrymandering claims are nonjusticiable); *Alexander*, 602 U.S. at 38-39 (upholding South Carolina's voter ID law); Ian Millhiser, *Chief Justice Roberts's Lifelong Crusade Against Voting Rights, Explained*, VOX (Sept. 18, 2020, 5:00 AM), https://www.vox.com/21211880/supreme-court-chief-justice-john-roberts-voting-rights-act-election-2020 (criticizing Justice Roberts's decisions in voting rights cases). The genuine surprise in response to *Allen v. Milligan* is a good indicator of how startling it was to see the Chief Justice affirm any portion of the Voting Rights Act. *See* Kareem Crayton, *Chief Justice Roberts Delivers a Surprise on the Voting Rights Act*, BRENNAN CTR. (June 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/chief-justice-roberts-delivers-surprise-voting-rights-act ("The Roberts Court appeared poised to issue a final blow to what was left of the Voting Rights Act, yet this decision represents the Supreme Court's first formal endorsement of a vote dilution claim since 2006.").

[497] *See* Re, *Congress, supra* note 119, at 1098-99 (summarizing arguments that the language of the Eighth Amendment allows the Court to assess the national consensus); Berry, *supra* note 19 (manuscript at 14 n.84) (explaining that evaluating national consensus is a way for the Court to measure whether a punishment is unusual).

[498] *See* Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 27-33 (2006) (describing the relationship between new aggravating factors, specific events, and politics); *see also* Alexandra L. Klein, *Nondelegating Death*, 81 OHIO ST. L.J. 923, 965-66 (2020) ("By authorizing the death penalty, legislators can claim to be tough on crime and then blame the agency for flaws in administering [the] penalty, or leave the mess to courts to sort out.").

they are not a politically powerful group, regardless of what various Supreme Court Justices claim.[499] Condemning an unpopular group can lead to the erosion of constitutional rights for everyone else and increase the risk that capital sentences will be arbitrarily and wrongly imposed.[500] Undoing *Kennedy v. Louisiana*, although it may be just one component of the Eighth Amendment, threatens all of it.

V. CONCLUSION

Kennedy is a vital part of Eighth Amendment jurisprudence that narrowed the scope and application of the death penalty. If the Supreme Court decides that the ESD permit devolution reintroducing certain categories as death-eligible then death sentences, which have been in decline, may increase. Worse still, if the Court decides to embrace an "originalist" approach to the Eighth Amendment, then there may be very few limits on permissible punishments.

It may be tempting to dismiss the consequences of overruling *Kennedy* because people convicted of sexually assaulting children are targets of universal revulsion and loathing.[501] These are serious offenses that cause great harm, and people who commit these offenses should be punished. But the Supreme Court should not allow populist preference to erode existing constitutional standards for punishment or eliminate the ESD. In his concurrence in *Furman v. Georgia*, Justice Thurgood Marshall asserted that **[*378]** "the Eighth Amendment is our insulation from our baser selves."[502] The death penalty is already disproportionately exercised against the "forlorn, easily forgotten members of society."[503] Changing constitutional and legal standards or refusing to change them because of outrage at criminal conduct weakens or may even eliminate constitutional protections against cruel and unusual punishments.[504] The real test of adherence to constitutional principles is retaining them and ensuring their application to all persons, even those whose crimes produce justifiable outrage.

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[499] *See* Glossip v. Gross, 576 U.S. 863, 895 (2015) (Scalia, J., concurring) ("The reality is that any innocent defendant is infinitely better off appealing a death sentence than a sentence of life imprisonment. . . . The capital convict will obtain endless legal assistance from the abolition lobby (and legal favoritism from abolitionist judges), while the lifer languishes unnoticed behind bars.").

[500] *See* United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J. dissenting) ("It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."); Florida v. Riley, 488 U.S. 445, 464 (1989) (Brennan, J., dissenting) (asserting that distaste for criminal activity should not justify restricting constitutional rights); Bell, *supra* note 131, at 29 ("When a law threatens to impinge on constitutional rights, and especially when those at risk are those whom society would most like to cast out or even exterminate, courts must understand and evaluate the social forces that motivated these laws.").

[501] *See* Margo Kaplan, *Taking Pedophilia Seriously*, 72 WASH. & LEE L. REV. 75, 83 (2015) (describing social responses to people who sexually abuse children); Ardman, *supra* note 38 (manuscript at 39-41) (discussing disgust and condemnation directed at persons who commit sexual offenses against children).

[502] Furman v. Georgia, 408 U.S. 238, 345 (1972) (Marshall, J., concurring).

[503] *Id.* at 366.

[504] *See id.* at 344 ("If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would be definition be acceptable means for designating society's moral approbation of a particular act. The 'cruel and unusual' language would thus be read out of the Constitution and the fears of Patrick Henry and the other Founding Fathers would become realities."). Florida, for example, now only requires eight out of twelve jurors to vote in favor of death because Nikolas Cruz, who murdered seventeen students at Marjory Stoneman Douglas High School, was not sentenced to death after three jurors refused to impose it. *See* Anthony Izaguirre, *Florida Eases Path for Death Penalty After Parkland School Shooter Verdict*, WPTV5 (Apr. 20, 2023, 12:13 PM), https://www.wptv.com/news/state/florida-eases-path-for-death-penalty-after-parkland-school-shooter-verdict. This law cannot apply to Cruz, but it will probably lead to more wrongful convictions and death sentences. *See* Kalmanson, *supra* note 209, at 39.

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Case Comment
Taylor House [a1]

CONSTITUTIONAL LAW - EIGHTH AMENDMENT: ORDINANCES AGAINST HOMELESS CONDUCT ARE NOT BARRED BY THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024)

ABSTRACT

In *City of Grants Pass v. Johnson*, the United States Supreme Court addressed whether it is cruel and unusual punishment to enforce statutes prohibiting encampments on public property when the prohibition directly affects the homeless population. The Court noted that the federal government has reported the highest rate of homelessness in America to date, leading to a rise in homeless encampments across the country and creating challenges for all levels of government to navigate. Like many others, the City of Grants Pass, Oregon, has taken several measures toward a solution to the homelessness crisis. Of those actions, three facially neutral ordinances in Grants Pass prohibit all persons from encamping on public property and impose a citation to those who fail to adhere to the local laws. Previously decided by the Ninth Circuit in *Martin v. City of Boise*, such restrictions were held to be prohibited by the Eighth Amendment because those experiencing homelessness have no alternative to sleeping on public property if the cities lack available shelter beds. In *Johnson*, the U.S. Supreme Court reviewed an injunction issued by the district court prohibiting Grants Pass from enforcing ordinances against encampments due to the *Martin* precedent. However, the U.S. Supreme Court *held* that ordinances against homeless conduct do not violate the Eighth Amendment of the U.S. Constitution, nor should the amendment be construed to preclude governments from criminalizing certain conduct. This pivotal decision resolved a circuit split, but its holding will likely be the subject of future litigation across the nation, and North Dakota is no exception. *Johnson* authorizes North Dakota state and local governments to enforce ordinances against camping on public property, and North Dakota practitioners should be cognizant of the legal liability that could be imposed by way of this decision.

***158 I. FACTS**

On November 13, 2019, Debra Blake, Gloria Johnson, and John Logan ("Named Plaintiffs") filed a putative class action lawsuit in the United States District Court for the District of Oregon ("District Court") on behalf of the community's homeless population. [1] The Named Plaintiffs were involuntarily ***159** homeless individuals with no alternative to sleeping outside or in their vehicles on public property. [2] The City of Grants Pass police officers enforced the ordinances, which affected the Named Plaintiffs and other members of the homeless community. [3] Plaintiffs sought to enjoin Grants Pass from enforcing three municipal ordinances prohibiting all persons from camping or otherwise sleeping overnight on public property. [4] Plaintiffs' complaint states, among other claims, that the ordinances impose cruel and unusual punishment in violation of the U.S. Constitution's Eighth Amendment, alleging the enforcement of laws against encampments constructively criminalizes the status of being homeless rather than criminalizing conduct. [5]

An encampment refers to "[a] group of people sleeping outside in the same location for a sustained period" and often includes "[t]he presence of some type of physical structures (e.g., tents, tarps, lean-tos)" and personal belongings. [6] Thus, the prohibition of camping on public property in *Johnson* would prevent people from forming encampments and otherwise prevent individuals from sleeping on public property. The three municipal ordinances at issue in *Johnson* are as follows:

> The first prohibits sleeping "on public sidewalks, streets, or alleyways." The second prohibits "[c]amping" on public property. 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." The third prohibits "[c]amping" and ""[o]vernight parking" in the city's parks. [7]

The District Court relied on the Ninth Circuit's holding in *Martin v. City of Boise* to issue the plaintiffs' requested injunction and enjoin Grants Pass from enforcing ordinances directly affecting the city's homeless population. [8] "According to the Ninth Circuit [in *Martin*], the Eighth Amendment's Cruel ***160** and Unusual Punishments Clause barred Boise from enforcing its publiccamping ordinance against homeless individuals who lacked 'access to alternative shelter.'" [9] The District Court applied the *Martin* precedent to *Johnson*, holding that the ordinances violated the Cruel and Unusual Punishments Clause because Grants Pass had more homeless individuals than available shelter beds. [10]

On appeal, the Ninth Circuit affirmed the District Court's holding in part, relevant to the issue of the Eighth Amendment. [11] Grants Pass sought review from the United States Supreme Court by filing a Petition for Certiorari. [12] The question presented was whether enforcing anti-encampment laws on public property violates the Eighth Amendment. [13] Several briefs in support of Grants Pass's Petition for Certiorari were filed, emphasizing the importance of the U.S. Supreme Court's input on the question presented. [14]

The U.S. Supreme Court granted certiorari to review this question and addressed the applicability of the Cruel and Unusual Punishments Clause of the Eighth Amendment to the ordinances at issue. [15] First, the Court asserted the Cruel and Unusual Punishments Clause serves to regulate the "method or kind of punishment" assessed after a person has been convicted of a crime. [16] Therefore, restricting what "particular behavior" may be criminalized "in the first place" would need to be found under the scope of an alternative course of action, but prohibiting homeless conduct does not invoke a violation of the Eighth Amendment. [17] Second, the Court stated that the punishments issued for a violation of the anti-encampment ordinances in the city, standing alone, are not cruel and unusual. [18] Therefore, the nature of the punishments do not invoke a violation of the Eighth Amendment. [19] Third, the Court found the ***161** ordinances at issue are facially neutral and enforceable against any person in Grants Pass. [20] Therefore, the laws do not criminalize status because they prohibit all persons from the conduct of

encamping on public property and do not invoke a violation of the Eighth Amendment. [21] The U.S. Supreme Court *held* that enforcing anti-encampment ordinances does not constitute cruel and unusual punishment. [22]

II. LEGAL BACKGROUND

A. THE EIGHTH AMENDMENT

The Eighth Amendment of the United States Constitution declares, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [23] At the time of its adoption, the Cruel and Unusual Punishments Clause was intended to distinguish punishments permitted in the "new Nation" from those "formally tolerated" under English law. [24] The clause is "directed at the method or kind of punishment imposed for the violation of criminal statutes" but does not address the conduct that may be criminalized. [25] Rather, the conduct that resulted in punishment will only be relevant to the Cruel and Unusual Punishments Clause when determining an appropriate consequence for the severity of the crime. [26]

B. DEFINING CRUEL AND UNUSUAL PUNISHMENT

The U.S. Supreme Court previously addressed the Cruel and Unusual Punishments "Clause's origin[] and meaning" in *Bucklew v. Precythe*. [27] Using eighteenth and nineteenth century dictionaries, along with relevant evidence, the U.S. Supreme Court provided an analysis in *Bucklew* of the clause that the Court referred to in *Johnson*. [28] To this end, ""cruel" was most likely understood by its definitions, "[p]leased with hurting others; inhuman; hardhearted; void of pity; wanting compassion; savage; barbarous; unrelenting" or "[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness." [29] ***162** "Unusual" is included to prevent Congress from permitting punishments that are no longer used. [30] Acknowledging the conflicting definition, "unusual" is not meant to "refer to punishments that are rare or out of the ordinary, but rather to punishments that are 'contrary to long usage.'" [31] At its core, the Eighth Amendment serves to limit the degree of criminal punishments, protect human dignity, and align with "civilized standards." [32]

III. ANALYSIS

In *Johnson*, the U.S. Supreme Court held that enforcing ordinances regulating camping on public property does not violate the Eighth Amendment's Cruel and Unusual Punishments Clause. [33] The clause does not take away the States' "primary responsibility for drafting their own criminal laws" nor does it provide any foundation to determine what "may or may not" be prohibited by cities and states. [34] This decision does not prevent "[s]tates, cities, and counties from declining to criminalize people for sleeping in public when they have no available shelter," instead it gives local, state, and federal governments the ability to use legal authority to address homelessness. [35] The Court identified that ordinances of the same or similar nature could aid in government efforts to encourage homeless individuals to accept resources available to them by their communities, to regulate encampments for public health and safety concerns, and to keep public property available for community use. [36]

A. THE MAJORITY OPINION

1. The Climbing Rate of Homelessness in the United States

Justice Neil Gorsuch wrote for the majority and began by addressing homelessness in the United States. [37] The Court looked to a federal government report that found that the number of individuals currently experiencing homelessness in the United States is the highest it's been since federal reporting began in 2007. [38] The briefs in support of the Grants Pass Petition for ***163** Certiorari identify concerns and emphasize the need for clarification on permissible action in light of this crisis. [39] The Court asserted that due to the climbing number of homeless individuals, communities around the country have also experienced a rise in the number of encampments. [40] While shelters may be an alternative to public encampment, there are several reasons

why such assistance may be rejected.[41] Therefore, simply "building more shelter beds and public housing options is almost certainly not the answer by itself."[42] The reasons that homeless encampments develop in communities also vary depending on the individual and their situation; however, "homeless encampments pose not only a grave risk to the public at large, but also to homeless individuals themselves."[43] For individuals living in encampments, dangers include "heightened risks of 'sexual assault' and 'subjugation to sex work,"' the facilitation of drug distribution, and an increased risk of disease due to the lack of sanitation facilities.[44]

2. The District Court's Reliance on Ninth Circuit Precedent in Martin v. City of Boise

Justice Gorsuch continued by explaining the distinction between the present case and *Martin*.[45] In *Martin*, there were three homeless shelters in Boise, Idaho with a total of "354 beds and 92 overflow mats for homeless individuals."[46] However, the shelters were incapable of sufficiently providing shelter to the county's homeless population, and questions were raised regarding what it means for a shelter to have available beds due to certain restrictions placed on occupants by the shelters.[47] In *Martin*, the Ninth Circuit narrowly held 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, ***164** lying, and sleeping in public."'[48] The Ninth Circuit found it unconstitutional to impose criminal penalties against individuals experiencing homelessness for sleeping on public property in violation of anti-encampment ordinances.[49] It reasoned that the Eighth Amendment precludes enforcement of statues that criminalize homeless conduct because the homeless individuals have no alternative to sleeping on public property.[50] Thus, under *Martin*, "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."[51]

The Ninth Circuit denied rehearing *en banc*, with Judges Smith and Bennet dissenting.[52] First, Judge Smith noted that the *Martin* majority misread precedent regarding the Eighth Amendment and its applicability to the ordinances.[53] Judge Smith went further, concluding *Martin* conflicts with prior holdings of its sister circuits. Noting that the "Fourth Circuit correctly recognized that these kinds of laws[, i.e., the City of Grants Pass camping ordinances,] do not run afoul of *Robinson* and *Powell*."[54] Second, Judge Bennett wrote a separate dissent, stating that the Cruel and Unusual Punishments Clause "does not impose substantive limits on what conduct a state may criminalize."[55] Judge Bennett emphasized that invoking a violation of the clause prior to a conviction would be improper as the clause has always been concerned with prohibiting methods or kinds of punishments.[56]

3. The Supreme Court's Analysis of Martin v. City of Boise in Johnson

In *Johnson*, the U.S. Supreme Court disagreed with the *Martin* decision.[57] To explain the purpose of ordinances like those at issue, Justice Gorsuch relied on briefs filed in support of the Petition for Certiorari and a federal ordinance restricting encampments.[58] Ordinances that prohibit encampments "provide the statutory authority that officials need to clear problematic ***165** encampments that pose significant health and safety risks."[59] Most often, regulations similar to the Grants Pass ordinances are used in conjunction with other devices to address homelessness.[60] Here, the Court discussed how the city adopted a "multifaceted approach" to respond to the homelessness crisis experienced in its community.[61] In addition to local shelters, these initiatives included policies to support individuals experiencing homelessness, an appointed "homeless community liaison" to assist the city's homeless population in accessing the city's resources, and ordinances that prohibit encampments on public property.[62]

The *Johnson* opinion states that anti-encampment ordinances provide governments with an additional avenue to respond to the homeless crisis.[63] However, the Court asserted that *Martin* created a challenge for cities in the Ninth Circuit as they expend resources to provide shelters and programs to their homeless populations while lacking legal authority to prompt homeless individuals to use city-provided resources.[64] The Court suggested *Martin* based injunctions make the enforcement of multifaceted approaches difficult because *Martin* diminishes the local governmental power "to persuade persons experiencing homelessness to accept shelter beds and [other] services."[65] Notably, the Grants Pass shelter reported an approximate forty

percent decrease in use of its services since the injunction was issued by the District Court. [66] The majority acknowledged that lack of legal authority to prevent individuals from sleeping or camping on public property weakens efforts in addressing homelessness. [67]

4. Distinguishing Johnson from Prior Caselaw Regarding the Eighth Amendment

Justice Gorsuch continued by addressing the purpose of the Eighth Amendment's Cruel and Unusual Punishments Clause and the parties' comparison of Grants Pass' ordinances to ordinances at issue in prior cases. [68]

***166** The majority asserted that the purpose behind the Eighth Amendment is to limit the punishments imposed on an individual who has been convicted of a crime, while other amendments limit governments on what may be criminalized. [69] The "Cruel and Unusual Punishments Clause" was incorporated into the Constitution to prevent *cruel* punishments that inflicted "terror, pain or disgrace," and "barbaric punishments like 'disemboweling, quartering, public dissection, and burning alive,"' deemed *unusual* because they "had 'long fallen out of use."' [70] In the Court's analysis, it found the punishment(s) imposed on violators are comparable to those administered by governments around the country for offenses of the same degree, and the nature of these punishments cannot be understood as either cruel or unusual under the Eighth Amendment. [71]

The argument made by respondents was heavily reliant on the Ninth Circuit's holding in *Robinson v. California*. [72] In *Robinson*, the U.S. Supreme Court held that a California statue making "it a criminal offense for a person to be 'addicted to the use of narcotics"D' inflicted "cruel and unusual punishment" because the statute at issue criminalized a person due to their *status* as an addict. [73] Since the statute did not seek to prosecute conduct, any punishment imposed on a person for their mere *status* as an addict would invoke a violation of the Cruel and Unusual Punishments Clause. [74] Respondents argued that limiting "status-based punishments" should be recognized in *Johnson* because anti-encampment ordinances make it "impossible for a homeless person who does not have access to shelter to live in Grants Pass without violating the ordinances." [75]

In its reply brief, Grants Pass reaffirmed that the ordinances prohibiting all persons from encamping on public property are prohibitive of conduct, not status. [76] To support the proposition, the city cited *Powell v. Texas*. [77] In *Powell*, the U.S. Supreme Court declined to extend *Robinson* over a Texas ***167** ordinance that imposed a fine on any person who appeared in public while intoxicated. [78] The person charged sought relief under *Robinson* due to his involuntary condition as a chronic alcoholic, but the Court reasoned that his status did not preclude him from escaping criminal liability. [79] "[B]ecause the defendant ... 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." [80]

In *Johnson*, the U.S. Supreme Court declined to extend *Robinson* to the ordinances at issue for the same reason that it declined to do so in *Powell*. [81] Because the Grants Pass ordinances do not criminalize the status of being homeless, but rather apply neutrally to prohibit all persons from certain conduct, the Court found there was no "lawful authority to extend *Robinson* beyond its narrow holding." [82] Instead, governments may pursue alternative legal protections, such as criminal defenses and substantive or procedural laws, to provide boundaries when regulating homeless conduct. [83] States are at liberty to adopt a response to the homelessness crisis, but the Court cannot prohibit encampment-related ordinances under the Eighth Amendment. [84]

B. THE CONCURRENCE

Justice Clarence Thomas wrote separately to concur with the majority, offering two additional points. [85] First, Justice Thomas stated that *Robinson* ""was wrongly decided" and that its holding contradicts the plain meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause. [86] The concurrence disagreed with *Robinson* and other U.S. Supreme Court precedent regarding the Eighth Amendment's interpretation, and Justice Thomas wrote that "[m]odern public opinion is not an appropriate metric for interpreting the Cruel and Unusual Punishments Clause-or any provision of the Constitution for that matter." [87] This rejection stems from *Trop v. Dulles*, where the U.S. Supreme Court provided that the "[Eighth] Amendment must draw its

meaning from the evolving standards of decency that mark the progress of a ***168** maturing society."[88] Under the *Johnson* concurrence, a challenge to the Cruel and Unusual Punishments Clause should be based solely on its "fixed meaning" as written in the Constitution.[89] Lastly, the concurrence stated that respondents failed to demonstrate "that their claims implicate the Cruel and Unusual Punishments Clause in the first place."[90]

C. THE DISSENT

Writing for the dissent, Justice Sonya Sotomayor began with the axiom "[s]leep is a biological necessity, not a crime."[91] The dissent argued governments must balance "public health and safety" with "the humanity and dignity of homeless people" to respond to homelessness experienced nationwide.[92] However, the dissent stated the majority failed to consider the humanitarian response to homelessness-the "causes of homelessness, the damaging effects of criminalization, and the myriad [of] legitimate reasons people may lack or decline shelter"-and instead focused primarily on governmental powers.[93]

The dissent noted that homelessness is complex, with varying causes that are sometimes beyond individual control, but criminalization is not proven to effectively reduce homelessness.[94] Instead, it can result in fear to seek assistance from law enforcement in times of need due to adverse consequences that may result.[95] Additionally, using the criminal justice system for homeless individuals who violate ordinances is not only expensive but can also adversely affect the individual.[96] Specifically, "[i]ncarceration and warrants from unpaid fines can ... result in the loss of employment, benefits, and housing options."[97]

The dissent reasoned that *Martin* did apply, and the majority incorrectly reversed the District Court.[98] Merely stating the city ordinances criminalize ***169** conduct, as opposed to status, does not necessarily mean the ordinances do not *constructively* criminalize the status of being homeless.[99] Thus, the dissent argued "*Robinson* should squarely resolve this case."[100] Justice Sotomayor continued by noting that this case did not decide whether the ordinances violate other constitutional amendments, but that the majority "misstep[s]" by limiting its review to *Robinson* applicability.[101]

IV. DECISION IMPACT

The decision in *Johnson* is one that will affect the entire country, and North Dakota is no exception. Addressing homelessness is a shared responsibility.[102]

A. HOMELESSNESS IN THE UNITED STATES

In 2023, the U.S. Department of Housing and Urban Development ("HUD") reported to Congress in its Annual Homelessness Assessment Report ("AHAR") that approximately 653,100 individuals in the United States are experiencing homelessness.[103] According to the AHAR, the overall "number of individuals experiencing sheltered and unsheltered homelessness is the highest it has ever been since data reporting began in 2007" and "the number of people experiencing homelessness increased by 12 percent, or roughly 70,650 more people" since 2022.[104] Though these numbers cannot be ascertained with absolute certainty due to the nature of homelessness, AHAR releases estimates based on their Point-In-Time ("PIT") data collection, "offering a snapshot of experiences of homelessness-both sheltered and unsheltered-on a single night."[105] The PIT count takes place annually on a single night in January across the country to provide data on the number of people experiencing homelessness, demographics of the homeless ***170** population, and the states' capacity to provide resources.[106] According to the AHAR, "[s]heltered [h]omelessness refers to people who are staying in emergency shelters, transitional housing programs, or safe havens," whereas "[u]nsheltered [h]omelessness refers to people whose primary nighttime location is a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for people (for example, the streets, vehicles, or parks)."[107]

In 2023, approximately "20 of every 10,000 people in the United States" experienced homelessness, and of those individuals, "[s]ix in ten people were experiencing sheltered homelessness."[108] The remaining four in ten people, approximately 261,240

people in the United States, experienced unsheltered homelessness with no "primary nighttime location" adequately "designated for, or ordinarily used as, a regular sleeping accommodation for people." [109] Regardless of the size, homelessness exists in all fifty states and is a humanitarian concern that is relevant to all.

B. HOMELESSNESS IN NORTH DAKOTA

In North Dakota, AHAR estimates there are 784 total people experiencing homelessness, a 28.5 percent increase from 2022. [110] Of the total number of people in 2023 experiencing homelessness in North Dakota, AHAR estimates approximately 568 persons are individuals, 216 are homeless families, 68 persons are unaccompanied youth, 27 persons are homeless veterans, and 174 persons are chronically homeless. [111] The majority of North Dakota's homeless population are between the ages of 25 and 44 (346 people), while 137 people experiencing homelessness are children, and 115 people experiencing homelessness are over the age of 55. [112]

In the past five years, the percentage of unsheltered homeless individuals has increased in North Dakota, underscoring the impact *Johnson* may have on local communities looking to implement ordinances to prohibit individuals experiencing homelessness from forming encampments while encouraging them to use community resources. [113] In 2023, 608 people in North Dakota ***171** experienced sheltered homelessness and an additional 176 people experienced unsheltered homelessness. [114] Though North Dakota's homeless population is lower than the number of homeless individuals estimated to live in other states, North Dakota has a homeless population and approximately 22.4 percent are unsheltered. [115]

HUD also gathers information on the available number of shelter beds in each state. In North Dakota, there is a total of 1,544 year-round beds available to people experiencing homelessness. [116] While some of these beds are restricted for use based on the individual, such as 539 designated family beds, 995 adult-only beds, and 10 child-only beds, shelter and other resources are available to North Dakota's homeless population. [117] Though the data indicates a sufficiency in the total number of shelter beds, it is difficult to state with certainty whether all persons experiencing homelessness in North Dakota have the knowledge, desire, and ability to access these resources.

Though the U.S. Supreme Court specifically identifies the AHAR in *Johnson*, other entities' findings on homelessness can shed light on homelessness concerns in North Dakota. In its 2023 annual report, the FM Coalition to End Homelessness (the "Coalition") provided information on "concerns surrounding homelessness in the Fargo-Moorhead" metropolitan area ("FM area"). [118] The FM area consists of Fargo and West Fargo in North Dakota, Moorhead and Dilworth in Minnesota, and neighboring communities. [119] Per the Coalition's findings, "2,570 individuals, 46 adult couples without children, and 298 families inquired about seeking shelter" in the FM ***172** area in 2022. [120] This indicates a significant number of North Dakotans are either experiencing homelessness or are at risk of becoming homeless. [121]

C. RESPONDING TO HOMELESSNESS IN NORTH DAKOTA

The decision in *Johnson* did not resolve how local or state governments may respond to homelessness, but instead has opened additional avenues for communities to combat homelessness. North Dakota communities are no different from other governments employing a multifaceted approach to end homelessness in a collaborative effort balancing public interests and humanity. [122] Under the U.S. Supreme Court's holding in *Johnson*, cities and states "may experiment" with approaches and "may find certain responses more appropriate for some communities than others." [123]

While North Dakota, at both state and local levels, has implemented camping-prohibitive ordinances for public parks, state and local parks are under different operative authority than other public property controlled by the governing body of each city. For example, the North Dakota Parks and Recreation Department may enforce camping-related ordinances within state parks, and the Grand Forks Park District may enforce anti-camping ordinances within Grand Forks' parks. [124] Despite the lack of camping ordinances on public city property in North Dakota, many local governments have implemented other conduct-prohibitive ordinances that provide legal authority for cities to regulate certain acts.

In Fargo, Bismarck, and Grand Forks, local governments have long used ordinances to prohibit behaviors pertaining to disruptive conduct and indecent exposure, which can also give cities the authority to regulate some conduct associated with homelessness. [125] Since the decision to implement camping-related ordinances is now left to the individual cities and states, North Dakota communities could implement laws that supplement their approaches to addressing homelessness. With North Dakota state and local governments already expending efforts to assist the homeless population, the use of camping-related ordinances may serve a similar purpose as they do in other cities.

***173** For instance, the City of San Francisco stated that its relevant ordinance functions "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." [126] Like San Francisco, North Dakota communities have an interest in providing safe public spaces, but they also have an interest in ensuring that all North Dakota residents are sleeping in a habitable space. North Dakota cannot require that people experiencing homelessness accept the resources that are available to them, nor should North Dakota communities overlook the individual autonomy of people declining assistance. As noted by the *Johnson* majority, assistance may be declined for several reasons, including shelter location, safety concerns, curfews, and religious practices. [127] However, enforcing certain ordinances can give cities the legal authority to encourage homeless individuals to take advantage of available assistance as *Johnson* suggests.

The enforcement of conduct-prohibitive ordinances, especially related to camping or sleeping on public property, could also negatively impact local communities. Individuals experiencing homelessness may become more fearful to seek assistance from law enforcement in times of need or may have trouble finding a place to sleep if communities lack available shelter beds. [128] Additionally, run-ins with the criminal justice system could have a negative effect on a homeless person's ability to receive benefits, find employment, or sleep at a shelter due to a violation of an ordinance. [129]

D. IMPLEMENTATION OF ANTI-ENCAMPMENT ORDINANCES IN NORTH DAKOTA

As of October 2024, the two largest cities in North Dakota have passed anti-encampment ordinances pursuant to the *Johnson* decision. In Fargo, Article 10-14 was recently added to the Code of Ordinances, prohibiting persons from camping or establishing a campsite on public property. [130] The ordinances require those unlawfully encamping on public property to "vacate and remove all belongings ... within forty-eight (48) hours of receiving notice to vacate from an enforcement officer." [131] Unclaimed items "with apparent value or utility will be stored for 60 days" while unclaimed items "that have ***174** no apparent utility or value, are in an unsanitary condition, or present an immediate hazard or danger," will be discarded when persons unlawfully encamping vacate. [132]

As provided by definition in Article 10-14, "'[u]nsanitary' means a hazard to the health and safety of the public, to include but not limited to human waste, bodily fluids, or chemical contamination." [133] In addition, "'[c]ampsite' means to pitch, erect, create, use, or occupy camp facilities for the purposes of habitation or maintaining a temporary place to live, as evidenced by the use of camp paraphernalia." [134] Violations are "punishable as an infraction[, and violators] shall be punished by a fine not to exceed $1,000.00; the court to have power to suspend said sentence and to revoke the suspension thereof." [135]

The second city in North Dakota that has implemented encampment-related legislation is Bismarck. Comparing the Fargo and Bismarck ordinances, one distinction in Bismarck's approach is the shorter time a violator has to vacate the public property upon notice of violation. In Bismarck, removal of campsite and accompanying property begins twenty-four hours after notice of violation is given. [136] Within the campsite removal language, the ordinance specifies that the City must post a twenty-four-hour notice prior to taking removal action. [137] Within this time, "the City shall inform a local agency (delivering social services to homeless individuals) of the location of the campsite." [138] Bismarck police officers are then "authorized to remove the campsite and all personal property related thereto." [139]

Though there is additional language in both cities' ordinances regarding implementation, details remain that are unclear. The holding in *Johnson* permits local governments to use prohibitive camping ordinances to address the growing concern of homelessness, as Fargo and Bismarck have already done. North Dakota communities may continue to do so if implementation produces favorable results.

V. CONCLUSION

In *Johnson*, the U.S. Supreme Court held that enforcing ordinances that regulate camping or otherwise sleeping overnight on public property does not ***175** violate the Cruel and Unusual Punishments Clause of the Eighth Amendment. [140] The text of the Eighth Amendment "focuses on the question [of] what 'method or kind of punishment' a government may impose after a criminal conviction, [rather than] whether a government may criminalize particular behavior in the first place." [141] The clause itself does not permit the Court to regulate the laws that state or local governments implement because other authorities serve that purpose. [142] For facially neutral ordinances that assess reasonable penalties akin to those imposed for similar offenses throughout the nation, the Cruel and Unusual Punishments Clause is not violated. [143] This holding has expanded the options for state and local governments to respond to homelessness, but it will likely be the subject of future litigation for practitioners across the nation as communities navigate the details of conduct-prohibitive laws following this decision. North Dakota practitioners must be aware of potential legislation, the influx that criminalization may have on the criminal justice system, changes to local law, the impact on the homeless population, and the trickle-down effect that an action taken in light of this decision could have on residents of North Dakota.

Footnotes

a1 2026 J.D./M.B.A. Candidate at the University of North Dakota School of Law. Thank you to the NORTH DAKOTA LAW REVIEW for their efforts and support in preparing this piece for publication. I would also like to thank my friends and family, especially my parents, for their endless love and encouragement. Additionally, I extend my heartfelt appreciation to Professor Blake Klinkner for his guidance and mentorship throughout my law school journey.

1 Third Amended Complaint, Blake v. City of Grants Pass, No. 1:18-cv-01823-CL (D. Or. Nov. 13, 2019), 2019 WL 11070914; *see also* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2213 (2024) (Grants Pass, Oregon, "is home to roughly 38,000 people. Among them are an estimated 600 individuals who experience homelessness on a given day.").

2 Third Amended Complaint, *supra* note 1, ¶¶ 18-21, 27-29, 37, 42.

3 *See id*. ¶¶ 22-24, 30-32.

4 *Id*. ¶¶ 2-3.

5 *Id*. ¶¶ 63-70.

6 U.S. DEP'T HOUS. & URB. DEV., OFF. POL'Y & RSCH., UNSHELTERED HOMELESSNESS AND HOMELESS ENCAMPMENTS IN 2019 2 (2021), https://www.huduser.gov/portal/sites/default/files/pdf/Unsheltered-Homelessness-and-Homeless-Encampments.pdf [https://perma.cc/E5NU-ELWE].

7 City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2213 (2024) (alteration in original) (internal citations omitted) (citing GRANTS PASS, OR., MUN. CODE §§ 5.61.020(A), 5.61.030, 5.61.010(A)-(B), 6.46.090(A)-(B) (2023); App. to Pet. for Cert. 221a, 222a; Johnson v. City of Grants Pass, 72 F.4th 868, 876 (2023), *rev'd*, 144 S. Ct. 2202 (2024)).

8 *Id*. at 2211 (citing Martin v. City of Boise, 920 F.3d 584, 615, 617 (9th Cir. 2019)).

9 *Id*. (citing *Martin*, 920 F.3d at 615).

10 *See Johnson*, 72 F.4th at 877-79, *rev'd*, 144 S. Ct. 2202 (2024); *see also Martin*, 920 F.3d at 617.

11 *Johnson*, 72 F.4th at 896, *rev'd*, 144 S. Ct. 2202 (2024). Debra Blake, class representative, passed away while this case was on appeal. Ms. Blake was subsequently removed from the case caption. The United States Court of Appeals for the Ninth Circuit held that "Blake's death does not moot the class's claims as to all challenged ordinances .... With respect to the park exclusion, criminal trespass, and anti-camping ordinances, the surviving class representatives, Gloria Johnson and John Logan, have standing in their own right." *Id*. at 883-84.

12 *Johnson*, 144 S. Ct. at 2208.

13 Petition for Writ of Cert., City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175), 2023 WL 5530379 at *i.

14 *See Johnson*, 144 S. Ct. at 2214.

15 *Id*. at 2208.

16 *See id*. at 2216 (quoting Powell v. Texas, 392 U.S. 514, 531-32 (1968)).

17 *Id*.

18 *Id*. at 2204, 2216 ("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.").

19 *See id*. at 2216.

20 *See id*. at 2218.

21 *See id*.

22 *Id*. at 2226.

23 U.S. CONST. amend. VIII.

24 *Johnson*, 144 S. Ct. at 2204.

25 Powell v. Texas, 392 U.S. 514, 531-32 (1968).

26 *Id*.

27 *Johnson*, 144 S. Ct. at 2215; *see generally* Bucklew v. Precythe, 587 U.S. 119 (2019).

28 *Bucklew*, 587 U.S. at 130-33; *Johnson*, 144 S. Ct. at 2215-16.

29 *Bucklew*, 587 U.S. at 130 (alterations in original) (quoting *Cruel*, DICTIONARY ENG. LANGUAGE (4th ed. 1773); *Cruel*, AM. DICTIONARY ENG. LANGUAGE (1828)).

30 *Id*.

31 John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739, 1815 (2008).

32 *See* Trop v. Dulles, 356 U.S. 86, 100 (1958).

33 *Johnson*, 144 S. Ct. at 2204, 2226.

34 *Id*. at 2221, 2224.

35 *See id*. at 2241 (Sotomayor, J., dissenting); *see also id*. at 2220 (majority opinion).

36 *Id*. at 2210, 2212-13 (majority opinion).

37 *See id*. at 2207-08.

38 *Id*. at 2208 (citing TANYA DE SOUSA ET AL., OFF. OF CMTY. DEV. & PLAN., THE 2023 HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 2-3 (2023)).

39 *See id*. at 2212, 2214.

40 *Id*. at 2209.

41 *See id*. at 2209-10.

42 *Id*. at 2209 (citing Brief for Local Government Legal Center et al. as Amici Curiae, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1008650, at *11).

43 Brief of Amici Curiae Members of Congress in Support of Petitioner, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1009146, at *4; *see also* Johnson, 144 S. Ct. at 2208-09 (noting that reasons for encampments include "freedom," "sense of community," and "dependable access to illegal drugs") (internal quotations omitted) (citing REBECCA COHEN ET AL, OFF. OF POL'Y DEV. & RSCH., DEP'T OF HOUS. & URB. DEV., UNDERSTANDING ENCAMPMENTS OF PEOPLE EXPERIENCING HOMELESSNESS AND COMMUNITY RESPONSES 5 (2019)).

44 *Johnson*, 144 S. Ct. at 2209.

45 *Id*. at 2211; *see generally* Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019).

46 *Martin*, 920 F.3d at 606.

47 *See id*. at 604 ("In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered."); *see also Johnson*, 144 S. Ct. at 2222.

48 *Martin*, 920 F.3d at 617 (alterations in original) (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)).

49 *Id*. at 604.

50 *Id*.

51 *Id*. at 617.

52 *Johnson*, 144 S. Ct. at 2211.

53 *Martin*, 920 F.3d at 590 (Smith, J., dissenting).

54 *Id*. at 594 (citing Powell v. Texas, 382 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962)).

55 *Id*. at 599 (Bennett, J., dissenting).

56 *Id*. at 602.

57 *See generally* City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

58 *Id*. at 2210; *see* 36 C.F.R. § 7.96(j)(1) (2023) ("In Lafayette Park the storage of ... bedding, ... pillows, sleeping bags, food, clothing, ... and all other similar property is prohibited.").

59 Brief of Local Government Legal Center et al. as Amici Curiae, *supra* note 42, at *11.

60 *Johnson*, 144 S. Ct. at 2210; *see also* Brief for Local Government Legal Center et al. as Amici Curiae, *supra* note 42, at *11.

61 *Johnson*, 144 S. Ct. at 2208.

62 *Id*.

63 *Id*. at 2210-11.

64 *See id*. at 2223.

65 *Id*. at 2212 (quoting Brief of Amici Curiae Ten California Cities and The County of Orange, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175) 2023 WL 6367637, at *2).

66 *Id*. at 2223.

67 *See id*. at 2212, 2223-24.

68 *See id*. at 2215-20.

69 *Id*. at 2215 (quoting Powell v. Texas, 382 U.S. 514, 531-532 (1968)).

70 *Id*. at 2215-16 (quoting Bucklew v. Precythe, 587 U.S. 119, 130 (2019)).

71 *See id*. at 2216; *see also supra* note 18.

72 *See* Brief for Respondents, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1420950; *see also* Robinson v. California, 370 U.S. 660 (1962).

73 *Robinson*, 370 U.S. at 660, 666 (citing CAL. HEALTH & SAFETY CODE § 11721 (repealed by Stats. 1972, c. 1407, p. 2987, § 2)).

74 *Id*. at 667 (Noting that addiction is recognized as an illness and "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 cruel and unusual punishment for the "crime' of having a common cold.").

75 Brief for Respondents, *supra* note 72, at *12, *18, *23.

76 Reply Brief for Petitioners, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1657077, at *5.

77 *Id*. (citing Powell v. Texas, 382 U.S. 514, 532-33 (1968)).

78 *Powell*, 382 U.S. at 532-33 (citing *Robinson*, 370 U.S. at 667).

79 *See id*. at 533-36.

80 City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2219 (2024) (alterations in original) (citing *Powell*, 392 U.S. at 532).

81 *Id*. at 2220.

82 *Id*.

83 *See id*. at 2220, 2224.

84 *See id*. at 2224, 2226.

85 *Id*. at 2226 (Thomas, J., concurring).

86 *Id*.

87 *Id*. at 2227.

88 Trop v. Dulles, 356 U.S. 86, 101 (1958).

89 *Johnson*, 144 S. Ct. at 2226-27 (Thomas, J., concurring).

90 *Id*. at 2227.

91 *Id*. at 2228 (Sotomayor, J., dissenting).

92 *Id*.

93 *Id*. at 2229.

94 *See id*. at 2230-31.

95 *See id*. at 2231 (citing Brief of 57 Social Scientists with Published Research on Homelessness as Amici Curiae in Support of Respondents, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1513058, at *27). ("[C]riminalization can lead homeless people to 'avoid calling the police in the face of abuse or theft for fear of eviction from public space.'").

96 *See id*. at 2230.

97 *Id*. (citing Brief of 57 Social Scientists with Published Research on Homelessness as Amici Curiae in Support of Respondents, *supra* note 95, at *13, *17).

98 *See id*. at 2232, 2241 (citing Martin v. City of Boise, 920 F.3d 584 616 (2019)) ("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.'").

99 *See id*. at 2234 ("The status of being homeless (lacking available shelter) is defined by the very behavior singled out for punishment (sleeping outside).").

100 *Id*. at 2237.

101 *Id*. at 2241-43. In response to this position, Justice Gorsuch stated: "Rather than address what we have actually said, the dissent accuses us of extending to local governments an 'unfettered freedom to punish,' and stripping away any protections 'the Constitution' has against 'criminalizing sleeping. Either stay awake,' the dissent warns, 'or be arrested.' That is gravely mistaken. We hold nothing of the sort." *Id*. at 2224 (majority opinion).

102 *Id*. at 2244 (Sotomayor, J., dissenting).

103 DE SOUSA ET AL., *supra* note 38, at 2.

104 *Id*. at 2, 6 (The report provides the most current statistics on the homeless population in the country, detailing demographics of the individuals and the "nation's capacity to serve people who are currently or formerly experiencing homelessness.").

105 *Id*. at 6.

106 *See id*.

107 *Id*. at 5.

108 *Id*. at 2.

109 *Id*. at 2, 5.

110 *Id*. at 109.

111 *Id*.

112 *See* U.S. DEP'T OF HOU. & URB. DEV., 2007-2023 POINT-IN-TIME ESTIMATES BY COC (2023), https://www.huduser.gov/portal/datasets/ahar/2023-ahar-part-1-pit-estimates-of-homelessness-in-the-us.html#:~:text=2007%20%C2D%C202023%C20Point%C2Din%C2DTime%C20Estimates%C20by%20CoC [https://perma.cc/7F8N-K3UB].

113 *See generally* DE SOUSA ET AL., *supra* note 38.

114 *Id*. at 109.

115 *Id*. at 96-114; *see generally* HUD EXCHANGE, 2007-2023 PIT ESTIMATES BY STATE (2023), https://www.hudexchange.info/resource/3031/pit-and-hic-data-since-2007/ [https://perma.cc/5LAT-PQKC] (Since AHAR began reporting data in 2007, North Dakota's highest number of homelessness occurred in 2013 with a total of 2,069 persons.).

116 U.S. DEP'T OF HOUS. & URB. DEV., HUD 2023 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOUSING INVENTORY COUNT REPORT 19 (2023), https://files.hudexchange.info/reports/published/CoC_HIC_NatlTerrDC_2023.pdf [https://perma.cc/NBW7-PBG6] ("Th[e] report is based on information provided to HUD by Continuums of Care in the 2023 Continuum of Care application and has not been independently verified by HUD."); *see* DE SOUSA ET AL., *supra* note 38, at 4 ("Continuums of Care (CoC) are local planning bodies

responsible for coordinating the full range of homelessness services in a geographic area, which may cover a city, county, metropolitan area, or an entire state.").

117 U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 116, at 19; *see generally supra* note 38 and accompanying text (Note that the AHAR report has estimated demographics of North Dakota's homeless population, and beds with occupancy restrictions may pose an additional challenge.).

118 CORINA BELL ET AL., FM COALITION TO END HOMELESSNESS, THE 2023 STATE OF HOMELESSNESS IN THE FARGO-MOORHEAD METRO AREA 2 (2023), https://www.fmhomeless.org/ [https://perma.cc/4KZU-W747].

119 *Id*. at 5.

120 *Id*. at 37.

121 *See id*. at 36-38.

122 *See generally supra* text accompanying notes 57-62.

123 City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2226 (2024).

124 *See* N.D. ADMIN. CODE 58-02-08-06 (2018); GRAND FORKS, N.D., PARK DIST. ORDINANCES § 4(17) (2017).

125 *See* FARGO, N.D., CODE OF ORDINANCES § 10-0301(A)(4) (2024); BISMARCK, N.D., CODE OF ORDINANCES § 6-05-02(1); GRAND FORKS, N.D., CODE OF ORDINANCES § 9-0107(4)-(5) (2024).

126 *Johnson*, 144 S. Ct. at 2212 (citing Brief for City and Cnty. of S.F. & Mayor Breed as Amici Curiae, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 966400, at *7-*8).

127 *Id*. at 2210.

128 *See supra* text accompanying note 93.

129 *See supra* text accompanying note 95.

130 FARGO, N.D., CODE OF ORDINANCES art. 10-14 (2024).

131 *Id*. § 10-1403(1).

132 *Id*. § 10-1403(2)(a)-(b).

133 *Id*. § 10-1401(11).

134 *Id*. §10-1401(3).

135 *Id*. § 10-1404, Ord. No. 5450 § 2.

136 BISMARCK, N.D., CODE OF ORDINANCES, Ord. No. 6587 (2024).

137 *Id*.

138 *Id*.

139 *Id*.

140 City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2224, 2226 (2024).

141 *Id*. at 2216 (citing Powell v. Texas, 382 U.S. 514, 531-32 (1968)).

142 *See id*. at 2215, 2220.

143 *Id*. at 2216, 2218.

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Marianne M. Jennings [1]

FROM THE COURTS

"Safe Streets Are Constitutional": [2] SCOTUS Finally Ends the Decade+ of Litigation

When we last left, dear readers, we were amidst complexities of the U.S. Constitution and homeless encampments. [3] We had pretty much wrapped up the litigation between the homeless and cities from sea to shining sea that was grounded in the Fourth and Fourteenth Amendments. What remained were the Eighth Amendment cases--those cases in which the homeless and formerly homeless argued that taking down their tents amounted to cruel and unusual punishment. Cleaning up homeless encampments was cruel and unusual punishment because the homeless were forced to the streets due to circumstances not always under their control.

Courts were relegated to developing ratios for homeless population vs. shelter spaces in determining constitutionality. The litigation was so complex and contentious that the U.S. Supreme Court (SCOTUS) granted *certiorari* in an Oregon case not only because there was a conflict among the circuits on the Eighth Amendment issues, but also because there appeared to be a conflict among all the opinions written by the judges in the Ninth Circuit's decision in the case. [4]

*116 How Did We Get to *Grants Pass, Oregon v. Johnson* [5]

Grants Pass and many other cities were hit with class-action suits based on the Eight Amendment prohibition of cruel and unusual punishments. There was precedent from the Ninth Circuit in *Martin v. Boise.* [6] However, the *Martin* case was originally *Bell v. Boise*, and some time during the 12 years of litigation, we lost Bell and put Martin in as the lead plaintiff. [7]

The court held that it could not render retrospective relief for damages because it would have to review each case individually and such evidence was not available. [8] The court rendered the plaintiffs' demand for prospective relief moot because the issues raised by the plaintiffs had been resolved by the Special Order. The city's motion for summary judgment was then granted.

On appeal, the Ninth Circuit reversed and remanded. [9] On remand, the federal district court partially granted and partially dismissed the city's motion for summary judgment. [10] The federal district court again denied retrospective relief but permitted prospective declaratory relief on the city's ***117** enforcement of its encampment rules. The plaintiffs were given leave to amend their complaint to seek prospective relief. [11]

At this point, it is 2019, and the *Bell* case, now featuring *Martin* as the lead plaintiff, was appealed again to the Ninth Circuit to challenge the finding of the federal district court on remand. [12] However, Boise and the plaintiffs (and most likely their advocates) adopted a Special Order that changed enforcement policies such that everyone could coexist in Boise, albeit in different types of structures.

However, on appeal, the Ninth Circuit was not buying Boise's argument that the case was now moot because of its Special Order that everyone had agreed to as a settlement of the case and policy. The Ninth Circuit still held that the plaintiffs had standing to pursue their case because Boise's adoption of the Special Order and resulting protocol on enforcement of its ordinances did

not deprive the plaintiffs of standing to pursue their Eighth Amendment claims as well as retrospective relief. The defendants then requested a rehearing of the Ninth Circuit decision as well as an *en banc* hearing. [13]

The Ninth Circuit panel unanimously denied a rehearing of the case, but other judges on the Ninth Circuit got wind of ***118** both the opinion and the denial of a rehearing and then *sua sponte* voted on granting an *en banc* rehearing. However, not enough of the judges voted for an *en banc* rehearing *en banc.* [14] Ordinarily, the Ninth Circuit's work would have been done.

However, there was quite a dust-up among the judges, and the result was that their original opinion on appeal was superseded, and although both a rehearing and an *en banc* hearing were denied, there were opinions in the case that contradicted and/or affirmed the original decision despite nothing new percolating up in the case.

The Ninth Circuit eventually held that the case was reversed and remanded (the second opinion). What we could piecemeal together following the civil war on the Ninth Circuit was a court decision that would require daily monitoring by cities to determine whether they could arrest and cite the homeless for violations of their camping/sleeping ordinances: If the city does not have enough shelter beds then law enforcement cannot arrest or cite the homeless because such actions violate the "cruel and unusual provision" of the Eighth Amendment. That was the fluid law that resulted from 12 years of litigation, which, in turn produced other decisions around the circuit on the Eighth Amendment issue. Following the urgings of many states, cities, and counties, SCOTUS decided that it was high time to clean up the lower circuit mess.

Saving Grants Pass and Many Other Cities Riding on Its Coattails to SCOTUS: *Grants Pass, Oregon v. Johnson*. [15]

This poor little city of 38,000 folks, including 600 homeless folks, had passed public-camping laws. The city's ordinances prohibited camping on public property or parking overnight in the city's parks. [16] Violations could result in a fine and multiple violations could result in imprisonment.

It was just six weeks after the *Boise, Martin, Bell* Ninth ***119** Circuit decision that this case began. Debra Blake and two other homeless individuals "residing," as it were, in Grants Pass, Oregon brought suit. [17] Their problem was identical to that of the *Boise* plaintiffs--they alleged that enforcement of various city ordinances was punishing them for being homeless in violation of the Eighth Amendment.

Procedural Background and the Grants Pass Ordinances

The initial opinion in the case was a quick breeze-through to qualify as a class action. The court found that counting even those who were "couch surfing" with friends and relatives because they had no home were at risk from the humiliation of anti-camping enforcement and found all Grants Pass qualified as "homeless" for purposes of computing such folks in the ratio of homeless to shelter spaces. [18] Grants Pass struggled with its homeless problem all during the time of the *Boise* decade of litigation that preceded the Ninth Circuit's decision in that case. [19]

The federal district court also found that all the homeless ***120** in Grants Pass were "involuntarily homeless" because of Grants Pass's lack of sufficient shelter space. The court quickly certified the class action of homeless individuals and moved to the heart of the case. [20] The relevant ordinances at the time of the federal district court decision were used by the Ninth Circuit in its review on appeal. However, the five Grants Pass ordinances (GPMC) at the time of summary judgment were not the same as the five ordinances in existence when the suit was filed. [21]

***121 The Issues with Fines**

The Grants Pass camping ordinances carry a mandatory fine of $295. The fine for illegal sleeping is $75. If the fines are unpaid, they increase to $537.60 and $160 respectively for what the city calls "collection fees." [22] There were provisions in another part of the GPMC that permitted reduction in the fines to $35 for a first offense and $50 for a second offense if the violator entered a guilty plea. [23] The plaintiffs representing the class had all been cited and fined for various violations. In fact, one of them owed over $5,000 in fines and penalties.

(A) The Criminal vs. Civil Distinction

Grants Pass argued that its ordinances were not criminal, but civil statutes and that the Eighth Amendment did not, therefore, apply. However, the court noted that Supreme Court decisions have made it clear that the purpose of the Eighth Amendment is to "limit the government's power to punish," and that "The notion of punishment, as we commonly understand it, cuts across the division between the civil and criminal law." [24]

The Ninth Circuit's phraseology in its *Boise* decision gave ***122** a clear indication that the distinction between civil and criminal punishments was not relevant in its analysis:

> The Ninth Circuit stated the broad question that it was addressing was "[D]oes 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?" The Ninth Circuit held that it does, quoting *Jones*, [25] "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." It is the punishment of a person's unavoidable status that violates the constitution, not whether that punishment is designated civil or criminal. [26]

(B) Determining Punitive: The Function of Retribution and Deterrence

Having determined that the Eighth Amendment applied, the secondary question for the court was whether the fines imposed by Grants Pass were punitive. The court held that the fines were punitive because the ordinances only gave discretion to police officers to issues warnings in lieu of a citation. However, once a citation was issued, there was no discretion given to officers on the amount of the fine. The amount of the fine was "autofilled" in all citations. [27] With little analysis and only a vague reference to a Supreme Court ***123** case the court concluded that the standard for whether a fine is punitive is that the fine "at least partially serves the traditional punitive functions of retribution and deterrence." [28]

(C) The Question of "Excessive"

There was yet a third Eighth Amendment question which was whether the fines imposed were excessive. Interestingly, the court cites a Ninth Circuit case for its authority on this issue in holding that the Grants Pass fines were excessive. The case cited, *Wright v. Riveland*, did not reach a decision on whether a fine was excessive because it concluded there was not enough evidence and there were also several unanswered questions. [29] The case was remanded for factual findings related to the amount of the fine and how that fine was allocated by the state. [30] The court in that case stopped short of actually addressing the standards for excessiveness fines.

Nonetheless, the court sallied forth with its findings of "excessive":

> ***124** Fining a homeless person in Grants Pass who must sleep outside beneath a blanket because they cannot find shelter $295 ($537.60 after collection fees are inevitably assessed) is grossly disproportionate to the " "gravity of the offense." Any fine is excessive if it is imposed on the basis of status and not conduct. For Plaintiffs, the conduct for which they face punishment is inseparable from their status as homeless individuals, and therefore, beyond what the City may constitutionally punish. The fines associated with violating the ordinances at issue, as applied to Plaintiffs, are unconstitutionally excessive. [31]

Federal District Court and Ninth Circuit Decisions

The federal district court then issued an injunction against portions of the sleeping and camping ordinances on the grounds that they violated the Eight Amendment's Cruel and Unusual Punishments. Grants Pass appealed the decision of the federal district court. There was a 2-1 Ninth Circuit decision affirming the district court's decision with some notations of error but this conclusion: "On the material aspects of this case, the district court was right." [32]

However, the Ninth Circuit was not finished. The history of *Boise* repeated itself and so also did the judges with their views on hearings, rehearings, and *en banc*. Judge Berzon is once again the author of the opinion for *Grants Pass* and you have dissenting, concurring, and concurring with the dissenting opinions. There were 17 judges on the Ninth Circuit who opposed the denial of the rehearing of the case and five ***125** separate opinions in the case. [33] For those of you keeping score, that is two more opinions than in the *Martin v. Boise* case. But if you count the statements on rehearing and hearing *en banc*, which the court did in *Martin,* then you had eight opinions in *Martin* and only five in *Grants Pass*. [34] However, this time, the decision focused on the Eighth Amendment holding that the imposition of criminal penalties for sitting, sleeping, or lying outside on homeless individuals was cruel and unusual punishment. This time SCOTUS could not dodge the case. The Eighth Amendment conclusion put the justices over the top.

The *Grants Pass* Scotus Opinion

The decision in the case was 6-3, with Justice Gorsuch writing the majority opinion joined by Chief Justice Roberts, and Justices Thomas, Alito, Kavanaugh, and Barrett. Justice Thomas filed a concurring opinion. Justice Sotomayor filed the dissenting opinion joined by Justices Kagan and Jackson.

Justice Gorsuch begins the opinion by discussing the extent and nature of homelessness. He characterizes both the causes of the homeless crisis and public responses as varied and complex. He also notes the resulting challenges including increases in crimes, heightened risks of sexual assault, facilitation of the distribution of illegal drugs, the lack of running water and sanitation facilities and resulting diseases such as typhus, shigella, and trench fever remerging in communities. He cites the information provided in the numerous briefs including the need for adults and children to navigate around used needles, human waste, and other hazards. Those with disabilities have particularly struggled because of their inability to move around and between these hazards.

Justice Gorsuch also notes the efforts of the cities to provide shelter and housing but also that the more assistance they provide, the greater the homelessness crisis becomes. He notes the vicious revolving doors of moving from ***126** "the street to the criminal justice system and back." [35] One of the purposes of Justice Gorsuch's history is to demonstrate how complex the problems and solutions are and that there are a variety of programs and efforts that provide relief and others that fail. Another purpose is providing those involved in the case with the insight that the court is aware of the issues those on both sides are facing, concluding his description of the social issues, "Different governments may use these laws in different ways and to varying degrees." 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." [36]

The Existing Jurisprudence: The Consequences of *Martin*

Justice Gorsuch then moves into a review of the case law, beginning with *Martin* and tying it to his previous discussion of the issues.

Five years ago, the U.S. Court of Appeals for the Ninth Circuit took one of those tools off the table. In Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) (abrogated by, City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202 (2024)), 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." 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." [37]

Martin was noted as singular among the circuits for its finding that public-camping law ordinances and their enforcement violated the Eighth Amendment. However, *Martin* resulted in what was described as follows, "'[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 ***127** threat of one 'in the few short years since [the Ninth Circuit] initiated its *Martin* experiment."' [38] In the *amicus* brief filed by the City of Phoenix, its officials offered that *Martin* "has paralyzed even commonsense and good faith efforts at addressing homelessness." [39] In fact, the *amicus* briefs of organizations such as the League of Cities showed that one of the effects of *Martin* has been to reduce the ability of public officials to persuade the homeless to accept shelter beds and other services. [40]

The Eighth Amendment Jurisprudence

Justice Gorsuch issued a reminder about the origins and purposes of the Eighth Amendment. In the 18th century, English laws permitted punishments such as disemboweling, quartering, public dissection, and burning alive and were still "formally tolerated." [41] By the time the Eighth Amendment discussions came along, those kinds of punishments had become unusual but as Justice Story noted it was important to outlaw atrocious punishments and "in adopting the Eighth Amendment, the framers took no chances." [42]

Justice Gorsuch then applies the history to the current case noting that the Eighth Amendment is not a good foundation for the type of remedy the homeless plaintiffs are seeking, i.e., a complete ban on enforcing anti-camping laws. Further, the fines imposed by the cities are the "drudge-horse of criminal justice." [43]

Turning to case law, the court relied on *Bucklew v. Precythe* ***128** a decision that held the language of the Eighth Amendment focuses on the question of what methods or kinds of punishment can be imposed by the government. [44] Justice Gorsuch then outlined a sort of "What's the worst that could happen under the ordinances?" In response to that overarching question, Justice Gorsuch outlined that an initial offense *might* trigger a fine. Repeat offenses might result in a temporary ban on camping in a public park. Only those who violated such an order could experience up to 30 days in jail and a larger fine. Neither the plaintiffs in the case nor the dissent disagreed with this precedent and analysis. The dissent relied on a different theory, discussed *infra*.

The Eighth Amendment Is Applied to Conditions and Not Conduct: The Dissent's Return to 1962 and *Robinson v. California* [45]

Justice Sotomayor spent over four pages offering what seems to be a talk on the issues surrounding homelessness She concludes the first part of the talk by concluding unequivocally and despite Justice Gorsuch's discussion of the *amici* briefs highlighting that the lack of enforcement has resulted in increased crime, sexual assaults, and the reintroduction of diseases once eradicated, that criminalization is ineffective. She concludes, evidence in the case aside, that criminalization 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." [46]

The Jurisprudence on the Punishments Clause

Justice Sotomayor outlines what she believes that the courts have established as the standards for determining whether the Punishments Clause is violated. There are three parts outlined by the courts on the punishment clause: (1) the kinds of punishments that can be imposed; (2) the regulation of grossly disproportionate punishments; and (3) ***129** Substantive limits on what can be made criminal and punished. [47]

The dissent then relies on *Robinson v. California* and its interpretation that focused on the third standard, what can be made criminal. [48] The Eighth Amendment jurisprudence on regulating conduct other than those activities connected with homelessness is fairly straightforward. In *Robinson*, the California statute in question 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." Instead, it made "the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms."' [49] In that case the court held that the California law violated the Eighth Amendment because it criminalized status. Another basic example of the distinction is: A law cannot criminalize chronic alcoholism, but the law can criminalize being drunk in public, even when the person who was drunk in public was an alcoholic. [50]

Using the *Robinson* standard, Justice Sotomayor concludes that the Grants Pass ordinances criminalize homeless. The conclusion she reaches is: "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." [51] In true Sotomayor fashion, the Justice concludes that the majority gives Grants Pass "unfettered freedom to punish" and "criminalizing sleeping." [52] The ***130** Sotomayor emotion comes through, "either stay awake or be arrested" and "Sleep is a biological necessity, not a crime." [53]

With this focus, Justice Sotomayor focuses solely on the substantive limits portion of the test she outlines. Justice Gorsuch responds by noting that the holding focuses only on what the wording of the Clause provides, which is a focus on the punishment.

The Underlying Issue That Explains the Emotional Dissent in Response to the Majority's Interpretation of Limiting Language

Justice Gorsuch, in his closing paragraphs addresses the reason for the wide gap between the majority decision and the dissent's reaction. In short, the disagreement lies in the various views justices and judges have about the role of the courts. The Ninth Circuit and the dissent believe that the courts need to step in to prevent some actions taken as a means of addressing homelessness. The majority, on the other hand, holds firm to the language of the Constitution that necessarily limits the role of the courts in public policy discussions and actions. Portions of the final paragraphs in the majority opinion outline the importance of judicial restraint that comes from interpreting language as opposed to judicial mandate derived from the views of judges and justices:

> 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.
>
> ***131** 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. [54]

The emotion at the Ninth Circuit and in the Sotomayor dissent springs from their views and desires on how to handle the homelessness crisis. Yet, there may not be a means for providing judicial cover for one side or the other in these ongoing public policy debates. The role of the judiciary is to review and determine the boundaries for the regulatory provisions communities try to address the public health issues that affect all citizens when there are extensive homeless encampments.

Footnotes

2 Title of Editorial, *Wall Street Journal,* July 1, 2024, p. A16.

1 Professor Emeritus Legal and Ethical Studies in Business, W.P. Carey School of Business, Arizona State University and author of *Real Estate Law*.

3 Jennings, The Unalienable Right to Vagrancy: SCOTUS Examines Constitutional Issues in Homelessness, 52 Real Est. L.J. 227 (2024).

4 The Ninth Circuit judges really took to some smack-down language. Also, some of the judges were on concurring and dissenting opinions and it seemed unclear who was actually in on the majority opinion.

5 Johnson v. City of Grants Pass, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024); City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202 (2024).

6 Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) (abrogated by, City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202 (2024)). Actually the litigation against Boise began in 2011, with Janet Bell being the lead plaintiff. However, for reasons unexplained Robert Martin (not Harriet's suitor in Jane Austen's *Emma*) who was the third in line in the conga line of plaintiffs suing Boise took over. His name now lives on not only in literature but also in the minds of law students around the country who will study *Martin v. Boise*.

7 Bell v. City of Boise, 709 F.3d 890 (9th Cir. 2013).

8 The court relied on the *Rooker-Feldman* doctrine for denying the retrospective relief. Discussing the Rooker-Feldman doctrine is above the author's pay grade. In addition, the author does not wish to be responsible for inducing public sleeping through such a discussion and the resulting risk of citation, depending on city ordinances, the number of shelter spaces, and definitions of sleeping.

9 Bell v. City of Boise, 709 F.3d 890 (9th Cir. 2013).

10 Bell v. City of Boise, 993 F. Supp. 2d 1237 (D. Idaho 2014), aff'd in part, rev'd in part and remanded, 902 F.3d 1031 (9th Cir. 2018), amended and superseded on denial of reh'g, 920 F.3d 584 (9th Cir. 2019) (abrogated by, City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202 (2024)) and aff'd in part, rev'd in part and remanded, 920 F.3d 584 (9th Cir. 2019).

11 It was at this point that we lost Janet F. Bell somewhere as a plaintiff. No explanation is given in the cases, but Robert Martin, the third plaintiff named in the original *Bell* case took the position as the lead plaintiff. It was tough scaring up enough for a class action of the unsheltered in Boise--*see* note 2 supra.

12 Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) (abrogated by, City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202 (2024)).

13 There was some inside baseball going on that should be disclosed. By this time (2019), the decade-old case was a subject of questions in the mayoral election debate. Also, by this time, Boise had hired some legal heavy hitters, including Theodore B. Olson and Theane Evangelis, both then of Gibson, Dunn & Crutcher as their counsel, which does explain the procedural nightmare of the case. Conor Dougherty, "Unlikely Front in Fight Over the Homeless: Boise," *New York Times,* December 3, 2019, p. B1. (The author notes from the article's title that even the *New York Times* shares her surprise with Boise leading the country in the Eighth Amendment/Homeless battle). Not San Francisco or Los Angeles but cities with populations of 38,000.

14 Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) (abrogated by, City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202 (2024)).

15 Johnson v. City of Grants Pass, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024); City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202 (2024).

16 City of Grants Pass Ordinances §§ 5.61.030 and 6.46.090(A)-(B).

17 These cases attracted a great many hangers-on from law schools, law firms, homelessness organizations, the ACLU, prestigious law firms, as well as constitutional advocacy groups. It took one full column on one page for the Ninth Circuit opinion in *Grants Pass* to list all the lawyers involved in the case, as *amici* and as lawyers for the parties. Johnson v. City of Grants Pass, 50 F.4th 787, 791-792, 113 Fed. R. Serv. 3d 1716 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024).

18 Blake v. City of Grants Pass, 2019 WL 3717800 (D. Or. 2019), aff'd, 50 F.4th 787, 113 Fed. R. Serv. 3d 1716 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024) and aff'd, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023).

19 Police officers had purchased bus tickets for the homeless so that they could find housing elsewhere, but they inevitably returned. There was increased enforcement and a statement by a city council member that the City's goal was "to make it uncomfortable enough for the [homeless persons] in our city so they will want to move on down the road." Johnson v. City of Grants Pass, 50 F.4th 787, 794, 113 Fed. R. Serv. 3d 1716 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024); Blake v. City of Grants Pass, 2020 WL 4209227 (D. Or. 2020), aff'd in part, vacated in part, remanded, 50 F.4th 787, 113 Fed. R. Serv. 3d 1716 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024) and aff'd in part, vacated in part, remanded, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023).

20 Blake v. City of Grants Pass, 2020 WL 4209227 (D. Or. 2020), aff'd in part, vacated in part, remanded, 50 F.4th 787, 113 Fed. R. Serv. 3d 1716 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024) and aff'd in part, vacated in part, remanded, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023).

21 The original ordinances that were in place when the plaintiffs experienced their arrest or citation were:

GPMC 5.61.010 Definitions

A. "To Camp" means to set up or to remain in or at a campsite.

B. "Campsite" means 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 5.61.020 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.

GPMC 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 ...

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 6:00am shall be considered in violation of this Chapter.

22 The author is no expert in the area, geographically or topically speaking, but collection of a fine from a homeless person must be one tough slog.

23 GPMC 1.36.010 (K).

24 Blake v. City of Grants Pass, 2020 WL 4209227, p.7 (D. Or. 2020), aff'd in part, vacated in part, remanded, 50 F.4th 787, 113 Fed. R. Serv. 3d 1716 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024) and aff'd in part, vacated in part, remanded, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), citing Timbs v. Indiana, 586 U.S. 146, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019); U.S. v. Halper, 490 U.S. 435, 447-448, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989) (abrogated by, Hudson v. U.S., 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450, 162 A.L.R. Fed. 737 (1997)) and Austin v. United States, 509 U.S. 602, 609-610, 113 S. Ct. 2801, 125 L. Ed. 2d 488, 1994 A.M.C. 1206 (1993).

25 Referring to, City of Los Angeles v. Jones, 505 F.3d 1006 (9th Cir. 2007), cert. denied, 135 S.Ct. 1152 (2014), a case that concluded that a Los Angeles ordinance that criminalized sitting, lying, or sleeping in public at any time was unconstitutional. Arrests under the ordinance were made in the Skid Row section of Los Angeles. At that time there was very little low-income housing available in that area of Los Angeles. The homeless population in Skid Row outnumbered the number of shelter beds. Finding that the homeless had nowhere to go and hence no control over their homelessness, the court concluded that the condition of being homeless was being criminalized by the statute and found it to be unconstitutional under the Eighth Amendment. However, after the parties reached a settlement, the case was withdrawn by the Ninth Circuit.

26 Martin v. City of Boise, 920 F.3d 584, 615-616 (9th Cir. 2019) (abrogated by, City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202 (2024)). However, as noted--that case was withdrawn by the Ninth Circuit.

27 Blake v. City of Grants Pass, 2020 WL 4209227, p.10 (D. Or. 2020), aff'd in part, vacated in part, remanded, 50 F.4th 787, 113 Fed. R. Serv. 3d 1716 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024) and aff'd in part, vacated in part, remanded, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023). Obviously, these findings are now incorrect under the SCOTUS holding.

28 Blake v. City of Grants Pass, 2020 WL 4209227, p.10 (D. Or. 2020), aff'd in part, vacated in part, remanded, 50 F.4th 787, 113 Fed. R. Serv. 3d 1716 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144

S. Ct. 2202 (2024) and aff'd in part, vacated in part, remanded, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023). The case referenced was U.S. v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314, 172 A.L.R. Fed. 705 (1998).

29 Wright v. Riveland, 219 F.3d 905, 24 Employee Benefits Cas. (BNA) 2225 (9th Cir. 2000).

30 The case dealt with deductions taken from fines paid by inmates for the costs of incarceration. The argument made in a class action suit by the inmates was that the state was keeping too much of the inmates' accounts (fines deposit accounts) and therefore, excessive fines were being imposed. Wright v. Riveland, 219 F.3d 905, 917-918, 24 Employee Benefits Cas. (BNA) 2225 (9th Cir. 2000). In fact, the court noted that the best remedy for the inmate plaintiffs would be to use an already established internal prison grievance system to challenge the use of the funds.

31 Blake v. City of Grants Pass, 2020 WL 4209227, p.9-10 (D. Or. 2020), aff'd in part, vacated in part, remanded, 50 F.4th 787, 113 Fed. R. Serv. 3d 1716 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024) and aff'd in part, vacated in part, remanded, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023). There were other constitutional issues raised by the Plaintiffs in the case, including unconstitutional vagueness. However, having decided the constitutionality issue under the Eighth Amendment, the court declined to decide those issues.

32 Johnson v. City of Grants Pass, 50 F.4th 787, 792, 113 Fed. R. Serv. 3d 1716 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 72 F.4th 868, 116 Fed. R. Serv. 3d 373 (9th Cir. 2023), cert. granted, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024) and rev'd and remanded, 144 S. Ct. 2202 (2024).

33 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.9 (2024).

34 One needs calculus to determine the real numbers here. Our executive and legislative branch battles cannot hold a candle to those at the Ninth Circuit.

35 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.7 (2024).

36 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.7 (2024).

37 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.7 (2024).

38 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.8 (2024).

39 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.8 (2024).

40 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.8 (2024).

41 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.10 (2024), citing 4 *W. Blackstone, Commentaries on the Laws of England* 370 (1769) (Blackstone).

42 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, at p.10 (2024), citing Bucklew v. Precythe, 587 U.S. 119, 139 S. Ct. 1112, 203 L. Ed. 2d 521 (2019).

43 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.11 (2024), citing Thomas, J. concurring opinion in Timbs v. Indiana, 586 U.S. 146, 155, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019).

44 Bucklew v. Precythe, 587 U.S. 119, 130, 139 S. Ct. 1112, 203 L. Ed. 2d 521 (2019).

45 Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

46 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.19 (2024).

47 Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

48 Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

49 Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

50 Powell v. State of Tex., 392 U.S. 514, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968).

51 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.22 (2024).

52 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.16 (2024).

53 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.18 (2024).

54 City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2024 WL 3208072, p.17 (2024).

53 RELJ 115

LEADING CASE: CONSTITUTIONAL LAW: Eighth Amendment Cruel and Unusual Punishment Clause City of Grants Pass v. Johnson

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[*375] "Poverty and immorality are not synonymous," the Supreme Court once observed.[1] A set of laws that would restrict where "the poor and the unpopular are permitted to" exist on public property "only at the whim of any police officer,"[2] is bad, the Court said.[3] That kind of regime would "furnish[] a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'"[4] Though today's Court may superficially uphold these principles, the practical implications of a recent decision suggest otherwise. Last Term, the Supreme Court in *City of Grants Pass v. Johnson*[5] held that a city ordinance criminalizing involuntarily unhoused people who set up encampments on public property does not violate the Eighth Amendment's Cruel and Unusual Punishment Clause.[6] The Court's ruling dramatically weakened, and potentially eroded, Eighth Amendment-based substantive limits on criminal laws.[7] Instead of the Eighth Amendment, the Court suggested this vulnerable population should turn to common law criminal defenses, and some hazy, half-hearted constitutional challenges, to protect themselves.[8] Yet this suggestion implicitly and incorrectly conflates pre- and post-enforcement challenges. In particular, it both ignores that post-enforcement challenges are practically much weaker remedies and avoids providing clarification necessary for alternate pre-enforcement claims. Ultimately, the Court's framing leaves the involuntarily unsheltered with less clearly defined rights, blazing a trail toward a future of fines and incarceration that will perpetuate their time in poverty.

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[1] Edwards v. California, 314 U.S. 160, 177 (1941).

[2] Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965)).

[3] *See* *id.* at 171.

[4] *Id.* at 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

[5] 144 S. Ct. 2202 (2024).

[6] *See* *id.* at 2224, 2226.

[7] *See* *id.* at 2240-41 (Sotomayor, J., dissenting).

[8] *See* *id.* at 2220 (majority opinion).

Over 600,000 people experience homelessness every day in the United States,[9] approximately 600 of whom lived in Grants Pass, Oregon in 2019.[10] Facing this national crisis, Grants Pass grappled with how to allay the concerns of its townspeople.[11] Grants Pass responded with three ordinances. The "anti-sleeping ordinance"[12] bars sleeping **[*376]** "on public sidewalks, streets, or alleyways at any time."[13] The "anticamping ordinance"[14] prohibits "[c]amping" on "any sidewalk, street, alley, . . . or any other publicly-owned property," with a "[c]ampsite" defined as "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed . . . for the purpose of maintaining a temporary place to live," including a vehicle.[15] And the third applies the camping prohibition to Grants Pass's parks.[16] Fines for violating the anti-camping laws start at $ 295.[17] If a person receives two citations in a year, they can be barred from city parks for thirty days.[18] A third violation would be criminal trespass,[19] punishable by a $ 1,250 fine and jail time capped at thirty days.[20]

In 2018, three longtime Grants Pass residents filed a class action suit against the town.[21] Two plaintiffs, Debra Blake and John Logan, faced housing instability and had been intermittently unsheltered for a decade; the third, Gloria Johnson, lived full-time in her van.[22] Together, they sued to enjoin the ordinances on behalf of themselves and a class of involuntarily unsheltered people in Grants Pass, challenging their constitutionality under the Eighth Amendment.[23]

Two key cases informed their challenge. Just one month earlier, in *Martin v. City of Boise*,[24] the Ninth Circuit held that a similar pair of anti-camping ordinances were cruel and unusual under the Eighth Amendment when enforced

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[9] TANYA DE SOUSA ET AL., U.S. DEP'T OF HOUS. & URB. DEV., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 2 (2023).

[10] Blake v. City of Grants Pass, No. 18-cv-01823, 2019 WL 3717800, at *3 (D. Or. Aug. 7, 2019).

[11] *See* Blake v. City of Grants Pass, No. 18-cv-01823, 2020 WL 4209227, at *2-3 (D. Or. July 22, 2020).

[12] **Johnson v. City of Grants Pass, 72 F.4th 868, 876 (9th Cir. 2023)**.

[13] GRANTS PASS, OR., MUN. CODE § 5.61.020(A) (2024).

[14] ***Johnson*, 72 F.4th at 876**.

[15] GRANTS PASS, OR., MUN. CODE §§ 5.61.010(B), 5.61.030.

[16] *Id.* § 6.46.090 (2019).

[17] ***Johnson*, 72 F.4th at 876**.

[18] GRANTS PASS, OR., MUN. CODE § 6.46.350.

[19] *See* ***Johnson*, 72 F.4th at 876**.

[20] OR. REV. STAT. §§ 161.615(3), 161.635(1)(c), 164.245 (2023).

[21] Blake v. City of Grants Pass, No. 18-cv-01823, 2019 WL 3717800, at *1 (D. Or. Aug. 7, 2019); *see* Jeremiah Hayden, Grants Pass v. Johnson*: Here's What Led to Key Homelessness Case Before High Court*, OPB (Apr. 4, 2024, 9:00 AM), https://www.opb.org/article/2024/04/04/grants-pass-oregon-homeless-parks-josephine-county-public-spaces-camping-shelter [https://perma.cc/Z7P7-M9EG].

[22] *Blake*, 2019 WL 3717800, at *1.

[23] *Id.* at *1-2, 4.

[24] 902 F.3d 1031 (9th Cir. 2018), *amended and superseded on denial of reh'g*, **920 F.3d 584 (9th Cir. 2019)**; *see* Hayden, *supra* note 21.

against people with no access to alternative shelter.[25] In turn, *Martin* rested on *Robinson v. California*,[26] a 1962 case finding that the Eighth Amendment precludes the criminalization of someone based on their status (in this case an addiction to narcotics).[27] Applying *Robinson*,[28] the *Martin* court held that sleeping outdoors was an "unavoidable consequence" of one's status as involuntarily homeless **[*377]** and nullified the anti-camping laws.[29] Given the factual similarity, the *Grants Pass* plaintiffs argued these precedents made the city's ordinances unconstitutional.[30] A class was certified.[31]

The district court granted summary judgment in part and an injunction for the plaintiffs.[32] Finding *Martin* to be controlling, the court deemed the ordinances cruel and unusual based on the unavailability of shelter beds.[33] It also held that the ordinances violated the Excessive Fines Clause of the Eighth Amendment: The fees were both punitive and "grossly disproportionate to the gravity of the offense"[34] of "engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry."[35] The subsequent injunction struck down parts of the laws while preserving significant regulatory powers for the city.[36] Time and place restrictions, the court ordered, could be set by Grants Pass for when involuntarily unsheltered people "may use their belongings to keep warm and dry"; tents could be banned so long as sleeping material wasn't; and the city could "enforce laws that actually further public health and safety," like those related to violence, harassment, or public urination or defecation.[37] The city appealed.[38]

The Ninth Circuit largely affirmed.[39] Hewing closely to *Martin*, the appellate court agreed with the district court that criminalizing involuntarily unhoused people violated the Eighth Amendment.[40] It opted not to reach "the potential excessiveness of the fines."[41] The court then remanded the case to the district court, requiring it "to craft a narrower

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[25] *Martin*, 902 F.3d at 1035.

[26] 370 U.S. 660 (1962).

[27] *Id.* at 666.

[28] *See, e.g., Martin*, 902 F.3d at 1046-47 (invoking *Robinson* as the "seminal case," *id.* at 1047, for considering the Cruel and Unusual Punishment Clause of the Eighth Amendment).

[29] *Id.* at 1048 (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006)).

[30] Plaintiffs' Motion for Summary Judgment at 26, Blake v. City of Grants Pass, No. 18-cv-01823 (D. Or. July 22, 2020).

[31] Blake v. City of Grants Pass, No. 18-cv-01823, 2019 WL 3717800, at *1 (D. Or. Aug. 7, 2019).

[32] *Blake*, 2020 WL 4209227, at *17.

[33] *Id.* at *8.

[34] *Id.* at *11 (quoting United States v. Bajakajian, 524 U.S. 321, 324, 334 (1998)).

[35] *Id.*

[36] *See id.* at *15.

[37] *Id.*

[38] Johnson v. City of Grants Pass, 50 F.4th 787, 793 (9th Cir. 2022).

[39] *Id.* at 798.

[40] *Id.*; **Johnson v. City of Grants Pass, 72 F.4th 868, 891, 894 (9th Cir. 2023)**.

injunction recognizing Plaintiffs' limited right to protection against the elements, as well as limitations when a shelter bed is available."[42] In the interim, Ms. Blake passed away; Ms. Johnson and Mr. Logan became the sole class representatives.[43] A contentious bid for rehearing **[*378]** en banc failed.[44] The city then appealed to the Supreme Court, which granted certiorari.[45]

The Court reversed and remanded.[46] Writing for the majority, Justice Gorsuch first opined at length about the homelessness crisis facing America and the bind that local governments and states face,[47] citing various amicus briefs written by local officials to suggest the heft of the problem and the need to regulate this behavior through criminal laws.[48] Having explored the practical benefits of upholding the ordinances, the Court then turned to the doctrine, specifically *Robinson*.[49] After a lengthy musing that *Robinson* was a "surpris[ing]" interpretation that the Eighth Amendment could not sustain, the Court determined *Robinson* irrelevant to the ordinances at hand.[50] The Court argued that while *Robinson* barred statutes that criminalized status, the Grants Pass ordinances forbade certain *actions*, like "occupy[ing] a campsite."[51] Thus, *Robinson* was inapposite.[52]

The Court then declined to apply *Robinson* to cases where enforcement *effectively* criminalizes status,[53] arguing that *Powell v. Texas*[54] prevented such a reading. In *Powell*, the plurality held that *Robinson* did not bar a law criminalizing public intoxication; it was the act of being drunk in public, not the "mere status" of addiction to alcohol, that was the law's target, even if, as plaintiffs argued, the law effectively criminalized status.[55] For the majority, the

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[41] *Johnson*, 50 F.4th at 798.

[42] *Id.* at 812.

[43] *See* Tracy Rosenthal, *The New Sundown Towns*, NEW REPUBLIC (Apr. 30, 2024), https://newrepublic.com/article/181036/new-sundown-towns-grants-pass-v-johnson [https://perma.cc/D3M9-2FU7].

[44] ***Johnson*, 72 F.4th at 874**.

[45] **City of Grants Pass v. Johnson, 144 S. Ct. 679 (2024)** (mem.).

[46] *Grants Pass*, 144 S. Ct. at 2226.

[47] *See id.* at 2207-11.

[48] *See id.* at 2214 n.3.

[49] *See id.* at 2217.

[50] *Id.* at 2217-18.

[51] *Id.* at 2218 (alteration in original) (quoting GRANTS PASS, OR., MUN. CODE § 5.61.030 (2024)).

[52] *Id.* The person violating the ordinance, the Court suggested, could be an involuntarily unsheltered person, or a backpacker, or a "student who abandon[ed] his dorm room to camp out in protest on the lawn of a municipal building," thus relying on actions rather than conduct. *Id.* But this in part muddied the question at hand, which was about the ordinance being enforced specifically against a class of people involuntarily unhoused, not students or backpackers.

[53] *See id.* at 2219-20.

[54] 392 U.S. 514 (1968). There was considerable dispute as to whether the *Powell* plurality's decision was indeed controlling. *Compare* Brief of Amicus Curiae District Attorney of Sacramento County in Support of Petitioner City of Grants Pass at 6-10, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175), *with* Brief of Amici Curiae Center for Constitutional Rights, Transgender Law Center, National Center for Lesbian Rights, Make the Road New York et al. in Support of Respondents at 29-30, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175).

same was true for the Grants Pass ordinances.[56] To the Court, this also made good policy sense: Such an application of *Robinson* would chill a "'productive' democratic 'dialogue'" of local government innovations addressing homelessness and **[*379]** instead place this power in the hands of unelected judges.[57] *Martin* illustrated this issue; the Court expressed concerns with the calculations that judges would need to make to determine who are the "involuntarily" unhoused.[58] Preferring the "experimentation" of municipal laws to the Ninth Circuit's "*Martin* experiment," and the unwieldy "back-of-the-envelope arithmetic" it required, the Court overruled *Martin*.[59]

Rejecting *Robinson* as irrelevant and *Martin* as wrongly decided, the Court found no reason to deem the Grants Pass ordinances cruel or unusual.[60] Under a historical analysis of the punishment imposed, the ordinances were neither cruel, because they did not "superad[d]" "terror, pain, or disgrace,"[61] nor unusual because fines are quite common punishments.[62] At last, the Court offered that if people are truly involuntarily in violation of these ordinances, there are still "legion protections our society affords a presumptively free individual from a criminal conviction," citing post-enforcement protections such as necessity, "[i]nsanity, diminished-capacity, and duress defenses."[63] Still, other avenues such as "limits on state prosecutorial power, promising fair notice of the laws and equal treatment under them, forbidding selective prosecutions, and much more"[64] might provide opportunities to curtail these ordinances just not the Eighth Amendment as construed by the majority.

Justice Thomas concurred.[65] In a terse aside, he praised the Court's focus in the Eighth Amendment inquiry on sentence alone.[66] He then argued that *Robinson*'s substantive limits, and other similar Eighth Amendment cases, injected too much "[m]odern public opinion" into the analysis.[67] The enforcement of these laws against the involuntarily unhoused via civil fines and exclusion orders was not suitable for Eighth Amendment analysis in the first place, in his view.[68]

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[55] *Grants Pass*, 144 S. Ct. at 2219 (quoting *Powell*, 392 U.S. at 532).

[56] *See id.* at 2220.

[57] *See id.* at 2221, 2223 (quoting *Powell*, 392 U.S. at 537).

[58] *Id.* at 2221 (quoting **Johnson v. City of Grants Pass, 72 F.4th 868, 877 (9th Cir. 2023)**).

[59] *See id.* at 2221-22 (quoting *Powell*, 392 U.S. at 537).

[60] *See id.* at 2216.

[61] *Id.* (alteration in original) (quoting Bucklew v. Precythe, 139 S. Ct. 1112, 1123 (2019)).

[62] *Id.* (citing Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 480 (1867); 4 WILLIAM BLACKSTONE, COMMENTARIES *370; Timbs v. Indiana, 139 S. Ct. 682, 695 (2019) (Thomas, J., concurring in the judgment)).

[63] *Id.* at 2220.

[64] *Id.*

[65] *Id.* at 2226 (Thomas, J., concurring).

[66] *See id.* at 2226-27. Since at least *Hudson v. McMillian*, 503 U.S. 1 (1992), Justice Thomas has long expressed his opinion that the Eighth Amendment should not be used to regulate use-offorce or conditions-of-confinement cases, but only the sentence imposed by the government. *Id.* at 18-20 (Thomas, J., dissenting).

[67] *Grants Pass*, 144 S. Ct. at 2227 (Thomas, J., concurring).

[68] *Id.*

Justice Sotomayor, along with Justice Kagan and Justice Jackson, dissented.[69] *Robinson*, the dissent argued, cleanly resolved this case.[70] **[*380]** Contra the majority's policy concerns, the dissent viewed the *Martin*-based injunctions issued by the Ninth Circuit as narrow; cities could utilize their police powers and regulate encampments while respecting *Robinson*'s grant.[71] But the majority complicated the issue; it overstated the difficulties of applying *Martin*, "spar[red] with a [*Powell*] strawman,"[72] and painted local governments as monolithically in favor of these ordinances all of which wrongly pointed them away from *Robinson*.[73] To mitigate the impact on advocates for the involuntarily homeless, the dissent listed potentially viable pre-enforcement challenges that remained untouched, including challenges under the Excessive Fines Clause (as argued below), due process, vagueness, and banishment.[74] The dissent closed by rebuking the Court for "abdicat[ing]" "its role in safeguarding constitutional liberties for the most vulnerable among us" by subjecting involuntarily unsheltered people in Grants Pass to enforcement under these ordinances.[75]

While expressing sympathy for the plight facing the involuntarily unhoused, the Court's reasoning, both practically and doctrinally, papered over the great harm its decision imposes. After dismissing *Robinson* as inapplicable and finding that the Eighth Amendment doesn't prohibit these laws, the majority intimated that the unhoused shouldn't be overly worried by this holding, for they still have access to a plethora of post-enforcement defenses.[76] But this framing contains two interconnected flaws. First, it ignores critical differences between pre-enforcement challenges and post-enforcement defenses, specifically that the latter are worse for the involuntarily unhoused. Second, by focusing on the post-enforcement remedies still available, the Court created a policy cover that allowed it to dodge doctrinal questions critical to the pre-enforcement options that do remain for the unhoused. At base, while the Court might express sympathy for the unsheltered, its approach seems to leave this population without effective recourse before or after anti-camping laws are enforced.

The Court's missteps began with a neglect of the differences between post-enforcement defenses substantive criminal law defenses raised in the context of a prosecution and pre-enforcement challenges constitutional challenges to a statute. Specifically, it ignored that post-enforcement defenses are often much worse for vulnerable populations; this is because much of the harm is in the enforcement itself.[77] Laws like Grants Pass's force people who have no other **[*381]** available shelter into more dangerous environments, such as highways and train tracks or abandoned, hazardous industrial lots, that raise the risk of physical harm.[78] Fines and fees further impoverish

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[69] *Id.* at 2228 (Sotomayor, J., dissenting).

[70] *Id.* at 2237.

[71] *See id.* at 2238-39.

[72] *See id.* at 2239.

[73] *See id.* at 2238-41.

[74] *Id.* at 2242-43.

[75] *Id.* at 2244.

[76] *See id.* at 2220 (majority opinion).

[77] *See, e.g.*, FORREST STUART, DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW 133 (2016).

[78] Brief of 57 Social Scientists with Published Research on Homelessness as Amici Curiae in Support of Respondents at 8, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) [hereinafter Brief of 57 Social Scientists] (citing Jamie Suki Chang et al., *Harms of Encampment Abatements on the Health of Unhoused People*, SSM-QUALITATIVE RSCH. HEALTH, Dec. 2022, at 1, 4; C.J. Gabbe et al., *Reducing Heat Risk for People Experiencing Unsheltered Homelessness*, INT'L J. DISASTER RISK REDUCTION, Oct. 2023, at 1, 5-7; Erin Goodling, *Intersecting Hazards, Intersectional Identities: A Baseline Critical Environmental Justice*

involuntarily unhoused people, which may perversely impede their ability to exit homelessness.[79] Receiving a criminal charge also affects their ability to secure employment, housing, social services, and bail.[80] And to even vindicate these post-enforcement rights, unhoused individuals need to secure legal representation, which itself poses logistical obstacles.[81]

Post-enforcement defenses also have a low likelihood of success. The Court portended that "legion protections" would be available to involuntarily unsheltered people.[82] But even its prior language betrayed this promise, with the Court acknowledging that only "some . . . jurisdictions" have necessity defenses to "certain criminal charges."[83] Yet, necessity isn't generally extended to these cases; in fact, a number of states reject the defense in cases of economic need, such as homelessness.[84] **[*382]** Even more troubling is the defense's success rate: "The history of the necessity defense in American criminal law indicates that whatever the scenario . . . and whatever the context . . . the law's response has generally been the same: *no*."[85] The same rings true for other defenses listed. The insanity defense is notoriously fact intensive, difficult to prove, and rarely successful.[86] So too for duress: "[T]he defense traditionally requires the offender's coercive circumstance to be the unlawful threats of another person," making it a difficult fit for the unhoused.[87] There's also a paucity of cases representing involuntarily unsheltered people that

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Analysis of US Homelessness, 3 ENV'T & PLAN. E 833, 833 (2020); Shawn Flanigan & Megan Welsh, *Unmet Needs of Individuals Experiencing Homelessness near San Diego Waterways: The Roles of Displacement and Overburdened Service Systems*, 43 J. HEALTH & HUM. SERVS. ADMIN. 105, 109 (2020); Chris Herring, *The New Logics of Homeless Seclusion: Homeless Encampments in America's West Coast Cities*, 13 CITY & CMTY. 285, 291 (2014)).

[79] *See* Hannah Kieschnick, Note, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1575 (2018); *cf.* KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 104 (2010).

[80] *See* Brief of 57 Social Scientists, *supra* note 78, at 14-15 (citing, inter alia, Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 88 (2012)); Meghan Sacks et al., *Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes*, 40 AM. J. CRIM. JUST. 661, 666 (2015) (noting that those "who had prior criminal records were more likely to be denied bail or have a high amount of bail set").

[81] *See* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 184 (2018) ("[P]rocedural hassles are the rituals by which the people brought into misdemeanorland are initiated into a denigrated status vis-á-vis the coercive powers of the police and courts."); Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1245-47 (2003) (discussing the difficulties with providing legal representation for the unhoused).

[82] *Grants Pass*, 144 S. Ct. at 2220.

[83] *Id.*

[84] *See* ANDREW MANUEL CRESPO & JOHN RAPPAPORT, CRIMINAL LAW AND THE AMERICAN PENAL SYSTEM (forthcoming 2025) (manuscript at 412-29) (on file with the Harvard Law School Library) (comparing the rare grant of necessity for involuntary homelessness in *Commonwealth v. Magadini*, 52 N.E.3d 1041 (Mass. 2016), to more frequent denials); *see also id.* at 832 n.14 ("[R]eported cases in which a defendant charged with theft or trespass was acquitted by virtue of the necessity defense are virtually nonexistent, at least in modern times." (alteration in original) (quoting Stuart P. Green, *Looting, Law, and Lawlessness*, 81 TUL. L. REV. 1129, 1154 (2007))); *id.* ("[S]everal courts [] have held that, as a categorical matter, the doctrine is not available when the evil the defendant seeks to avoid is caused by economic forces alone." (quoting Eduardo Moisés Peòalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1173 (2007))).

[85] Michele Cotton, *The Necessity Defense and the Moral Limits of Law*, 18 NEW CRIM. L. REV. 35, 45 (2015).

[86] *See* Louis Kachulis, Note, *Insane in the Mens Rea: Why Insanity Defense Reform Is Long Overdue*, 26 S.CAL. REV. L.&SOC. JUST. 245, 252 (2017) ("Ultimately, a successful insanity defense is raised in approximately one in every 20,000 criminal cases.").

could act as guideposts for applying these defenses.[88] Finally, even if a post-enforcement defense were viable, the costs of representation, acquiring records, and effective expert testimony may be prohibitive for the unhoused and impoverished.[89] In short: The Court's implication that involuntarily unsheltered people's rights would be well protected post-enforcement is far-fetched.

Given these difficulties, understanding the landscape of remaining pre-enforcement challenges outside of the now-inapplicable Eighth Amendment is all the more important for the involuntarily unhoused. Yet, the majority's focus on post-enforcement defenses makes it easier for the Court to evade commenting clearly on the other pre-enforcement challenges discussed in its opinion. Two specific pre-enforcement challenges discussed by the Court Eighth Amendment cruel and unusual punishment and due process claims exemplify the Court's haziness on the path forward.

In many regards, the Eighth Amendment's cruel and unusual punishment test going forward is uncertain. Traditionally, the clause has had three potential modes of analysis: (1) whether the sentence imposed by the government itself is cruel and unusual; (2) a proportionality **[*383]** analysis whether a punishment is "grossly disproportionate to the severity of the crime"; and (3) *Robinson*'s substantive limit on criminal laws.[90] The majority's diatribe against *Robinson*, while dictum, sent a strong signal that the third mode of analysis could be on the way out.[91] But there is also a second, more subtle point of uncertainty: The majority reviewed the Grants Pass ordinances under only the first mode of analysis, but not the second.[92] This is especially notable given that the Court was presented with an argument, both in Ms. Johnson's brief and by amici, that the Grants Pass ordinances were cruel and unusual because they were grossly disproportionate.[93] While the Court may not have intended this ambiguity, its decision creates uncertainty for the proportionality analysis going forward. To be sure, the Court didn't go as far as to embrace Justice Thomas's view that the Eighth Amendment should extend only to sentencing.[94] Nor

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[87] David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487, 503 n.109 (1994); *see id.* at 501 ("Traditional duress . . . contains certain limitations that would bar a typical homeless duress claim.").

[88] *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) ("Because the arrested plaintiffs are released without further official process . . . plaintiffs never have the opportunity to raise such valid defenses as necessity or duress.").

[89] *See, e.g.*, Nicholas Miller, *You Have the Right to an Attorney, But It Might Cost You*, THE NATION (Oct. 30, 2023), https://www.thenation.com/article/society/public-defender-fees [https://perma.cc/2GXA-WCL8] (explaining that there are approximately forty states where defendants can be charged varying fees by the state for representation by a public defender); Eve Brensike Primus, *Defense Counsel and Public Defense, in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 121 (Erik Luna ed., 2017) (noting the difficulties public defender offices have in securing funding for experts and investigation tools).

[90] *See* *Grants Pass*, 144 S. Ct. at 2233 (Sotomayor, J., dissenting) (quoting Ingraham v. Wright, 430 U.S. 651, 667 (1977)).

[91] *See* *id.* at 2217-18 (majority opinion); *id.* at 2234 (Sotomayor, J., dissenting). Of course, while it is dictum, there's a strong chance that other courts will use the Court's language as heralding the end of *Robinson* and will put *Robinson* to bed. *See generally* David Klein & Neal Devins, *Dicta*, *Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54WM. &MARY L. REV. 2021 (2013) (exploring the "holding-dictum distinction," *e.g., id.* at 2022, and noting that lower courts often treat Supreme Court dicta with due deference and sometimes use them to justify their decisions, even in anticipation of the higher court potentially overruling a precedent).

[92] *See* *Grants Pass*, 144 S. Ct. at 2215-17.

[93] *See* Brief for Respondents at 26-34, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175). *See generally* Brief of the American Civil Liberties Union and Nineteen Affiliates as Amici Curiae in Support of Respondents, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) (arguing the Eighth Amendment's proportionality jurisprudence demonstrates that Grants Pass's ordinances were unconstitutional).

[94] *See* *Grants Pass*, 144 S. Ct. at 2227 (Thomas, J., concurring).

has the Court shown an appetite for undoing the proportionality analysis as of late.[95] But as the dissent implicitly acknowledged, the majority's lack of a clear statement on the Court's "firmly rooted" proportionality analysis leaves room for interpretation.[96] For lower courts that share Justice Thomas's perspective, the majority's lack of clarity on proportionality analysis leaves it in a potentially subvertable state.

The majority was similarly unclear about pre-enforcement due process challenges to anti-camping laws post *Grants Pass*. Admittedly, a due process question was not before the Court;[97] but it curiously spoke at length about the potential success of this claim. Both the majority and dissent signaled that *Robinson*'s understanding, that "[e]ven one **[*384]** day in prison would be . . . cruel and unusual" punishment, fits more comfortably under the Fifth and Fourteenth Amendment's Due Process Clauses.[98] Indeed, the majority noted that the original argument in the appellant's briefing in *Robinson* was a state due process claim.[99] In keeping with the history-and-tradition analysis popular with the Roberts Court,[100] both the majority and the dissent made inroads into the lack of historical roots for *Robinson*'s ordinance, implying that the same could be true for the Grants Pass ordinances.[101] But the Court stopped short of vindicating the right altogether.[102] This begs the question of why the Court engaged in the analysis at all. If the Court sees itself as "safeguarding constitutional liberties for the most vulnerable,"[103] it's unclear why the Court identified a threat to a constitutional liberty and yet chose to leave safeguarding it for another day.

Despite the Court gesturing to all the rights involuntarily unsheltered people may have be it pre-enforcement rights to shield, or post-enforcement rights to remedy it neglected to interrogate the practical and doctrinal remains of

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[95] In 2010, the Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), recognized that "proportionality is central to the Eighth Amendment." *Id.* at 59.

[96] The dissent interpreted the majority's silence on proportionality as not "cast[ing] doubt" on the principle. *Grants Pass*, 144 S. Ct. at 2234 (Sotomayor, J., dissenting) (citing Estelle v. Gamble, 429 U.S. 97, 103 & n.7 (1976)).

[97] It was, however, a part of the argument before the trial court. *See* Third Amended Complaint at 17, Blake v. City of Grants Pass, No. 18-cv-01823 (D. Or. July 22, 2020). While the due process argument featured in the respondent's brief to the Court, it was not brought directly before the Court. *See* Brief for Respondents, *supra* note 93, at 24.

[98] *See* *Grants Pass*, 144 S. Ct. at 2217 (alteration in original) (quoting Robinson v. California, 370 U.S. 660, 667 (1962)); *id.* at 2242 (Sotomayor, J., dissenting) ("The majority notes that due process arguments in *Robinson* 'may have made some sense.' 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*).'" (alteration in original) (citation omitted) (quoting *id.* at 2217 (majority opinion)).

[99] *Id.* at 2217 (majority opinion). It "remains a mystery why the Court chose the Eighth Amendment as the vehicle to address the problem posed in *Robinson*" instead of the Due Process Clause before it. Martin R. Gardner, *Rethinking* Robinson v. California *in the Wake of* Jones v. Los Angeles*: Avoiding the "Demise of the Criminal Law" by Attending to "Punishment*," 98 J. CRIM. L. & CRIMINOLOGY 429, 461 (2008).

[100] *See, e.g.*, Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s* *Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 110 (2023).

[101] *See* *Grants Pass*, 144 S. Ct. at 2217; *id.* at 2242 (Sotomayor, J., dissenting).

[102] Certainly, there is a strong and reasonable abuse-of-power concern to keep in mind should the Court sua sponte reach a decision on a constitutional analysis not squarely before it. *See generally* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002) (critiquing sua sponte decisions by appellate courts for violating principles of due process, interrupting the adversarial process, and aggrandizing and abusing judicial power).

[103] *Grants Pass*, 144 S. Ct. at 2244 (Sotomayor, J., dissenting).

these rights. Advocates may still have some pre-enforcement tools at their disposal to try and keep harm at bay.[104] But for now, the Court's decision leaves this vulnerable population exposed to real harm today.

[104] The dissent pointed to Eighth Amendment excessive fines, Fourth Amendment search and seizure, void-for-vagueness, and banishment claims as potential paths forward. *Id.* at 2241-43. Advocates have also pursued First Amendment claims against panhandling laws, which have been used against the unhoused. *See* Press Release, ACLU ofMass., ACLU of Massachusetts Challenges Unconstitutional Ban on "Panhandling" (Mar. 28, 2019), https://www.aclum.org/en/press-releases/aclu-massachusetts-challenges-unconstitutional-ban-panhandling [https://perma.cc/9HES-QF3Z].

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Comment
Douglas Steinman

THE DEATH OF DECENCY: HOW A CASE ABOUT HOMELESSNESS NEARLY UPENDED SEVENTY YEARS OF EIGHTH AMENDMENT JURISPRUDENCE [a1]

ABSTRACT

For nearly sixty-six years, the evolving standards of decency doctrine, first articulated in *Trop v. Dulles*, has undergirded nearly all Eighth Amendment jurisprudence. In essence, the Supreme Court has taken as foundational the assumptions that the Eighth Amendment prohibits more than was just prohibited at the time of the ratification of the Constitution and that societally accepted punishments are expected to evolve in one direction: toward increasingly kind and humane punishments. Though the Court has applied this doctrine repeatedly over the years to carve out categorical limitations on the application of certain punishments to certain classes of people, the doctrine has increasingly come under fire, with the recent Supreme Court case, *City of Grants Pass v. Johnson*, representing the most direct challenge yet to the doctrine. This Comment seeks to explain how Eighth Amendment jurisprudence reached this point and to give a lay of the land as it currently stands, walking through the history of the evolving standards of decency doctrine and examining, in particular, the challenge to the doctrine presented in *Grants Pass*.

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*675 I. INTRODUCTION

Nearly sixty-six years ago, the United States Supreme Court, while opining on the nature and purpose of the often mercurial Eighth Amendment, adopted a formulation that has undergirded nearly all Eighth Amendment jurisprudence since. On its face, the Eighth Amendment is as short as it is vague: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel

and unusual punishments inflicted." [1] Indeed, drafters and early courts struggled to define exactly what the Amendment meant by "cruel and unusual," cycling through various analytical methods. [2]

However, in the seminal *Trop v. Dulles*, the Court definitively concluded that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [3] Thus, the Court incorporated into Eighth Amendment doctrine several foundational concepts. First, it announced that the Eighth Amendment is not a static document (i.e., it prohibits more than was just prohibited at the time of the ratification of the Constitution). [4] Second, it assumed that societally accepted punishments are expected to evolve in one direction: toward increasingly kind and humane punishments. [5] Guided by these principles, later dubbed "the evolving standards of decency" doctrine based on the *Trop* language, the Court applied a test based on an evolving sense of societal decency, declaring unconstitutional such practices as the death penalty for the intellectually disabled, [6] the death penalty for juveniles, [7] the death penalty for the insane, [8] the death penalty for rapists of adult victims, [9] the death penalty for rapists of child victims, [10] and certain life without parole sentences for juveniles, [11] among others.

***676** In 2024, however, a new battle emerged over the evolving standards of decency, centered around a case concerning, of all things, municipal ordinances addressing homelessness. [12] The Supreme Court granted certiorari to this Ninth Circuit case, [13] in which twenty states filed an amicus brief specifically asking the Court to revisit *Trop* and do away with the evolving standards of decency. [14] Thus, this case represented a legal crossroads, a moment in time at which many in the nation were contemplating the very real possibility that the Supreme Court may call into question nearly seventy years of Eighth Amendment jurisprudence.

This Comment seeks to explain how Eighth Amendment jurisprudence got to this point and to give a lay of the land as it currently stands. First, this Comment will walk through some of the history of the Eighth Amendment and the evolving standards of decency, describing the development of the doctrine up to *Trop*, the general structure of the evolving standards of decency test that the Court developed, and several illustrations of the test's application to juveniles and the intellectually disabled. Second, this Comment will address some recent challenges to the evolving standards of decency doctrine by noting the Supreme Court's recent retreat from the doctrine and by addressing scholarly critique of the doctrine, most notably from Professor John F. Stinneford. Finally, this Comment will walk through the most recent challenge to the doctrine by detailing the background to *City of Grants Pass v. Johnson*, commenting on the amicus brief submitted by twenty states, discussing the Court's ultimate decision, and submitting for consideration the Author's own predictions and suggestions for the evolving standards of decency moving forward.

II. THE HISTORY OF THE EIGHTH AMENDMENT AND THE EVOLVING STANDARDS OF DECENCY

A. The Development of the Constitutional Provision

The concepts now enshrined in the Eighth Amendment of the Constitution did not themselves originate in the drafting process of the Constitution, but rather date back to prior colonial and English legal traditions. In particular, the text of the Amendment ***677** was imported from the 1776 Virginia Declaration of Rights, which had itself taken the language from Article 10 of the English Bill of Rights. [15] Though there is disagreement among experts about what exactly the prohibition against cruel and unusual punishments in Article 10 was intended to prohibit, most experts agree that it was meant to include both torturous punishments and punishments excessive in light of common practices. [16]

However, the drafters of the 1776 Virginia Declaration of Rights and the United States Constitution may not have had the same understanding of the meaning of this language. In particular, the drafters of the Virginia Declaration of Rights may have understood the prohibition on cruel and unusual punishments as placing a ban only on barbarous methods of punishment. [17] Furthermore, during the drafting of the Constitution, several representatives, including Patrick Henry and George Mason of Virginia, commented that this Amendment would prohibit torture and other "cruel and barbarous punishment [s]." [18] However, the Amendment was adopted after minimal debate, and even representatives present expressed confusion over what exactly would be prohibited by the Amendment, with one representative criticizing the ""indefinite[ness]" of the language. [19]

Thus, the drafting history of the Amendment provides some context to the drafters' original intent, but ultimately the task fell on the courts to interpret and develop the vague language of the Eighth Amendment.

B. The Early Jurisprudence of the Eighth Amendment

The early jurisprudence of the Eighth Amendment was characterized by courts struggling to create a consistent and workable test for what the prohibition against cruel and unusual punishment actually forbade. For example, the Supreme Court in *Pervear v. Massachusetts* was asked to analyze whether the imposition of a $50 fine and a sentence of three months of hard labor ***678** for the crime of selling liquor without a license was prohibited by the Eighth Amendment. [20] Though the Court's decision rested in part on the fact that the Eighth Amendment had not yet been incorporated against the states, the Court also determined that this sentence could not be considered cruel and unusual because it was not an unusual punishment, being the standard mode adopted in most states at the time. [21] The *Pervear* Court's analysis is indicative of an early tendency of courts to separately analyze the cruelty and unusuality of a particular punishment, in this case determining that a punishment could not be forbidden under the Eighth Amendment if it was not *both* cruel and unusual. [22]

However, just twelve years later, the Supreme Court addressed an Eighth Amendment challenge in *Wilkerson v. Utah* by seemingly suggesting that a punishment that was sufficiently cruel would be prohibited under the Eighth Amendment, regardless of its unusuality. [23] Thus, these two cases exemplify a struggle within the Court to determine whether punishments forbidden under the Eighth Amendment had to be *both* cruel and unusual or alternatively excessively cruel or excessively unusual.

Still, the same threads from the discussion around the Amendment's drafting persisted. On one hand, the *Wilkerson* Court remained certain that the Eighth Amendment, at the very least, proscribed torture, saying that "it is safe to affirm that punishments of torture ... are forbidden by that amendment to the Constitution." [24] On the other hand, the Court also acknowledged that it was inherently difficult to trace the exact contours of what was prohibited and allowed by the vague Eighth Amendment text, saying "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." [25] The vagueness surrounding Eighth Amendment doctrine might be traced to the simple fact that the Court heard relatively few cases on the matter until the Amendment was incorporated against the states. [26] Thus, the question of how to best interpret the Cruel and Unusual Punishments Clause remained open.

***679** *C. The Establishment of the Evolving Standards of Decency Doctrine*

It was in the early twentieth century that the modern form of Eighth Amendment doctrine began to take shape, starting with the Supreme Court's decision in *Weems v. United States*. [27] There, the Court addressed a statute that imposed the *cadena temporal* punishment upon a man convicted of falsifying an official document. [28] The punishment of *cadena temporal*, however, was essentially a long sentence of hard labor, as the Court explained: "those sentenced to *cadena temporal* and *cadena perpetua* shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution." [29] The Court concluded that such a sentence violated the Eighth Amendment through its grossly disproportionate nature. [30] Interestingly, the Court also based its opinion, in part, upon an understanding that the Constitution and this Clause, in particular, must be interpreted in an evolving manner:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. [31]

This language is of deep significance because it shows that the *Weems* Court had incorporated into Eighth Amendment doctrine the idea that what is considered cruel and unusual is not a static concept, defined merely by a certain understanding at a certain historical time. Rather, the Court understood that "the content of the prohibition changes as societal conceptions of what constitutes cruel and unusual change over time." [32]

***680** The Court further expounded on and cemented this idea in its seminal 1958 case, *Trop v. Dulles*. [33] There, the petitioner, a former U.S. Army private, was dishonorably discharged during wartime when he deserted his post in Casablanca for less than twenty-four hours. [34] Eight years later, while applying for a passport, he discovered that his U.S. citizenship had been revoked under the Nationality Act of 1940 as a result of his dishonorable discharge for desertion during wartime. [35] The *Trop* Court found that this punishment was cruel and unusual under the Eighth Amendment because, though it did not involve "physical mistreatment" or ""primitive torture," it instead involved a "punishment more primitive than torture": "the total destruction of the individual's status in organized society" and the loss of "the right to have rights." [36]

In its analysis, the Court delved into the English and American history of the Cruel and Unusual Punishments Clause, concluding that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." [37] Furthermore, building on *Weems*, the Court stated that the "words of the Amendment are not precise" and "their scope is not static." [38] To summarize, the Court concluded that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [39] This is the concept that has since become foundational to the modern understanding of the Eighth Amendment, giving a name to the doctrine [40] and being repeatedly quoted by later Courts. [41]

D. Defining the Evolving Standards of Decency Doctrine

As time has gone on, courts have taken this core tenant of "evolving standards of decency" and formulated a coherent doctrine. As William W. Berry III noted, three core principles underlie the Eighth Amendment's evolving standards of decency doctrine: (1) the evolving nature of societal standards; (2) the use ***681** of "differentness" as a basis for giving heightened constitutional scrutiny to some cases; and (3) a test which brings together both objective and subjective elements. [42]

First, as noted above, this doctrine takes as foundational the fact that the legal prohibition on what is cruel and unusual shifts over time with societal opinions, meaning some punishments once considered acceptable may become, over time, unconstitutional. [43] Baked into this idea is the hope, and perhaps expectation, that we live in a society that is increasingly becoming kinder, more humane, and less tolerant of the barbarous punishments of the past. [44] Furthermore, it is noteworthy that, in the midst of long-time debates surrounding the originalist and living theories of constitutional interpretation, Eighth Amendment doctrine is unique in that it has *explicitly* adopted a living constitution approach. [45]

Second, the evolving standards of decency doctrine have categorically set aside certain types of cases as "different" enough to warrant increased scrutiny. In particular, the Court has considered death sentences and juvenile life without parole sentences to be fundamentally "different," applying to these cases the evolving standards of decency doctrine and carving out categorical limitations for certain types of offenders, offenses, and sentences. [46] In other cases that are not deemed "different," the Court has instead applied a narrower disproportionality test, asking on a case-by-case basis whether an individual's punishment was grossly disproportionate to their conduct. [47]

Third, when applying the evolving standards of decency test to consider a categorical limitation on a particular punishment practice, the Court conducts a two-part analysis, examining both subjective and objective indicia. For the ""objective" part of the analysis, courts examine whether a national consensus has formed against the practice, looking to "legislative enactments and state practice" on the matter. [48] This often involves simply counting the state legislatures ***682** that have banned the practice in question, [49] but can also involve looking at international practices [50] and the actual frequency with which juries impose the sentence in question. [51] Often, if a supermajority of states has prohibited a practice, the Court will consider that practice to be in violation of the Eighth Amendment, intuitively understanding the practice to now be "unusual" within the meaning of the Amendment. [52] However, the Court's analysis has not always been so straightforward or consistent, sometimes

emphasizing the legislative trend over the absolute number of states, [53] and other times emphasizing the absolute number of states over the trend. [54]

The second part of the Court's two-part analysis involves looking at ""subjective" indicia, which, in short, means "the Court turns to its own independent judgment to determine whether, in the Court's view, the practice comports with the existing standards of decency." [55] This involves, in part, an analysis of whether the categorical practice in question satisfies a general purpose of punishment (such as retribution or deterrence), with the understanding that a punishment that is unsupported by a valid purpose is cruel. [56] Interestingly, the Court has always reached the same result in both the subjective and objective steps of its analysis. [57]

***683** Taken together, one effect of the evolving standards of decency doctrine is its so-called "one-way ratchet." [58] Essentially, once the Court determines that a particular practice is unconstitutional, jurisdictions cannot reenact that practice, meaning the national consensus measured by the Court's objective indicia can no longer point towards allowing that practice. [59] During oral arguments for *Atkins v. Virginia*, one Justice summarized this phenomenon:

> Well, Mr. Ellis, logically it has to be a one-way ratchet. Logically it has to be because a consensus cannot be manifested. States cannot constitutionally pass any laws allowing the execution of the mentally retarded once--once we agree with you that it's unconstitutional. That is the end of it. We will never be able to go back because there will never be any legislation that can reflect a changed consensus. [60]

In essence, the one-way ratchet is a clear embodiment of the principle the evolving standards of decency doctrine has ingrained into its core: the only way in which societal punishments may evolve is towards increasingly humane punishments. [61] With this doctrine and test in hand, the Court has gone on to declare unconstitutional such practices as the death penalty for the intellectually disabled, [62] the death penalty for juveniles, [63] the death penalty for the insane, [64] the death penalty for rapists of adult victims, [65] the death penalty for rapists of child victims, [66] and certain life without parole sentences for juveniles, [67] among others.

E. The Intellectually Disabled and Juveniles: Two Examples of The Evolving Standards of Decency in Action

Before addressing the current challenges facing this doctrine, it is illustrative to see how the evolving standards of decency doctrine has been applied in two specific contexts: the death penalty for intellectually disabled people and for juveniles.

***684** In the 1989 case *Penry v. Lynaugh*, the Supreme Court addressed the question of whether the Eighth Amendment categorically prohibited the execution of intellectually disabled individuals. [68] Looking to objective indicia of a national consensus on the matter, the Court noted that only two states (Georgia and Maryland) had enacted statutes banning the execution of intellectually disabled persons. [69] Taking these two states together with the fourteen that banned the death penalty outright, the Court found insufficient evidence of a national consensus, holding that the Eighth Amendment thus did not categorically preclude the execution of intellectually disabled persons. [70]

However, the Court returned to this same question thirteen years later in *Atkins v. Virginia*. [71] Noting that the national situation had changed much since *Penry* was decided, the Court listed sixteen states that had passed statutes banning the execution of the intellectually disabled in the intervening time, in addition to three states whose legislatures had taken steps to pass similar bills. [72] The Court even observed other indicia of a growing national trend, pointing out, for example, that many of these statutes passed in their respective state legislatures with overwhelming support. [73] Therefore, "[c]onstruing and applying the Eighth Amendment in the light of our 'evolving standards of decency,'" the Court held that the practice of executing intellectually disabled individuals had become repugnant to the Eighth Amendment. [74]

A nearly identical story played out in the context of juveniles. In 1989, the Supreme Court in *Stanford v. Kentucky* found that there existed "neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any

person who murders at 16 or 17 years of age," ruling that such punishments did not violate the Eighth Amendment. [75] The Court reached this determination by, again, counting the states that allowed and disallowed this practice, finding that "[o]f the 37 States whose laws ***685** permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders." [76] This, in the Court's understanding, did not establish a national consensus. [77] But sixteen years later, in *Roper v. Simmons*, the Court reached the opposite conclusion, holding that the practice was now cruel and unusual. [78] In its analysis of the objective indicia, the Court found that thirty states had entirely banned the juvenile death penalty and the rate of juvenile death sentences had dwindled post-*Stanford* even in the states that still allowed the practice. [79]

Interestingly, neither the *Roper* nor the *Atkins* Courts overruled the prior cases or explicitly criticized the earlier Courts' reasoning. [80] This is indicative of the unique nature of the evolving standards of decency doctrine, which allows constitutional rules and prohibitions to shift and evolve as the national consensus changes.

III. EMERGING CHALLENGES TO THE EVOLVING STANDARDS OF DECENCY DOCTRINE

In recent years, the evolving standards of decency doctrine has stood on increasingly precarious ground. With the doctrine under fire from both scholars [81] and sitting judges, [82] many of its supporters fear its days are now numbered. [83] The current Supreme Court has more and more ignored the evolving standards of decency doctrine in its Eighth Amendment cases, [84] and it has, in other areas of law, ***686** embraced an originalist constitutional methodology that seems inherently opposed to the evolving doctrine of *Trop*. [85] The position of the doctrine has grown so dire that it appeared to truly be in peril when the Supreme Court granted certiorari [86] on a case in which the attorneys general of twenty states explicitly asked the Court to overrule *Trop* and do away with the evolving standards of decency doctrine. [87] In the following sections, this Comment will briefly detail the recent trend of Supreme Court Eighth Amendment jurisprudence before diving into the details of the specific challenges posed to the evolving standards of decency doctrine by Professor John F. Stinneford, a scholar cited by the Supreme Court for his interpretation of the original meaning of the Cruel and Unusual Punishments Clause. [88]

A. The Supreme Court's Retreat from the Evolving Standards of Decency

The recent Eighth Amendment jurisprudence of the Court shows that the Court is increasingly setting aside the established evolving standards of decency doctrine and looking to other tests to determine the constitutionality of punishment practices. For example, in the Court's 2008 case, *Baze v. Rees*, Chief Justice Roberts's opinion for the Court makes no mention of the "evolving standards" language of *Trop*. [89] In this case, the Court was asked to address the constitutionality of the lethal injection protocol, with the petitioners arguing that the protocol was cruel and unusual because of "the risk that the protocol's terms might not be properly followed, resulting in significant pain." [90] Though Chief Justice Roberts paid lip service to the state-counting of the ***687** evolving standards of decency test, [91] he did not otherwise follow the established test, instead arguing that because the Court had already determined that execution was constitutional there must therefore be some constitutional method of execution. [92] Such a line of reasoning is inherently in conflict with the core principle of the evolving standards of decency doctrine, namely that punishment once deemed constitutionally acceptable (like capital punishment) may later become abhorrent to the Eighth Amendment as national standards of decency shift over time.

The Court took this line of reasoning further in its 2019 decision in *Bucklew v. Precythe*. [93] Here, instead of applying any semblance of the evolving standards of decency test, the Court based its opinion on an originalist evaluation of the "original and historical understanding of the Eighth Amendment." [94] While the Court did not explicitly overrule any of its evolving standards of decency jurisprudence, its focus on how "a reader at the time of the Eighth Amendment's adoption would have understood" the words ""cruel and unusual" led it to conclude that the focus of the Amendment was prohibiting "forms of punishment that intensified the sentence of death with a (cruel) 'superadd[ition]' of 'terror, pain, or disgrace.'" [95]

This rule represents not only a clear separation from the jurisprudence of *Trop* but also opens the door for states to return to previously discarded methods of execution. Like *Baze*, *Bucklew* involved a constitutional challenge to the lethal injection protocol as a method of execution, and here the Court held that a prisoner challenging a method of execution must identify

"a feasible and readily implemented alternative method of execution." [96] Besides the inherent cruelty of forcing a prisoner to pick and argue for the least painful method of his own execution, this rule raises a number of questions. What if, as Blume and Van Winkle note, "a state says it is unable to find drugs for lethal injection and can only perform executions by electrocution or firing squad?" [97] Moreover, if, as the Court held, there *must* be a feasible and constitutional method of execution, a state may cite the difficulty ***688** of obtaining lethal injection drugs as a reason for reverting to a previously discarded method of execution, just as South Carolina did in 2021 when the legislature reintroduced the firing squad and electric chair as methods of execution. [98] The problem, of course, is that these methods were discarded because of their propensity to go horribly wrong and result in gruesome, prolonged deaths. [99]

While this line of Supreme Court cases is concerning to proponents of the evolving standards of decency doctrine, *Baze* and *Bucklew* do not as of now spell doom for the doctrine. For one, as previously noted, neither case explicitly overruled the evolving standards of decency doctrine, with the *Bucklew* Court making no mention at all of "evolving" standards. [100] Additionally, both of these cases concerned methods of execution and thus could be reasonably distinguished from the categorical exemption line of cases. [101] As the *Bucklew* Court itself noted, the Court had not yet invalidated a state's chosen method of execution as cruel and unusual, so perhaps the Court is content to apply a different standard to method cases than to other sorts of Eighth Amendment cases. [102]

Finally, even the Court's largely originalist opinion leaves the door open for some movement in the understanding of "cruel and unusual." In its discussion of the original meaning of "cruel and unusual," the Court quoted a John F. Stinneford article in which he observed that "Americans in the late 18th and early 19th centuries described as 'unusual' governmental actions that had 'fall[en] completely out of usage for a long period of time.'" [103] Though Stinneford favored doing away with the evolving standards of decency, calling the doctrine "irredeemably vague," he also argued in the same article that reclaiming such an original meaning of "unusual" would mean still recognizing that certain punishments indeed can fall out of common use and thus become "unusual" in the Eighth Amendment sense. [104] Indeed, while the Court's opinion in *Bucklew* seems to imply that the Eighth Amendment primarily disallows *methods* of punishment that superadd terror, pain, or disgrace, Stinneford sees in the original ***689** meaning of "unusual" a broader application. [105] For example, he notes both that "the Cruel and Unusual Punishments Clause almost certainly *was* intended to cover grossly disproportionate punishments" and that some categorical death penalty exceptions may apply when the death penalty has fallen out of usage for a certain crime, such as for burglary or counterfeiting. [106] Based on this understanding that the Court accepted, petitioners facing execution under previously discarded methods (such as the firing squads and electric chairs South Carolina recently reallowed) may be able to argue that these methods have become "unusual" under the Eighth Amendment. [107]

Therefore, while the Court's recent focus on originalism in the Eighth Amendment context endangers the evolving standards of decency doctrine as it has been historically applied, supporters of the doctrine may find hope that the doctrine has not yet been overruled. Furthermore, the Court's reliance on Stinneford's work provides a compelling originalist basis for arguing that the Cruel and Unusual Punishments Clause prohibits more than simply the methods of punishment disallowed at the drafting of the Constitution. Still, there are other dimensions to the evolving standards of decency doctrine, and thus it is worth taking the time to explore the exact nature of the most recent challenges to the doctrine.

B. Arguments Against the Evolving Standards of Decency

As shown above, the evolving standards of decency doctrine faces significant criticism from originalists on and off the Court, but we have not fully examined the reasons *why*. In his critique of the doctrine, Stinneford identified two problems he saw with the evolving standards of decency. [108]

The first problem Stinneford saw with the test was the so-called "Who decides?" problem. [109] To Stinneford, the evolving standards of decency doctrine is plagued by vagueness concerning the sources by which the Court purports to determine whether societal standards have evolved: "[Did] the Supreme Court [set] itself up as the ultimate arbiter of the nation's evolving moral standards? Or is the Court ***690** required to look to external sources for these standards? If so, what sources? And what criteria should the Court use in examining them?" [110] Originalists like Stinneford argue that vague judgment criteria open the door to manipulation by judges hoping to insert their own moral preferences in place of the law. [111]

Though these arguments seem reasonable in theory, the "Who decides?" problem does not seem to have been a problem for the Court in practice. Though the Court's evolving standards of decency test requires consideration of subjective indicia, [112] the Court, when evaluating categories of punishment, has never deviated from the results of its objective indicia. [113] This, at the very least, suggests that the Court's own preferences do not singularly control in these cases. Furthermore, Stinneford viewed the *Stanford* and *Roper* cases as exemplifying "the inherent instability and manipulability" of the evolving standards of decency, arguing that the societal attitudes had changed only incrementally in the interim, meaning the defining distinction between the cases was actually "an increased assertiveness of judicial will." [114] However, Stinneford undersold the difference in objective indicia between the cases. Though, as Stinneford noted, only five states had banned the death penalty for juveniles in the interim between *Stanford* and *Roper*, the total number of states disallowing the practice, including states entirely banning the death penalty, shifted from twenty-five to thirty. [115] Furthermore, the Court bolstered this state counting with further objective analysis, specifically noting that, even in the twenty states allowing the practice, only six had actually executed a juvenile in the interim, and only three had done so in the ten years prior to *Roper*. [116] ***691** In cases like *Roper*, the Court's reliance on multiple types of objective indicia counteracts the originalist criticism that this analysis is mere cover for the imposition of personal moral preference, especially when, as here, all the objective indicia point in the same direction and prove to control the ultimate disposition of the case.

Stinneford's second criticism of the evolving standards of decency was that it makes the rights of criminal defendants dependent upon public opinion. [117] Other individual rights enshrined in the Bill of Rights tend to be designed to protect unpopular individuals and minority groups from the whims of the popular majority, while the established Eighth Amendment doctrine seems to only come into play after public opinion has already turned in favor of such defendants. [118] Additionally, while the evolving standards of decency presuppose that society will grow increasingly kind and humane, sometimes society may actually move in the opposite direction. [119]

While these points are not without merit, it is unclear whether Stinneford's suggested approach would actually be more protective of the rights of criminal defendants. Namely, while Stinneford's Eighth Amendment test that "directs courts' attention toward new punishments and asks them to decide whether such punishments are consonant with our longstanding traditions" may protect criminal defendants from cruel innovations of punishment, it does little, it seems, to counter the *readoption* of historically accepted punishments previously discarded. [120] Though Stinneford argues that a punishment should not be granted a presumption of reasonableness if it has "fallen out of usage for a significant period of time," he does little to clarify how much time would need to pass for a punishment to lose this ***692** presumption of reasonability. [121] For all the claims that the evolving standards of decency test puts forth a vague standard, it utilizes, at the very least, accepted objective indicia on which a court can rely to determine whether a punishment has become repugnant to the Constitution. Furthermore, even if society is not actually growing more decent in relation to criminal punishment, the evolving standards of decency test in practice forces such development of society through the "one-way ratchet": once society "evolves" to the point that a particular punishment is repugnant to the Eighth Amendment, the punishment will never again be able to gain popular acceptance despite any societal devolution on the matter. Logically, then, each new case that declares a particular punishment unconstitutional permanently restricts the breadth of possible punishments. On the other hand, Stinneford sees his test as potentially broadening the scope of current punishments that could be subjected to Eighth Amendment scrutiny, opening the door to evaluate punishment innovations, such as the modern practice of imprisonment. [122] Perhaps, then, one's preference between these tests turns on what evil one considers more significant: the readoption of older and crueler punishments or the invention of new ones.

Regardless, the Court's reliance upon Stinneford's definition of ""unusual" in *Bucklew* paints a bleak picture for the evolving standards of decency test. While a Stinneford-style Eighth Amendment test would avoid the full-originalism of an Eighth Amendment doctrine that only forbade punishments considered cruel in 1790, such a test would also sideline or even dismantle the one-way ratchet, the hallmark of the current doctrine. Still, the evolving standards of decency survived *Bucklew*, and it has only recently come back into the sights of the nation's highest Court.

IV. *CITY OF GRANTS PASS V. JOHNSON*: THE LAST STAND OF THE EVOLVING STANDARDS OF DECENCY?

On January 12, 2024, the U.S. Supreme Court granted certiorari to a Ninth Circuit case, *City of Grants Pass v. Johnson*. [123] This case, which involved the application of the Eighth Amendment to a city ordinance affecting homelessness, [124] represented the most significant challenge yet to the evolving standards of decency ***693** doctrine, because the attorneys general of twenty states directly asked the Court to reconsider the doctrine. [125] Though the Court ultimately did not use this opportunity to reconsider *Trop*, [126] this case is worth analyzing because it provides a clear picture of the current reality of the doctrine and because *Grants Pass* will not be the last threat to the *Trop* doctrine. [127] This section will briefly walk through the background of this case, the arguments of the parties in regard to the evolving standards of decency doctrine in particular, and the ultimate disposition of the case before the Supreme Court. Finally, this Comment offers an opinion regarding the current state of the doctrine and a potential path forward for the Court.

A. A Brief Overview of Grants Pass *and the Recent Eighth Amendment Jurisprudence of the Ninth Circuit*

In 2019, the Ninth Circuit issued a ruling in *Martin v. City of Boise* concluding 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." [128] In reaching this conclusion, the court of appeals relied upon a thread of Eighth Amendment jurisprudence that has thus far gone unaddressed in this Comment: a sequence of decisions declaring, in essence, that ***694** any law that criminalizes a person's status (as opposed to their conduct) runs afoul of the Eighth Amendment. [129]

The significance of this decision extended beyond the confines of Eighth Amendment jurisprudence in the courtroom, as this decision came to play a pivotal role in shaping the policies in regard to homelessness, particularly on the West Coast. [130] Many cities scrambled to modify their ordinances to comply with (or find loopholes in) *Martin*, and though no other circuit court adopted this position explicitly, dozens of other courts, including the Fourth Circuit, cited *Martin*. [131]

However, *Martin* did not, on its face, seem particularly relevant to the evolving standards of decency doctrine. The court in *Martin* never cited *Trop*, nor did they ever rely upon the "evolving standards" language. [132]

About six weeks after the *Martin* decision, homeless individuals filed a class action suit against the City of Grants Pass on behalf of a class of persons who are "involuntarily homeless," arguing that certain city ordinances were unconstitutional. [133] Consistent with *Martin*, the Ninth Circuit, on appeal, held that the Eighth Amendment makes it "unconstitutional to [punish] simply sleeping *somewhere* in public if one has nowhere else to do so." [134]

***695** However, unlike *Martin*, several of the *Grants Pass* opinions touched on the evolving standards of decency doctrine. Notably, Senior Judge O'Scannlain authored an opinion arguing that the *Grants Pass* ruling conflicted with the "text, history, and tradition of the Eighth Amendment." [135] Specifically, he stated that "Constitutional text, history, and tradition make plain that the [Cruel and Unusual Punishments] Clause was directed to *modes of punishment*" and not to limit the sort of acts the legislature could prohibit, "certainly not before conviction." [136] By implication, it seems that Judge O'Scannlain considered the proper constitutional grounds for decision-making to be the "text, history, and tradition of the Constitution," citing decisions such as *Dobbs* and *Bruen* to bolster this assertion. [137]

In contrast, Judges Silver and Gould, in a joint statement regarding the denial of rehearing, asserted that, as it currently stands, the Supreme Court's accepted method for assessing Eighth Amendment claims is not "text, history, and tradition" but rather "the evolving standards of decency that mark the progress of a maturing society." [138]

Thus, though *Grants Pass* was not a direct outgrowth of the evolving standards of decency test that has been applied to categorical death penalty exceptions, it had at its core the very conflict threatening the established doctrine: a conflict between "text, history, and tradition" on one hand and "the evolving standards of decency that mark the progress of a maturing society" on the other. [139]

*696 *B. The Idaho Amicus Brief*

The most full-throated attack upon the evolving standards of decency in the *Grants Pass* saga came in the form of an amicus brief filed on behalf of Idaho, Montana, and eighteen other states. The states rooted their interest in a rather dramatic portrayal of the homelessness epidemic, painting an almost dystopian image of the state of cities affected by *Martin*. [140] With this context, the states argued that the *Martin* and *Grants Pass* decisions should be overturned on the basis that (1) criminal law and land-use policy are state issues; and (2) the decisions are an "[o]utgrowth" of the illogical, atextual, and ahistorical evolving standards of decency doctrine. [141] The latter argument is most relevant to this Comment.

The central concern of the states regarding the evolving standards of decency doctrine was that "it engrafted increase, instability, and subjectivity to the text." [142] This concern mirrored Stinneford's "Who decides?" problem, for both Stinneford and the states argued in essence that "[c]ourts should not be tasked with judging the changing winds of society's evolving morals." [143] The solution, according to the states, was "to ground the Eighth Amendment's meaning in text, structure, and history." [144]

Next, the states took aim at *Trop* itself, arguing that the "evolving standards" language, in that case, was dicta resulting from brief and insufficient textual analysis. [145] Though the evolution of societal decency was not, on its face, the foundational piece of the *Trop* decision, it would be incorrect to characterize it as mere dicta. Instead, the *Trop* Court delved into the meaning of the Eighth Amendment, distinguishing core concepts ("the dignity of man") from the meaning of the Amendment that shifts with time ("the evolving standards of decency that mark the progress of a maturing society"). [146] Additionally, it is worth noting that a deep ***697** dive into the text, structure, and history of the Eighth Amendment may not be as clear and conclusive as the states seem to think it would be, given that the drafters themselves were not clear on what is prohibited. [147]

The states also criticized the evolving standards of decency as a "lawless standard" by which the Court disregards precedent, bolstering this claim by appealing to the examples of the *Penry-Atkins* and *Stanford-Roper* sagas. [148] In regards to both sagas, the states argued that the Court ""overturned" a prior decision based on a sketchy determination of national consensus via the banning of the practice by "18 of 38 states with the death penalty." [149] Again, this argument mirrored that of Stinneford, and thus the same rebuttals previously stated apply here as well. [150] The Court's decisions in those cases were firmly rooted in the analysis of objective factors indicating a national trend, and the subjective analysis of the Justices tracked with the objective analysis, as it always has. [151]

As an alternative, the states suggested that the proper test for Eighth Amendment analysis should be "the text, structure, and history" of the Amendment, noting that this is the "'standard' approach the Court applies when interpreting constitutional text." [152] Under this understanding, the states argued that "[t]he Amendment is 'directed to *modes of punishment*'--it does not limit 'the substantive authority of legislatures to prohibit "acts" like those at issue here, and "certainly not before conviction."D'D'' [153] The states also acknowledged that the Eighth Amendment must not prohibit *only* those punishments considered cruel and unusual at ratification. [154] However, the states offered little explanation on how exactly a judge might determine that a punishment allowable at ratification has become repugnant to the Constitution, offering ***698** only vague musings on the "being" and ""becoming" attributes of the Constitution. [155]

Therein lies the crucial problem with a "text, structure, and history" approach to the Eighth Amendment. No originalist legal minds, not Stinneford, not Justice Scalia, and not the states in this amicus brief, want the Eighth Amendment to only proscribe punishments considered cruel and unusual at the founding. [156] However, each failed to offer any clear system for determining when a previously acceptable practice becomes cruel and unusual. For all its flaws, the evolving standards of decency doctrine provides such a system, complete with precedential guidance concerning how courts should weigh the objective indicia. If we lose the evolving standards of decency doctrine, we lose its one-way ratchet protecting us from previously discarded punishments, meaning a "text, structure, and history" approach might signal the return of punishments currently held to be cruel and unusual. [157] More fundamentally, however, an evolving understanding of the Eighth Amendment opens the door to applications like that of the Ninth Circuit in *Martin* and *Grants Pass*, which seek to curtail novel forms of governmental cruelty that do not fall neatly into the category of "modes of punishment."

C. The Supreme Court's Decision

Ultimately, the Supreme Court overturned the Ninth Circuit decision and held that *Robinson* and the Eighth Amendment do not support such a ruling. [158] Notably, the Court did not take aim at the evolving standards of decency or *Trop*, instead rooting their analysis in *Robinson*, a case which held, in essence, that the Eighth Amendment prohibits the criminalization of the status of narcotics addiction. [159] To some extent, this was an unsurprising result, given that *Martin* was rooted in *Robinson* and *Powell*, ***699** never mentioning *Trop*. [160] Still, the Court's relative silence on the debate between originalism and evolving standards is noteworthy. Given the Court's recent jurisprudence in other legal areas, the Court could easily have taken the opportunity to adopt some form of the states' suggested "text, structure, and history" analysis. [161] Instead, the Court made only passing remarks concerning the text, history, and original public meaning of the Eighth Amendment. [162]

However, the concurring and dissenting opinions from Justices Thomas and Sotomayor each mentioned *Trop*. [163] Justice Thomas, perhaps unsurprisingly, stated that *Robinson* was wrongly decided and that its "holding conflicts with the plain text and history of the Cruel and Unusual Punishments Clause." [164] The error of *Robinson*, in Justice Thomas's view, is the same error that pervades "[m]uch of the Court's other Eighth Amendment precedents," namely that "[m]odern public opinion is not an appropriate metric for interpreting the Cruel and Unusual Punishments Clause." [165] Quoting *Trop* by noting that the Court has often "set out to enforce 'evolving standards of decency,'" Justice Thomas concluded that the Court should instead "adhere to the Cruel and Unusual Punishments Clause's fixed meaning." [166]

On the other hand, Justice Sotomayor positively referenced *Trop* twice in her dissenting opinion, though never directly addressing the evolving standards of decency. [167] Even acknowledging *Trop* positively is a significant statement, especially in light of Justice Thomas's direct criticism.

Ultimately, however, the effect of *Grants Pass* upon the evolving standards of decency is unclear. Justice Thomas would certainly jump at the opportunity to establish a more fixed meaning for the Cruel and Unusual Punishments Clause, but that is unsurprising coming from a constitutional originalist like him. [168] That said, supporters have some reasons for hope. The Court is evidently ***700** reluctant to wade into the debate directly, given the Court's silence on the matter despite the states' amicus brief. Still, this is certainly not the last challenge facing the evolving standards of decency doctrine.

D. Where We Go from Here

What, then, do we make of *Grants Pass*? What did this saga reveal about the state of the evolving standards of decency? First, it is significant that opponents of the doctrine, both on and off the Court, have grown more vocal in their opposition. [169] By calling for an adherence to a fixed meaning of the Cruel and Unusual Punishments Clause and criticizing the Court's usage of "evolving standards" as essentially judicial activism, Justice Thomas has clearly indicated his eagerness to overrule *Trop*. [170] Opponents outside the Court are growing in boldness as well, as clearly shown by the directness of the states' amicus brief. [171]

Second, *Grants Pass* may also show that the Court as a whole may not be as eager as Justice Thomas to reconsider *Trop*. The Court could very easily have laid the foundation for a "text, structure, and history" analysis of the Eighth Amendment while ignoring *Trop* in its majority opinion, but Justice Gorsuch made only passing references to the Amendment's text, history, and original meaning. [172] Instead, the Court focused its analysis on precedent, namely *Powell*, to which the Court found the present case comparable. [173] Though the current Court is certainly open to upending decades of precedent, [174] the Court's relative respect for Eighth Amendment precedent in this case may be telling, given the fact that losing the doctrine would ***701** upset seventy years' worth of cases and call into question the categorical death penalty exceptions for juveniles, the intellectually disabled, and rapists. [175] Losing the evolving standards of decency would, at least in the short term, inject incredible uncertainty and instability into the world of criminal law.

Regardless, *Grants Pass* is only the beginning. Indeed, as the case was only tangentially related to the evolving standards of decency doctrine, it is truly only a preview rather than the first battle. Other petitioners are raising the same request to overrule *Trop*, and the Court would likely be forced to address these requests in one way or another when and if they have reason to

review a death sentence, allowable under a 2023 Florida statute, for sexual battery of a minor. [176] Even if the Court did not want to overrule *Trop* explicitly, it could very easily diminish and dismiss as dicta the "evolving standards of decency that mark the progress of a maturing society" language, just as the states did in their amicus brief. [177]

Perhaps, however, there is an alternative, a middle path for a Court unwilling to either fully adopt or fully discard *Trop*. According to Stinneford, a test based on history and "longstanding traditions" is better equipped to address cruel innovations in punishment than the evolving standards of decency. [178] Additionally, while many agree that the Eighth Amendment must prohibit more than only those punishments considered cruel and unusual at the ratification of the Constitution, [179] no current formulation of a ""text, structure, and history" test gives enough ***702** clarity to direct judges as to when to declare unconstitutional a previously accepted punishment. [180]

Thus, perhaps both approaches would benefit from a merging of the two. Under this combined framework, novel punishments are compared with longstanding history and tradition while accepted punishments challenged in court can undergo an evolving standards of decency analysis to determine whether a national consensus is developing against them. Put another way, a punishment would be deemed cruel and unusual if it is crueler than historically accepted punishments or if a national consensus has developed against it. Such an approach may have several benefits. First, it retains the one-way ratchet of the evolving standards of decency, preventing erosion of any societal progress towards increased decency. Second, it avoids the potential pitfall of the evolving standards of decency, namely the assumption that society is necessarily always becoming more decent. Thus, a text, structure, and history analysis may be preferable in situations when society has not yet developed an adequate consensus to protect an unpopular criminal class. Finally, such a compromise test is perfectly compatible with the existing evolving standards of decency test, as it merely clarifies the nature of the subjective portion of the test. This means that, within the framework of the evolving standards of decency, the objective portion would still involve the traditional analysis of objective indicia (e.g., state counting), while the subjective portion of the test would involve a comparison of the punishments with longstanding history and tradition, with failure of either prong individually sufficient to declare a practice unconstitutional and satisfaction of both needed to uphold the practice.

Such an approach, by combining the two tests, would, naturally, be more restrictive on state punishment practices, as it would provide two separate avenues for declaring a particular punishment unconstitutional. For example, a punishment would be unconstitutional if it could be shown to be crueler than historically accepted punishments, even if a national consensus had not yet developed against it. Thus, this test provides potential plaintiffs with multiple angles of attack against a particular punishment practice. Because the fundamental concept underlying Eighth Amendment determinations is, as the Court has repeatedly stated, the human dignity of the person punished, ***703** perhaps states *should* have to work harder to craft humane punishments that do not run afoul of either prong of this combined test. [181] Even if our nation does not naturally grow more decent, perhaps a more robust test such as this could, in some way, force an evolution of decency in the realm of punishment.

Ultimately, it is doubtful whether this current Court would look favorably enough on the evolving standards of decency doctrine to try and salvage it, but it is, for many reasons already stated, worth salvaging.

V. CONCLUSION

As the *Trop* Court stated, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." [182] Thus, the evolving standards of decency doctrine, far from being simply a legal oddity confined to courtrooms, touches on some of the core philosophical and moral foundations that underly our legal and social structures. Is dignity a static concept, defined once and for all time? Or do we aspire to be a people defined by an ever-expanding concept of dignity, rooted in the aspiration that future generations will be kinder than past ones? These are some of the questions essential to the current Eighth Amendment debate. Though we likely stand on a precipice before the unknown, with much established Eighth Amendment jurisprudence potentially on the chopping block in the years to come, there are still reasons to believe the Court need not and would not entirely do away with all the fruit of the evolving standards of decency doctrine.

Footnotes

a1 University of Houston Law Center, J.D. Candidate, 2025, and Senior Articles Editor of Board 62 of the *Houston Law Review*; B.A. Mathematics and Theoretical Economics, Trinity University, 2016. This Comment received the 2024 Heim, Payne & Chorush Award for Best Overall Paper. I am enormously thankful for the help of Jeff Newberry, Supervising Attorney at Texas Innocence Network and Director of the Death Penalty and Criminal Appeals Clinic at the University of Houston Law Center. He was instrumental in suggesting the topic for this Comment and providing me with a multitude of articles, briefs, and cases that became the foundation of this Comment. Truly, this Comment would not exist without him or without the excellent editorial efforts of Boards 62 and 63 of the *Houston Law Review*.

1 U.S. CONST. amend. VIII.

2 *See infra* Sections II.A-II.B.

3 Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

4 *Id*. at 100-01.

5 Meghan J. Ryan, *Framing Individualized Sentencing for Politics and the Constitution*, 58 AM. CRIM. L. REV. 1747, 1763 (2021) [hereinafter Ryan, *Framing*] ("The Eighth Amendment is generally considered a 'one-way ratchet,' meaning that once a punishment reaches the status of unconstitutionality under the Eighth Amendment, there is no going back on that determination." (footnotes omitted)).

6 Atkins v. Virginia, 536 U.S. 304, 321 (2002).

7 Roper v. Simmons, 543 U.S. 551, 578 (2005).

8 Ford v. Wainwright, 477 U.S. 399, 409-10 (1986).

9 Coker v. Georgia, 433 U.S. 584, 597-600 (1977).

10 Kennedy v. Louisiana, 554 U.S. 407, 446-47, *modified on denial of reh'g*, 554 U.S. 945 (2008).

11 Graham v. Florida, 560 U.S. 48, 82 (2010).

12 Johnson v. City of Grants Pass, 72 F.4th 868, 875-76 (9th Cir. 2023), *rev'd*, 144 S. Ct. 2202 (2024).

13 City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2208 (2024).

14 Brief of Idaho et al. as Amici Curiae Supporting Petitioner at 15-29, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 133820.

15 Meghan J. Ryan, *The Death of the Evolving Standards of Decency*, 51 FLA. ST. U. L. REV. 255, 261 (2024) [hereinafter Ryan, *Decency*].

16 *Id*. at 262-63.

17 *Id*. at 263; Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 578-80 (2010) [hereinafter Ryan, *Both Cruel and Unusual*] (noting that the drafters may have misunderstood the English background to Article 10, thus placing the focus of the cruel and unusual prohibition on barbarous methods of punishment rather than on barbarous methods *and* punishments excessive in light of common practice, both of which were encompassed by Article 10).

18 Ryan, *Decency*, *supra* note 15, at 261 (alteration in original).

19 *Id*. (alteration in original).

20 Pervear v. Massachusetts, 72 U.S. 475, 476-77 (1866).

21 *Id*. at 479-80.

22 Ryan, *Decency*, *supra* note 15, at 263.

23 Wilkerson v. Utah, 99 U.S. 130, 136-37 (1878) (noting that the Eighth Amendment prohibits torture and all other punishments "in the same line of unnecessary cruelty").

24 *Id*. at 136.

25 *Id*. at 135-36.

26 Ryan, *Decency*, *supra* note 15, at 265.

27 Weems v. United States, 217 U.S. 349 (1910).

28 *Id*. at 357-58, 381.

29 *Id*. at 364.

30 *See id*. at 381.

31 *Id*. at 373.

32 William W. Berry III, *The Evolving Standards, as Applied*, 74 FLA. L. REV. 775, 785 (2022).

33 Trop v. Dulles, 356 U.S. 86 (1958).

34 *Id*. at 88 (plurality opinion).

35 *Id*.

36 *Id*. at 101-02.

37 *Id*. at 99-100.

38 *Id*. at 100-01.

39 *Id*. at 101.

40 Berry, *supra* note 32, at 785.

41 *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 668 n.36 (1977); Stanford v. Kentucky, 492 U.S. 361, 369 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002); Atkins v. Virginia, 536 U.S. 304, 311-12 (2002); Roper v. Simmons, 543 U.S. 551, 561 (2005); Kennedy v. Louisiana, 554 U.S. 407, 419, *modified on denial of reh'g*, 554 U.S. 945 (2008).

42 Berry, *supra* note 32, at 783.

43 *Id*. at 784-85.

44 John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1751 (2008).

45 Ryan, *Decency*, *supra* note 15, at 275.

46 Berry, *supra* note 32, at 786-87.

47 *Id*. at 787-88.

48 Ryan, *Decency*, *supra* note 15, at 268; Berry, *supra* note 32, at 788; Roper v. Simmons, 543 U.S. 551, 563 (2005).

49 *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 593-96 (1977); *Roper*, 543 U.S. at 563-67; Kennedy v. Louisiana, 554 U.S. 407, 422-26, *modified on denial of reh'g*, 554 U.S. 945 (2008).

50 *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); *Roper*, 543 U.S. at 575-78 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.").

51 *See, e.g.*, *Coker*, 433 U.S. at 596-97 (noting that it is "important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried"); Graham v. Florida, 560 U.S. 48, 62-66 (2010) ("Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent.").

52 Berry, *supra* note 32, at 788.

53 *See, e.g.*, *Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

54 *See, e.g.*, *Kennedy*, 554 U.S. at 432-33 (noting that, though six states had recently enacted statutes allowing the death penalty for child rape, this was not a significant trend in light of the total number of states that did not allow the death sentence for child rape).

55 Ryan, *Decency*, *supra* note 15, at 268.

56 Berry, *supra* note 32, at 789.

57 *Id*.

58 Ryan, *Decency*, *supra* note 15, at 276.

59 *Id*.

60 Transcript of Oral Argument at 10, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452).

61 Ryan, *Decency*, *supra* note 15, at 276.

62 *Atkins*, 536 U.S. at 321.

63 Roper v. Simmons, 543 U.S. 551, 578 (2005).

64 Ford v. Wainwright, 477 U.S. 399, 409-10 (1986).

65 Coker v. Georgia, 433 U.S. 584, 597-600 (1977).

66 Kennedy v. Louisiana, 554 U.S. 407, 446-47, *modified on denial of reh'g*, 554 U.S. 945 (2008).

67 Graham v. Florida, 560 U.S. 48, 82 (2010).

68 Penry v. Lynaugh, 492 U.S. 302, 307 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

69 *Id*. at 333-34.

70 *Id*. at 334, 340.

71 Atkins v. Virginia, 536 U.S. 304, 306-07 (2002).

72 *Id*. at 314-15.

73 *Id*. at 315-16.

74 *Id*. at 321.

75 Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

76 *Id*. at 370.

77 *Id*. at 370-71.

78 Roper v. Simmons, 543 U.S. 551, 578 (2005).

79 *Id*. at 564-66.

80 Ryan, *Decency*, *supra* note 15, at 271.

81 *See, e.g.*, Stinneford, *supra* note 44, at 1825 (suggesting the Court recognize the "original meaning" of unusual and asking the Court "to compare challenged punishments with the longstanding principles and precedents of the common law, rather than shifting and nebulous notions of 'societal consensus' and contemporary 'standards of decency'"); Benjamin White, Comment, *Pain Speaks for Itself: Divorcing the Eighth Amendment from the Spirit of the Moment*, 58 SAN DIEGO L. REV. 453, 490-91 (2021) (proposing overruling *Trop* and the evolving standards of decency doctrine).

82 *See, e.g.*, Nate Raymond, *US Appeals Judge Urges New Standard on "Cruel and Unusual' Punishment*, REUTERS (Oct. 19, 2023, 3:55 AM), https://www.reuters.com/legal/government/us-appeals-judge-urges-new-standard-cruel-unusual-punishment-2023-10-18/ [https://perma.cc/CVD9-VB84].

83 *See, e.g.*, John H. Blume & Brendan van Winkle, *Execution Methods and Evolving Standards of Decency*, LITIG., Spring 2022, at 29, 33; Ryan, *Decency*, *supra* note 15, at 298-304 ("The Eighth Amendment is on the road to extinction."); *see also* Berry, *supra* note 32, at 799 (noting that the changing composition of the Court makes it unlikely for there to be any new categorical limitations any time soon).

84 *See, e.g.*, Baze v. Rees, 553 U.S. 35, 40-63 (2008) (plurality opinion) (making no explicit mention of the evolving standards of decency doctrine in an Eighth Amendment case about the lethal injection procedure).

85 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022) (holding that a fundamental constitutional right must be "deeply rooted in [our] history and tradition" (alteration in the original)); New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2125-26 (2022) (holding that a firearm regulation is unconstitutional under the Second Amendment unless "the regulation is consistent with this Nation's historical tradition of firearm regulation").

86 City of Grants Pass v. Johnson, 144 S. Ct. 679, 679 (2024) (mem.).

87 Brief of Idaho et al. as Amici Curiae Supporting Petitioner, *supra* note 14, at 17-19, 21, 29-30; *see also* Petition for Writ of Certiorari at 21-23, Hamm v. Smith, No. 23-167, 2024 WL 4654458 (U.S. Nov. 4, 2024); Brief of Idaho et al. as Amici Curiae Supporting Petitioner at 15-19, Hamm v. Smith, No. 23-167, 2024 WL 4654458 (U.S. Nov. 4, 2024) [hereinafter

Smith Amicus Brief] (urging the Court to dispense with the evolving standards of decency, using substantially similar arguments and language as those found in the *Grants Pass* brief, in a case concerning *Atkins* claims).

88 Bucklew v. Precythe, 139 S. Ct. 1112, 1123 (2019) (citing Stinneford, *supra* note 44, at 1814).

89 *See Baze*, 553 U.S. at 40-63 (plurality opinion).

90 *Id*. at 41.

91 *Id*. at 44.

92 *Id*. at 47 ("We begin with the principle ... that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out." (citation omitted)).

93 *Bucklew*, 139 S. Ct. at 1112.

94 *Id*. at 1126-27.

95 *Id*. at 1123-24 (alteration in original) (quoting *Baze*, 553 U.S. at 48 (plurality opinion)).

96 *Id*. at 1118, 1125.

97 Blume & van Winkle, *supra* note 83, at 33.

98 *Id*. at 29.

99 *Id*. at 31-32 (detailing several examples of electrocution and firing squad executions going horribly wrong and resulting in protracted and painful deaths).

100 *See* Baze v. Rees, 553 U.S. 35, 40-63 (2008) (plurality opinion); *Bucklew*, 139 S. Ct. at 1118-34.

101 *Baze*, 553 U.S. at 41 (plurality opinion); *Bucklew*, 139 S. Ct. at 1129.

102 *Bucklew*, 139 S. Ct. at 1124.

103 *Id*. at 1123 (alteration in original) (citing Stinneford, *supra* note 44, at 1814).

104 Stinneford, *supra* note 44, at 1814, 1816, 1819.

105 *Bucklew*, 139 S. Ct. at 1124 (quoting *Baze*, 553 U.S. at 48 (plurality opinion)).

106 Stinneford, *supra* note 44, at 1820-22.

107 Joanmarie Ilaria Davoli, *Evolving Standards of Irrelevancy?*, 41 QUINNIPIAC L. REV. 81, 131 (2022).

108 Stinneford, *supra* note 44, at 1751-54; *see also* White, *supra* note 81, at 456 (repeating the same two problems with the evolving standards of decency doctrine identified by Stinneford).

109 Stinneford, *supra* note 44, at 1751.

110 *Id*.

111 *Id*. at 1751-52; *see also* Raymond, *supra* note 82 (reporting on a speech at Harvard by U.S. Circuit Judge Thomas Hardiman, who criticized the evolving standards of decency as a "contrived ratchet" that has fueled a ""runaway train of elastic constitutionalism," saying "[i]ts inscrutable standards require judges to ignore the law as written in favor of their own moral sentiments").

112 Ryan, *Decency*, *supra* note 15, at 268.

113 Berry, *supra* note 32, at 789.

114 Stinneford, *supra* note 44, at 1757.

115 *Id*. at 1756; Stanford v. Kentucky, 492 U.S. 361, 370 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); Roper v. Simmons, 543 U.S. 551, 564 (2005).

116 *Roper*, 543 U.S. at 564-65. Ultimately, the Court relied upon three separate indicia to conclude that a societal consensus had developed: "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice." *Id*. at 567. Stinneford makes almost no mention of the latter two indicia in his summary of the Court's reasoning, instead disregarding the persuasive power of the "five-state shift" and concluding that the Court struck down the practice simply because "[t]he *Roper* majority *wanted* to strike down the death penalty for seventeen-year-olds." Stinneford, *supra* note 44, at 1756-57.

117 Stinneford, *supra* note 44, at 1753-54.

118 *Id*. at 1754. Stinneford further notes that "[the evolving standards of decency test] does virtually nothing to stop new forms of cruelty that are on the way in, so long as this cruelty is supported by public opinion." *Id*. at 1755.

119 *Id*. at 1816.

120 *Id*. To be fair, Stinneford distinguishes his view from that of an originalist like Justice Scalia, who would seemingly find that the Eighth Amendment permits any punishment prevalent in 1790. *Id*. at 1818-19; Atkins v. Virginia, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting) (arguing that the Eighth Amendment "is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum," but instead "is addressed to always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew"). However, even Justice Scalia himself could not stomach the implications of his own originalism, saying: "I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

121 Stinneford, *supra* note 44, at 1819.

122 *Id*. at 1818.

123 City of Grants Pass v. Johnson, 144 S. Ct. 679 (2024) (mem.).

124 Johnson v. City of Grants Pass, 72 F.4th 868, 877 (9th Cir. 2023), *rev'd*, 144 S. Ct. 2202 (2024).

125 Brief of Idaho et al. as Amici Curiae Supporting Petitioner, *supra* note 14, at 29-30. Specifically, the following states joined as amici curiae in support of the petitioner, the City of Grants Pass: Idaho, Montana, Alabama, Alaska, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and West Virginia. *Id*.

126 *See infra* Section IV.C.

127 *See also* Petition for Writ of Certiorari, *supra* note 87 at 21-22; *Smith Amicus Brief*, *supra* note 87, at 15-19 (urging the Court to dispense with the evolving standards of decency, using substantially similar arguments and language as those found in the *Grants Pass* brief, in a case concerning *Atkins* claims). Additionally, Florida enacted a new law in 2023 allowing the death penalty for certain cases of sexual battery of a minor, in direct contravention of the ruling of *Kennedy v. Louisiana*. *See* Dan Sullivan & Romy Ellenbogen, *Florida Seeks Death Penalty in Lake County Sex Abuse Case Under New Law*, TAMPA BAY TIMES, https://www.tampabay.com/news/crime/2023/12/14/florida-death-penalty-child-rape-law-desantis-lake-county/ [https://perma.cc/S9NV-N2LT] (last updated Dec. 14, 2023). In December 2023, Florida prosecutors announced their intention to seek the death penalty against Joseph Andrew Giampa for sexual battery on a person younger than twelve, marking Florida's first application of this new law. *Id*. These actions on the part of Florida, coupled with the state's amicus brief in *Hamm v. Smith*, represent a concerted effort to challenge the U.S. Supreme Court to reconsider established Eighth Amendment doctrine and, in particular, the evolving standards of decency doctrine and its fruit. *Id*.

128 Martin v. City of Boise, 920 F.3d 584, 603 (9th Cir. 2019).

129 *Id*. at 615-17; *see* Robinson v. California, 370 U.S. 660, 666-67 (1962) (declaring unconstitutional a statute criminalizing the "status" of narcotics addiction); Powell v. Texas, 392 U.S. 514, 532-33 (1968) (interpreting *Robinson* as prohibiting criminalization of status). The *Martin* court relied upon the opinions of the five dissenting and concurring Justices in *Powell* in concluding that *Robinson* stood, in part, for the proposition that "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Martin*, 920 F.3d at 616 (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1135 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007)).

130 Rachel Cohen, *The Little-Noticed Court Decision that Changed Homelessness in America*, VOX (June 12, 2023, 6:30 AM), https://www.vox.com/23748522/tent-encampments-martin-boise-homelessness-housing [https://perma.cc/E8SR-3UAY].

131 *Id*.

132 *See Martin*, 920 F.3d at 615-18 (discussing the Eighth Amendment's prohibition on punishing status, while neither citing *Trop* nor relying upon the "evolving standards" language).

133 Johnson v. City of Grants Pass, 72 F.4th 868, 875 (9th Cir. 2023), *rev'd*, 144 S. Ct. 2202 (2024). In particular, the challenged provisions included an "anti-sleeping" ordinance (prohibiting sleeping in various public places), two "anti-camping" ordinances (prohibiting occupying a campsite on public property and prohibiting camping in public places), and a ""park exclusion" ordinance (allowing a police officer to ban a person from city parks for thirty days if an individual was issued two or more citations for park-related violations within a year). *Id*. at 875-76.

134 *Id*. at 896 (alteration in original) (quoting *Martin*, 920 F.3d at 590 (Berzon, J., concurring in denial of rehearing en banc)).

135 *Id*. at 927 (O'Scannlain, J., respecting denial of rehearing en banc).

136 *Id*.

137 *See id*.

138 *Id*. at 919 (Silver, J., and Gould, J., joint statement regarding denial of rehearing en banc) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)) (arguing that the Ninth Circuit's *Grants Pass* holding represents a natural application of settled Supreme Court precedent for Eighth Amendment claims). The judges also cited the Court's *Kennedy v. Louisiana* and *Graham v. Florida* decisions, stating that "a proper Eighth Amendment analysis 'is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail,'" and that "'courts must look beyond historical conceptions' when assessing Eighth Amendment challenges." *Id*. (first quoting Kennedy v. Louisiana, 554 U.S. 407, 419, *modified on denial of reh'g*, 554 U.S. 945 (2008); and then quoting Graham v. Florida, 560 U.S. 48, 58 (2010)).

139 *Id*. at 919 (O'Scannlain, J., respecting denial of rehearing en banc); *id*. at 927 (Silver, J., and Gould, J., joint statement regarding denial of rehearing en banc).

140 Brief of Idaho et al. as Amici Curiae Supporting Petitioner, *supra* note 14, at 1.

> Families can no longer walk the streets of Portland, San Francisco, and Seattle in safety. The pungent smell of urine and human feces fills the air. Hypodermic needles used for narcotics cover the ground. And rats carrying diseases that were once thought eradicated scurry from encampments to nearby businesses and homes. These cities used to be beacons of the West, but their sidewalks are now too dangerous to visit.
>
> *Id*.

141 *Id*. at 2-3, 12, 17.

142 *Id*. at 17.

143 *Id*. at 18; Stinneford, *supra* note 44, at 1751-52.

144 Brief of Idaho et al. as Amici Curiae Supporting Petitioner, *supra* note 14, at 18.

145 *Id*. at 18, 20-21.

146 Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion).

147 *See supra* Section II.A.

148 Brief of Idaho et al. as Amici Curiae Supporting Petitioner, *supra* note 14, at 21-23.

149 *Id*. at 22-23. Though it is likely mere imprecision of language, the states were not totally correct in stating that *Atkins* and *Roper* ""overturned" the prior decisions. As stated previously, the Court never explicitly overruled the prior decisions in either of these cases. Ryan, *Decency*, *supra* note 15, at 271.

150 *See supra* text accompanying notes 113-16.

151 *See supra* text accompanying notes 57, 68-79.

152 Brief of Idaho et al. as Amici Curiae Supporting Petitioner, *supra* note 14, at 25-26, 28 (quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2271 (2022)).

153 *Id*. at 26-27 (quoting Johnson v. City of Grants Pass, 72 F.4th 868, 927 (9th Cir. 2023) (O'Scannlain, J., respecting denial of rehearing en banc)).

154 *Id*. at 27.

155 *Id*. at 27-28.

156 Stinneford, *supra* note 44, at 1818-19; Scalia, *supra* note 120, at 864; Brief of Idaho et al. as Amici Curiae Supporting Petitioner, *supra* note 14, at 27.

157 *See supra* text accompanying notes 120-22.

158 City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2218, 2226 (2024).

159 *Id*. at 2217-18; Robinson v. California, 370 U.S. 660, 666-67 (1962). The Court did not overrule *Robinson*, but instead acknowledged it as essentially a legal anomaly, noting that, in the sixty-two years since *Robinson*, the Court has not "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." *Grants Pass*, 144 S. Ct. at 2218. Instead, the Court distinguished *Robinson* from the present case, noting that the camping ordinances forbade actions, not status. *Id*.

160 *See supra* notes 129, 132 and accompanying text.

161 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022) (holding that a fundamental constitutional right must be "deeply rooted in [our] history and tradition" (alteration in original)); New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) (holding that a firearm regulation is unconstitutional under the Second Amendment unless "the regulation is consistent with this Nation's historical tradition of firearm regulation").

162 *See, e.g.*, *Grants Pass*, 144 S. Ct. at 2220-21, 2225.

163 *Id*. at 2227 (Thomas, J., concurring); *id*. at 2228, 2243 (Sotomayor, J., dissenting).

164 *Id*. at 2226 (Thomas, J., concurring).

165 *Id*. at 2226-27.

166 *Id*. at 2227 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

167 *Id*. at 2228, 2243 (Sotomayor, J., dissenting).

168 *See, e.g.*, New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) (holding that a firearm regulation is unconstitutional under the Second Amendment unless "the regulation is consistent with this Nation's historical tradition of firearm regulation").

169 *See Grants Pass*, 144 S. Ct. at 2227 (Thomas, J., concurring); *supra* Section IV.B.

170 *Grants Pass*, 144 S. Ct. at 2227 (Thomas, J., concurring). Justice Thomas's opinion of *Trop* should come as no surprise, given that he has previously signed onto a concurring opinion in which Justice Scalia suggested that *Trop* may need to be overruled and stated that the case "has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind." Glossip v. Gross, 576 U.S. 863, 893, 899 (2015) (Scalia, J., concurring). Justice Thomas has also expressed a belief that the Eighth Amendment is limited in application to torturous modes of punishment. Bucklew v. Precythe, 139 S. Ct. 1112, 1135 (2019) (Thomas, J., concurring) ("a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain."); *Glossip*, 576 U.S. at 899 (Thomas, J., concurring) (stating the same idea).

171 *See supra* Section IV.B.

172 *See Grants Pass*, 144 S. Ct. at 2220-21, 2225.

173 *Id*. at 2220. Indeed, the Court criticized the dissent for ignoring parts of *Robinson* and failing to address adequately Justice Marshall's opinion in *Powell*. *Id*. at 2224-25.

174 *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273, 2307 (2024) (overruling Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), upon which rested over seventy Supreme Court decisions and thousands upon thousands of lower court decisions).

175 *See supra* text accompanying notes 62-67. The question of whether rapists *should* be punished by the death penalty falls outside the bounds of this Comment, as the relevant point here is simply that several classes of defendants, including rapists, are in danger of becoming constitutionally eligible for the death penalty again. However, in spite of the horrific nature of the crime, there are many reasons for exempting rapists from the death penalty. Notably, the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) pointed out in an amicus brief for *Kennedy v. Louisiana* that the death penalty for rape, more than for any other crime, was historically applied in a deeply discriminatory manner against Black defendants in the American South, a trend which persisted up until *Kennedy*. Brief for Am. C.L. Union et al. as Amici Curiae Supporting Petitioner at 7-14, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 70-343). Furthermore, the *Kennedy* Court cited, as additional reasons for the abolition of the death penalty for rape, the increased risk of wrongful execution in some child rape cases involving child testimony and

the fact that the death penalty in rape cases removes an incentive for rapists to leave their victims alive. *Kennedy*, 554 U.S. at 443-45.

176 *See supra* note 127 and accompanying text.

177 Brief of Idaho et al. as Amici Curiae Supporting Petitioner, *supra* note 14, at 18 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

178 Stinneford, *supra* note 44, at 1816.

179 *See, e.g.*, *id*. at 1818-19; Scalia, *supra* note 120, at 864; Brief of Idaho et al. as Amici Curiae Supporting Petitioner, *supra* note 14, at 27.

180 *See supra* notes 120-21, 152-55 and accompanying text.

181 Ryan, *Framing*, *supra* note 5, at 1764.

182 *Trop*, 356 U.S. at 100 (plurality opinion).

62 HOULR 673

KeyCite Yellow Flag
Declined to Extend by United States v. White, 11th Cir.(Ala.), March 11, 2019

82 S.Ct. 1417
Supreme Court of the United States

Lawrence ROBINSON, Appellant,
v.
STATE OF CALIFORNIA.

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

Synopsis

Defendant was convicted in the Municipal Court of Los Angeles of violation of statute making it a criminal offense for a person to be addicted to the use of narcotics, and his conviction was affirmed on appeal to the Appellate Department of the Los Angeles County Superior Court, and defendant appealed. The Supreme Court, Mr. Justice Stewart, held that state law which made 'status' of narcotic addiction a criminal offense for which offender might be prosecuted at any time before he reformed, and upon conviction required imprisonment of at least 90 days in a county jail, inflicted a 'cruel and unusual punishment,' in violation of the Fourteenth Amendment.

Reversed.

Mr. Justice White and Mr. Justice Clark dissented.

West Headnotes (2)

[1] **Federal Courts** Review of State Courts

Instructions of a trial court applying a criminal statute, implicitly approved on appeal, amounted to a ruling on a question of state law that is as binding on appeal to the United States Supreme Court as though the precise words had been written into the statute.

123 Cases that cite this headnote

[2] **Constitutional Law** Other condition, disability, or illness

Controlled Substances Validity

Sentencing and Punishment Persons subject

State law which made "status" of narcotic addiction a criminal offense for which offender might be prosecuted at any time before he reformed, and upon conviction required imprisonment of at least 90 days in a county jail, inflicted a "cruel and unusual punishment," in violation of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14; West's Ann.Cal.Health & Safety Code, § 11721.

2070 Cases that cite this headnote

Attorneys and Law Firms

****1417** ***660** S. Carter McMorris, Los Angeles, Cal., for appellant.

William E. Doran, Los Angeles, Cal., for appellee.

Opinion

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 ***661** 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 ****1418** 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 follow 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, ***662** 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 ***663** 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 ****1419** 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.' ***664** 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. s 1257, 28 U.S.C.A. s 1257. See Smith v. California, 361 U.S. 147, 149, 80 S.Ct. 215, 216, 4 L.Ed.2d 205; Edwards v. California, 314 U.S. 160, 171, 62 S.Ct. 164, 165, 86 L.Ed. 119. 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, 82 S.Ct. 244, 7 L.Ed.2d 133, 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, 41 S.Ct. 425, 65 L.Ed. 819, 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 habitforming 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, 41 S.Ct. at 426.

Such regulation, it can be assumed, could take a veriety 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 violation ***665** 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, 25 S.Ct. 358, 49 L.Ed. 643. 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 **1420 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.

*666 [1] 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, 69 S.Ct. 894, 895, 93 L.Ed. 1131. 'We can only take the statute as the state courts read it.' Id., at 6, 69 S.Ct. at 896 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 State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422.

*667 [2] 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 **1421 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 *668 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.

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 ***669** 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, ****1422** 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 category ***670** 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.

'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.

"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.

"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.'

'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.

"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.

***671** "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 ****1423** 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.

***672** 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, U.S. Code Congressional and Administrative News, 1956, p. 3281. 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 ***673** 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 ****1424** 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 psycho-therapy 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 ***674** 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 ***675** 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 ****1425** 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 State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 67 S.Ct. 374, 376, 91 L.Ed. 422. 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, 10 S.Ct. 930, 933, 34 L.Ed. 519), quartering, the rack and thumbscrew (see Chambers v. Florida, 309 U.S. 227, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716), and in some circumstances even solitary confinement (see In re Medley, 134 U.S. 160, 167—168, 10 S.Ct. 384, 386, 33 L.Ed. 835).

***676** 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 punishment.' See O'Neil v. Vermont, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed. 450. 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, 25 L.Ed. 345. 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, 144 U.S. at 340, 12 S.Ct. at 699 (dissenting opinion); State of Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. at 473, 67 S.Ct. at 381 (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 s 11721 is not to cure, but to penalize. ***677** 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 ****1426** 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 s 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 ***678** 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 ***679** reasonably be thought to amount to more than a ****1427** 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, 69 S.Ct. 894, 895, 93 L.Ed. 1131, 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 s 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 s 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 ***680** Code deals with this problem in realistic stages. At its incipiency narcotic addiction is handled under s 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 s 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 s 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, s 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. ***681** California Welfare and Institutions Code, s 5355. For the purposes of this provision, a narcotic addict is defined as ****1428** '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, s 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 s 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. s 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 ***682** 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 s 5355 as one who had completely 'lost the power of self-control.' The jury was instructed that narcotic 'addiction' as used in s 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 view point is premised upon the theme that s 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. ***683** Even in California's program for hospital commitment of nonvolitional narcotic addicts ****1429** —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 s 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 s 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 s 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 ***684** 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 s 5355 of its Welfare Institutions Code which clearly is not penal. Even if it could be argued that s 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 ****1430** is governed by the discussion above. ***685** 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 s 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]

***686** 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 ****1431** was to supersede its own venue requirements applicable to prosecutions for the use of narcotics and in effect to allow convictions for use ***687** 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 s 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 ***688** 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 ****1432** 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.

***689** 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.

All Citations

370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758

Footnotes

1 The statute is s 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 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 in 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.

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.

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.

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

7 California appears to have established just such a program in ss 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.

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, 45 S.Ct. 446, 449, 69 L.Ed. 819.

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).

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.'

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 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.'

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, 82 S.Ct. 1063, 8 L.Ed.2d 211; note, 1 L.R.A. (N.S.), p. 540 et seq.

5 The difference between s 5350 and s 11721 is that the former aims at treatment of the addiction, whereas s 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 s 11391, to be sure, indicates that perhaps some form of treatment may be given an addict convicted under s 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 s 11721. Should the necessity for treatment end before the 90-day term is concluded, or should no treatment be given, the addict clearly would be undergoing punishment for an illness. Therefore, reference to s 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.

* 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.

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, etc. v. McAdory, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725, 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 Local No. 8—6, Oil etc., Workers International Union v. Missouri, 361 U.S. 363, 370, 80 S.Ct. 391, 396, 4 L.Ed.2d 373: '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 construe its law as to bring it into conflict with the federal Constitution or an act of Congress.' Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board, 315 U.S. 740, at page 746, 62 S.Ct. 820, at page 824, 86 L.Ed. 1154.'

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.

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 Supp. 858, 331 P.2d 251; People v. Garcia, 122 Cal.App.2d Supp. 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 s 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 Supp. 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., ss 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.

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

KeyCite Red Flag
Abrogated by City of Grants Pass, Oregon v. Johnson, U.S., June 28, 2024

920 F.3d 584
United States Court of Appeals, Ninth Circuit.

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
|
Argued and Submitted July 13, 2017 Portland, Oregon
|
Filed April 1, 2019

Synopsis

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, Bennett, 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.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (24)

[1] Federal Courts Summary judgment

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.

1 Case that cites this headnote

[2] Federal Civil Procedure In general; injury or interest

Federal Civil Procedure Causation; redressability

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.

8 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

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.

5 Cases that cite this headnote

[4] **Constitutional Law** Criminal Law

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.

3 Cases that cite this headnote

[5] **Constitutional Law** Criminal Law

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.

5 Cases that cite this headnote

[6] **Summary Judgment** Parties, process, and standing

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.

3 Cases that cite this headnote

[7] **Civil Rights** Criminal law enforcement; prisons

Summary Judgment Prisons and jails

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.

3 Cases that cite this headnote

[8] **Constitutional Law** Government Property

Vagrancy Prevention or suppression of vagrancy

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.

1 Case that cites this headnote

[9] **Civil Rights** Criminal prosecutions

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 Cases that cite this headnote

[10] **Civil Rights** Criminal law enforcement; prisons

Declaratory Judgment Criminal laws

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.

7 Cases that cite this headnote

[11] **Civil Rights** Criminal prosecutions

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.

1 Case that cites this headnote

[12] **Civil Rights** Criminal prosecutions

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.

11 Cases that cite this headnote

[13] **Sentencing and Punishment** Scope of Prohibition

Sentencing and Punishment Declaring Act Criminal

Sentencing and Punishment Proportionality

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.

11 Cases that cite this headnote

[14] **Sentencing and Punishment** Declaring Act Criminal

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.

7 Cases that cite this headnote

[15] **Sentencing and Punishment** Particular offenses

Vagrancy Prevention or suppression of vagrancy

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.

57 Cases that cite this headnote

[16] **Civil Rights** Criminal law enforcement; prisons

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.

1 Case that cites this headnote

[17] **Civil Rights** Criminal law enforcement; prisons

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

4 Cases that cite this headnote

[18] **Civil Rights** Criminal prosecutions

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.

6 Cases that cite this headnote

[19] **Sentencing and Punishment** Scope of Prohibition

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.

9 Cases that cite this headnote

[20] **Sentencing and Punishment** Declaring Act Criminal

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** Declaring Act Criminal

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.

2 Cases that cite this headnote

[22] **Sentencing and Punishment** Declaring Act Criminal

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.

2 Cases that cite this headnote

[23] **Sentencing and Punishment** Declaring Act Criminal

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.

11 Cases that cite this headnote

[24] **Sentencing and Punishment** Particular offenses

Vagrancy Prevention or suppression of vagrancy

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.

80 Cases that cite this headnote

Attorneys and Law Firms

***587** 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.

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

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

***588 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 ***589** 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 ordinances ***590** 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.

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 ***591** 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"); ***592** *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 ***593** 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*.

> 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.

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:

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] ***594** 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 cities ***595** 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] Accordingly, ***596** 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." ***597** [16]

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 ***598** *Edwards*, 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. ***599** *Johnson*, 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 ***600** 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, —— L.Ed.2d —— (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." ***601** *Harmelin*, 501 U.S. at 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* ***602** *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., dissenting) ***603** (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.

Opinion

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 permanent ***604** 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.

***605** 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 ***606** 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 ***607** "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 unconstitutional ***608** ... 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] **[3]** **[4]** **[5]** **[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 ***609** 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 atmosphere ***610** 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.

*611 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, declared ***612** 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).

***613** 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.

***614** **[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), alluding ***615** 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 ***616** 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 ***617** 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 ***618** 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]

> [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.

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 "conviction ***619** 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:

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* ***620** *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.

All Citations

920 F.3d 584, 19 Cal. Daily Op. Serv. 2944, 2019 Daily Journal D.A.R. 2762

Footnotes

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.

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.

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).

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.

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.

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/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").

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.

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.

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.").

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 *Robinson* 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).

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."

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.

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.

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.

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.

10 Costs shall be awarded to the plaintiffs.