GRANTS PASS AND THE INNOCENCE LIMIT

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ABSTRACT

This Article examines City of Grants Pass v. Johnson *as an important development in the Supreme Court's doctrine concerning the Constitution's "innocence limit." This limit is a fundamental boundary on the state's power to punish; it provides that criminal punishment may only apply to that which is morally culpable or blameworthy and thus may not apply to wholly innocent conduct. This principle was famously expressed in* Robinson v. California*, but this Article identifies a broader network of cases in which the Court has consistently effectuated the innocence limit and intervened against prosecutions of the innocent. This Article observes that the Court has been especially vigilant in enforcing the innocence limit in cases of pretextual criminal punishment—situations in which society's hostility towards a stigmatized group manifests in the use of criminal punishment to harm or ostracize unwanted people.* Grants Pass *presented a startling example of this type of case, and yet the Court failed entirely to recognize it. This Article teases apart the*

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different iterations of the innocence limit evident in the Court's doctrine and reflects on the continuing importance of the limit in the aftermath of Grants Pass.

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INTRODUCTION

In 1962, the Supreme Court held in *Robinson v. California* that punishing someone for being addicted to narcotics violates the Eighth Amendment, just as it would be unconstitutional to punish someone for having a common cold.[1] The principle the Court embraced was simple: No criminal punishment—not "[e]ven one day in prison"—is permissible when the thing being punished is wholly innocent.[2] Criminal punishment may extend only to things that are criminal, which is to say, wrongful or culpable. This fundamental restriction on the state's authority to impose criminal punishment embedded in the Constitution is what this Article refers to as the "innocence limit."

As simple as the innocence limit may seem, the Court has not always expressed it in a consistent and clear way. While *Robinson* struck down a prosecution as "cruel and unusual punishment" under the Eighth Amendment,[3] the Court has intervened against other prosecutions using a variety of different approaches. Sometimes, the Court resorts to faulting laws for being vague[4] or for failing to provide due process;[5] other times, the Court interprets criminal statutes to contain implicit elements that the prosecution has not established.[6]

These different approaches all stem from a fundamental recognition of the innocence limit. In each iteration, the Court expresses its concern for the punishment of innocent conduct—of people who have done nothing culpable or blameworthy so as to justify criminal sanction—and finds a way to halt the prosecution.

These different approaches have been especially useful to the Court in addressing an important class of cases: those in which the

1. *See* 370 U.S. 660, 667 (1962); *see also id.* at 666 ("[A] law which made a criminal offense of [mental illness, leprosy, or venereal disease] would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." (citing State of Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459 (1947))).

2. *Id.* at 667.

3. *See id.*

4. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

5. *See, e.g.*, *Robinson*, 370 U.S. at 667.

6. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 426 (1985) (inferring a required mens rea element in federal food stamp fraud statute).

Court suspects that the prosecution's claim of immoral or wrongful behavior is pretextual, and in reality, the prosecution is motivated by stigma or hostility towards disfavored people or groups. In *Robinson*, for example, the Court drew a connection between the defendant's status as a person addicted to narcotics and other groups that society had stigmatized, such as those with venereal diseases or leprosy.[7] The Court recognized that using criminal punishment instrumentally to harm people, or to outlaw their presence, is not within the state's authority under the Constitution—and the state cannot circumvent this limitation simply by declaring that some wholly innocent behavior or characteristic is "criminal."

Although the Court has steadfastly applied the innocence limit for decades, its use of a variety of different legal doctrines has made the limit vulnerable to misinterpretation, or even outright rejection. Sixty-two years after *Robinson*, those risks came to a head when the Court confronted another instance of criminal punishment applied to something wholly innocent in *City of Grants Pass v. Johnson*.[8] In that case, a city in Oregon began punishing people for occupying "campsite[s]" in public spaces.[9] The term "campsite" as used in the City's ordinances was a misnomer because the law did not require setting up an actual campsite by pitching a tent and building a fire.[10] In fact, someone could be guilty of occupying a "campsite" simply by being in a public place, with a blanket, with the intent to stay there temporarily.[11] This broad scope was aimed at the unhoused residents of Grants Pass, many of whom had no place to live in the city other than public spaces. In fact, a federal district court expressly determined that a class of people prosecuted under the ordinances had nowhere else to go—they had been forced to stay involuntarily in public spaces, in the middle of the Oregon winter, because no alternative shelter was available.[12] In other words, they were not choosing to violate the law, and they were not doing

7. *Robinson*, 370 U.S. at 667.
8. 144 S. Ct. 2202, 2207-08 (2024).
9. *Id.* at 2213.
10. *Id.* at 2236 (Sotomayor, J., dissenting).
11. *See id.* at 2213 (majority opinion).
12. Johnson v. City of Grants Pass, 72 F.4th 868, 879 (9th Cir. 2023), *rev'd*, *Grants Pass*, 144 S. Ct. 2202; *see id.* at 2214.

anything dangerous or wrongful. They were simply trying to survive the cold in the only places in the city they could find.

Nevertheless, the Supreme Court concluded that these residents could be punished as criminals. To do so, the Court characterized *Robinson* as the sole instance in which the Court had treated something as beyond the scope of legitimate criminal punishment, and construed the law at issue in *Robinson* as a "historically anomalous" criminalization of pure status.[13] Distinguishing the Grants Pass ordinances as concerning actions, not status, the Court concluded that *Robinson* did not apply, and it refused to extend *Robinson*'s articulation of the innocence limit any further.[14] Without addressing any other precedents that similarly recognized or applied the limit, the Court permitted prosecutions under the Grants Pass ordinances to proceed.[15]

This Article discusses *Grants Pass* as a missed opportunity for the Constitution's innocence limit. Far from being an outlier in the Court's jurisprudence, *Robinson* is part of a decades-long series of decisions recognizing that the Constitution prohibits the application of criminal punishment to something wholly innocent.[16] The *Robinson* Court focused on the status of drug addiction not because the act versus status distinction is what separates innocence from wrongfulness. To the contrary, both statuses and acts can be innocent. Rather, *Robinson* continued a pattern of using the innocence limit to intervene against prosecutions that treat as criminal something entirely innocent, especially when calling something "criminal" is simply an expedient for casting out a disfavored group.[17]

Part I situates *Robinson* in this historical line of cases and teases apart the different iterations of the innocence limit. Part II discusses the Court's application of these different approaches when doing so was necessary to stop the pretextual use of punishment to target people or groups stigmatized by society. Part III discusses *Grants Pass* and its narrow focus on *Robinson* and examines how

13. *Grants Pass*, 144 S. Ct. at 2218.
14. *See id.*
15. *See id.* at 2226.
16. *See infra* Part I.A.
17. *See infra* Part I.A.

the Court failed to recognize that *Grants Pass* fell within the core class of cases challenging the mislabeling of innocent conduct as criminal for ulterior purposes. Part IV concludes by underscoring the consequences of the Court's decision in *Grants Pass* and the continuing need for the Court to identify and apply the innocence limit.

The innocence limit identified in this Article is a crucial component of the Court's criminal law jurisprudence. Although the Court failed to recognize it appropriately in *Grants Pass*, this Article argues that the innocence limit is not lost. By surfacing this principle and highlighting its many iterations and appearances in the Court's case law over a period of decades, this Article shows that judges, lawyers, and others involved in the criminal legal system should continue to draw on the different iterations of the innocence limit and guard the outer boundary of criminal punishment.

I. ITERATIONS OF THE INNOCENCE LIMIT

A. Robinson*,* Powell*, and the Eighth Amendment*

The Supreme Court's most recognized articulation of the innocence limit appears in its Eighth Amendment jurisprudence, specifically in the twin cases of *Robinson v. California* and *Powell v. Texas*. In both cases, the Court recognized that the Constitution's prohibition on cruel and unusual punishments prevent a state from imposing criminal punishment on something lacking any moral culpability or blameworthiness.

Robinson involved a state statute that made it a crime to "be addicted to the use of narcotics" in California.[18] As the trial judge instructed the jury, the statute did not require proof of any "'act' of using."[19] Indeed, a person could be convicted regardless of whether he had "ever used or possessed any narcotics within the State."[20] Merely having the "condition or status" of being "addicted" would suffice, as this constituted a "continuing offense" that "subject[ed]

18. Robinson v. California, 370 U.S. 660, 660 (1962).
19. *Id.* at 662.
20. *Id.* at 666.

the offender to arrest at any time before he reform[ed]."[21] Moreover, a person could be convicted under the statute based on "a single examination, if the characteristic reactions of that condition [were] found present."[22]

The *Robinson* Court began by affirming the broad authority of governments to respond to narcotics as a matter of public policy.[23] States could "establish a program of compulsory treatment"; they could "require periods of involuntary confinement"; and they could even impose "penal sanctions" for the "failure to comply with established compulsory treatment procedures."[24] States could also turn to "public health education," or economic and social policy designed to address the underlying conditions in which narcotics trafficking flourishes.[25] The "range of valid choices which a State might make in this area is undoubtedly a wide one," the Court emphasized, and it promised it would not question "the wisdom of any particular choice *within the allowable spectrum*."[26]

But *Robinson* recognized a critical, legal caveat: Criminal punishment of addiction fell outside that allowable spectrum. In *Robinson*'s famous penultimate paragraph, the Court explained that "a law which made a criminal offense" of being mentally ill, or of having leprosy, or a venereal disease, "would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[27] The Court viewed addiction similarly, as an "illness which may be contracted innocently or involuntarily."[28] As a result, "imprison[ing] a person thus afflicted as a criminal," solely on that basis, "inflict[ed] a cruel and unusual punishment."[29]

Robinson's articulation of the innocence limit was significant because it explicitly set a boundary on the State's authority to criminally punish something wholly innocent. Punishing addiction

21. *Id.* at 662-63.
22. *Id.* at 663.
23. *See id.* at 665.
24. *Id.* (citing Jacobson v. Massachusetts, 197 U.S. 11, 22-39 (1905)).
25. *See id.*
26. *Id.* (emphasis added).
27. *Id.* at 666.
28. *Id.* at 667.
29. *Id.*

as a crime is simply not something a state has the authority to do, no matter how clearly the public is notified of the prohibition, no matter how great the procedural protections afforded to defendants are, and no matter the proof offered by the prosecution. Any use of criminal punishment against addiction—even just "one day in prison"—violates the Eighth Amendment.[30]

The Court built on *Robinson* six years later in *Powell*.[31] There, the Supreme Court addressed a Texas statute criminalizing public intoxication. Specifically, the statute provided that: "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."[32] Leroy Powell was convicted under this statute.[33] In his defense, Mr. Powell argued that he was "afflicted with the disease of chronic alcoholism," and thus "his appearance in public [while drunk was] ... not of his own volition."[34] He presented an expert witness who explained that a "chronic alcoholic" is "powerless not to drink," and testified that when Mr. Powell was intoxicated, he was "not able to control his behavior ... because he ha[d] an uncontrollable compulsion to drink."[35] The trial court even made findings of fact that Mr. Powell was a chronic alcoholic and that "a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism."[36] In other words, Mr. Powell's condition was as innocent as the addiction of the defendant in *Robinson*.

Mr. Powell's trial court concluded, however, that these facts were not a defense to the charge under the terms of the statute.[37] Accordingly, despite its explicit findings of fact about Mr. Powell's condition, the court found him guilty.[38]

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30. *Id.*
31. 392 U.S. 514 (1968).
32. *Id.* at 517 (plurality opinion) (quoting TEX. PENAL CODE ANN. art. 477 (West 1948)).
33. *Id.*
34. *Id.* (alterations in original).
35. *Id.* at 518.
36. *Id.* at 521.
37. *Id.* at 558.
38. *Id.*

Powell fractured into separate opinions,[39] but the Court agreed on the basic principle of *Robinson*: Criminal punishment may only be applied to wrongful conduct. For example, as Justice Black explained in his concurrence, *Robinson* "establishes a firm and impenetrable barrier to the punishment of persons who, whatever their bare desires and propensities, have committed no prescribed wrongful act."[40] Echoing this, Justice Fortas reiterated in his dissent that

> *Robinson* stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.[41]

The Court fractured because the Justices disagreed about whether Mr. Powell had done something culpable so as to justify criminal punishment. In the plurality opinion, Justice Marshall concluded that Mr. Powell's conviction could stand because, unlike Mr. Robinson, Mr. Powell was "convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion."[42] In Justice Marshall's view, *Robinson* held simply 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."[43] The line, as he understood it, was that criminal punishment requires an "evil-doing hand"[44]—a "wrongful deed" of some kind.[45]

Justice Marshall worked to describe Mr. Powell's conduct as a wrongful act. Justice Marshall "disagree[d]" that Mr. Powell suffered "from such an irresistible compulsion to drink and to get

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39. *See id.* at 516-37 (plurality opinion); *id.* at 537-48 (Black, J., concurring); *id.* at 548-54 (White, J., concurring in the result); *id.* at 554-70 (Fortas, J., dissenting).

40. *Id.* at 548 (Black, J., concurring).

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

42. *Id.* at 532 (plurality opinion).

43. *Id.* at 533.

44. Morissette v. United States, 342 U.S. 246, 251 (1952).

45. *Actus Reus*, BLACK'S LAW DICTIONARY (12th ed. 2024).

drunk in public" that he was "utterly unable to control" his behavior.[46] Instead, Justice Marshall insisted that Mr. Powell's "appearance in public in a state of intoxication" was a voluntary act.[47] In doing so, he rejected the trial court's findings of fact as "the premises of a syllogism transparently designed to bring this case within the scope" of *Robinson*.[48] To discredit the trial court's findings, Justice Marshall cited expert testimony "that when appellant was sober, the act of taking the first drink was a 'voluntary exercise of his will,' but that this exercise of will was undertaken under the 'exceedingly strong influence' of a 'compulsion' which was 'not completely overpowering.'"[49]

By characterizing Mr. Powell's conduct as within his control, Justice Marshall placed it within the scope of behavior that could arguably be treated as wrongful. He cited "the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds"—"actus reus, mens rea, insanity, mistake, justification, and duress."[50] In Justice Marshall's view, Mr. Powell had met these standards because Justice Marshall "disagree[d]" with Mr. Powell that his addiction made him "unable to control" his drinking.[51] Drinking was a choice he made, and that conduct was the kind of "public behavior which may create substantial health and safety hazards ... and which offends the moral and esthetic sensibilities of a large segment of the community."[52] As a result, Mr. Powell had done something wrongful—something within the allowable spectrum of conduct that could be punished criminally.

In a separate opinion, Justice White disagreed with Justice Marshall's approach to finding wrongfulness. Justice White argued that there was no difference, in terms of culpability, between an act prompted by compulsion and the compulsion itself, comparing the distinction to "forbidding criminal conviction for being sick with flu

46. *Powell*, 392 U.S. at 535 (plurality opinion).
47. *Id.* at 534-35.
48. *Id.* at 521.
49. *Id.* at 525.
50. *Id.* at 535-36 (citing Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932)).
51. *Id.* at 535.
52. *Id.* at 525, 532.

or epilepsy but permitting punishment for running a fever or having a convulsion."[53] Either way, the person had done nothing wrong—even if he had done *something* by, for example, sneezing. That Mr. Powell drank, therefore, was not a basis for distinguishing *Robinson*.

Instead, Justice White found wrongfulness in a different place. Justice White noted that there was no evidence that Mr. Powell's compulsion required him to drink specifically in a public place.[54] "[M]any chronic alcoholics drink at home," he noted, "and are never seen drunk in public."[55] Thus, the wrongfulness in Mr. Powell's conduct was "knowingly fail[ing] to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place."[56]

Justice White acknowledged, however, that his theory of wrongfulness rested on an important assumption: that the person had a private place in which he could remain. Justice White noted that while "many chronics have homes, many others do not."[57] For these people, Justice White reasoned that "a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible."[58] For them, "this statute [was] in effect a law which ban[ned] a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk."[59]

In dissent, Justice Fortas disagreed with both Justice Marshall's and Justice White's attempts to identify a wrongful act. As to Justice Marshall's theory that Mr. Powell chose to take his first drink, Justice Fortas pointed to the trial court's finding of fact that "'chronic alcoholism' [is] 'a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.'"[60] Mr. Powell's first drink, therefore, was no more voluntary than his second, third, and every drink thereafter.[61] As to

53. *Id.* at 548 (White, J., concurring in the result).
54. *See id.* at 549.
55. *Id.* at 550.
56. *Id.*
57. *Id.* at 551.
58. *Id.*
59. *Id.*
60. *Id.* at 568 (Fortas, J., dissenting).
61. *See id.*

Justice White's theory that Mr. Powell failed to stay in a private space, Justice Fortas pointed to the trial court's finding of fact that "a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism."[62] As a result, "once intoxicated, he could not prevent himself from appearing in public places."[63] Thus, both of the "wrongful acts" identified by Justice Marshall and Justice White were no better than a sneeze by a person with a common cold; punishing the former was no more constitutional under *Robinson* than punishing the latter.[64]

Although these opinions sharply disagreed about whether Mr. Powell had done anything culpable, all of the Justices felt compelled to ask whether the conduct at issue was innocent or wrongful. If it was innocent, then it could not be the subject of criminal punishment. That would transgress the Constitution's innocence limit.

Following *Powell* in 1968, the Court would not consider the innocence limit in those terms again until *Grants Pass*. That does not mean, however, that the Court abandoned the innocence limit during this period. To the contrary, in the decades before and after *Robinson*, the Court repeatedly expressed its belief that such a limit exists. Acting on this consistent instinct to stop criminal punishment against the innocent, the Court has employed a variety of doctrines and jurisprudential tools to achieve its goals.

B. Avoidance by Statutory Interpretation

One approach the Court has taken to effectuate the innocence limit is to interpret criminal statutes so as to avoid reaching innocent conduct. As scholars have noted, the Supreme Court sometimes dodges thorny questions of constitutional law through the doctrine of constitutional avoidance: a practice of interpreting statutes narrowly to steer clear of "constitutional doubts."[65] Few

62. *Id.*

63. *Id.*

64. *See id.* at 548, 569-70.

65. Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1282 (2016) (citing United States *ex rel* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)); Frederick Schauer, Ashwander *Revisited*, 1995 S. CT. REV. 71, 72.

constitutional doubts have more consistently troubled the Supreme Court than the punishment of innocent conduct. Rather than address these concerns by finding such punishment expressly prohibited under the Constitution, however, the Court has instead invented creative, even implausible, assumptions about Congress's drafting intent to exclude the innocent from criminal statutes' apparent reaches.

One common scenario in which the Court has used statutory interpretation to avoid confronting the innocence limit is by reading laws in a way that limits the punishment of conduct without mens rea. At common law, criminal liability generally required a "vicious will" or "evil-meaning mind."[66] Without "an evil purpose or mental culpability," a person simply was not guilty of a felony.[67] He may have acted in a way that caused harm or contravened prevailing moral standards, but an inadvertent act was not morally reprehensible in the way that "infamous common-law crimes" required.[68] Demanding proof of mens rea was thus one of the most important protections for "those who were not blameworthy in mind from conviction."[69]

Congress, however, has a habit of drafting federal criminal statutes without specifying that the defendant is guilty only if he acts intentionally or knowingly. For example, in one statute, Congress prohibited "steal[ing]" government property, without specifying whether such stealing must be done "knowingly."[70] In 1948, Joseph Morissette was charged with stealing government property after he picked up spent bomb casings located in his favorite hunting area.[71] He pleaded innocence on the ground that he did not realize he had been stealing; he "believed the casings were cast-off and abandoned."[72] The trial court, however, responded that his ignorance—the lack of mens rea—was "no defense."[73] Because he

66. Morissette v. United States, 342 U.S. 246, 251 (1952).
67. *See id.* at 252.
68. *Id.*
69. *Id.*
70. 18 U.S.C. § 641.
71. *Morissette*, 342 U.S. at 247-48.
72. *Id.* at 248.
73. *Id.* at 249.

took government property in violation of the statute, he faced up to ten years in prison.[74]

On review, the Supreme Court was plainly troubled by the possibility that Mr. Morissette could be punished even if "he truly believed it to be abandoned and unwanted property."[75] The Court emphasized what it saw as a "universal and persistent" principle in "mature systems of law": that people have the "ability and duty ... to choose between good and evil."[76] Requiring a mens rea was necessary to isolate for punishment only those who chose to do evil; for that reason, "[c]rime, as a compound concept, [is] generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand."[77] The Court even noted that "treason—the one crime deemed grave enough for definition in our Constitution itself—requires not only the duly witnessed overt act of aid and comfort to the enemy but also the mental element of disloyalty or adherence to the enemy."[78]

Despite these concerns, the Court never expressly stated that punishing someone who lacked malintent for stealing government property would be unconstitutional. The Court noted a class of strict liability crimes called "public welfare offenses" that—"whether wisely or not"—imposed criminal liability without requiring mens rea.[79] The Court cited "misgiving" about such offenses, but ultimately cabined them as a "limited class."[80]

Instead, to protect people like Mr. Morissette, the Court articulated an interpretive presumption that "an injury can amount to a crime only when inflicted by intention."[81] Thus, Congress's "mere omission ... of any mention of intent" would not be "construed as eliminating that element from the crimes denounced."[82] As a result,

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74. 18 U.S.C. § 641.

75. *Morissette*, 342 U.S. at 271.

76. *Id.* at 250.

77. *Id.* at 251.

78. *Id.* at 265.

79. *Id.* at 254-56.

80. *Id.* at 256, 258; *see* United States v. U.S. Gypsum Co., 438 U.S. 422, 437-38 (1978) (first citing United States v. Balint, 258 U.S. 250 (1922); then citing United States v. Behrman, 258 U.S. 280 (1922); then citing United States v. Dotterweich, 320 U.S. 277 (1943); and then citing United States v. Freed, 401 U.S. 601 (1971)) (describing the "generally disfavored status" of public welfare offenses).

81. *Id.* at 250, 263.

82. *Id.*

proof that Mr. Morissette knew he was stealing was an essential element of the crime, and Mr. Morissette's ignorance would be a defense.

This kind of inference from silence was unusual because normally the Court presumes that "if Congress had intended" to require something, it "could have easily said so."[83] Indeed, in *Morissette*, the Court surveyed how "Congress had been alert" in other statutes to the "mental element in crime,"[84] and yet had failed to specify mens rea for stealing. But faced with the prospect of allowing criminal punishment for an entirely unknowing act, the Court chose to "attribute to Congress" an assumption that mens rea would be required regardless of what Congress said.[85]

The Court has repeatedly used the *Morissette* presumption to interpret federal criminal statutes in a way that avoids the punishment of innocent conduct. For example, in the context of the Sherman Antitrust Act, the Court in *United States v. U.S. Gypsum Co.*, noted the need to protect "the gray zone of socially acceptable and economically justifiable business conduct" from criminal liability and therefore inferred a mens rea element in the statute.[86] Similarly, when the Court inferred a mens rea element in a criminal statute regulating food stamps in *Liparota v. United States*, the Court expressed concern that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."[87] And in *United States v. X-Citement Video, Inc.*, the Court cited the same hesitation when interpreting a statute criminalizing sexually explicit material, emphasizing that "the age of the performers"—for which the Court required a mens rea of knowledge—"is the crucial element separating legal innocence from wrongful conduct."[88] In every case, rather than saying that Congress

83. Ysleta del Sur Pueblo v. Texas, 142 S. Ct. 1929, 1943 (2022); *see* Ruckelshaus v. Sierra Club, 463 U.S. 680, 693-94 (1983).

84. 342 U.S. at 264.

85. *Id.* at 254.

86. 438 U.S. 422, 440-41 (1978).

87. 471 U.S. 419, 426 (1985); *see also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 213 (1991) (discussing mens rea cases and noting that they turn on "the existence of factors corroborating blameworthiness").

88. 513 U.S. 64, 72-73 (1994).

could not punish people for innocent conduct, the Court chose instead to presume Congress *did not* authorize such punishment.

In perhaps its most detailed discussion of innocence in this context, the Court in *Staples v. United States* concluded that a mens rea element was required for a conviction under a federal statute prohibiting the possession of an unregistered machine gun—that is, a firearm capable of fully automatic fire.[89] The petitioner was found in possession of an AR-15 rifle that had been modified to be capable of fully automatic fire.[90] He claimed ignorance, however, and insisted that, as far as he knew, his rifle fired only semiautomatically.[91] He was convicted after the judge instructed the jury that the government did not need to prove the petitioner's knowledge of "every last characteristic" of the rifle that made it unlawful.[92] Vacating the conviction, the Supreme Court noted that "guns generally can be owned in perfect innocence."[93] Indeed, according to Department of Justice records at the time, "[r]oughly 50 percent of American homes contain[ed] at least one firearm of some sort."[94] The Court expressed concern for "a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent."[95] To avoid subjecting these people to criminal liability, the Court inferred a mens rea requirement, even though the law itself was "silent" as to any such requirement.[96]

Like the canon of constitutional avoidance, the *Morissette* presumption reflects the Court's sense of real, substantive constitutional limits.[97] The Court will "read into the statute" mens rea requirements in order "to separate wrongful conduct from 'otherwise innocent conduct.'"[98] It has done so not necessarily because that separation is what Congress actually intended, but because a

89. 511 U.S. 600, 619 (1994).
90. *Id.* at 603.
91. *Id.*
92. *Id.* at 604.
93. *Id.* at 611, 620.
94. *Id.* at 613-14.
95. *Id.* at 614-15.
96. *Id.* at 605, 619.
97. *See* Schauer, *supra* note 65, at 87 ("[T]his determination is itself a confrontation with the very issue that *Ashwander* seeks to avoid.").
98. Elonis v. United States, 575 U.S. 723, 736 (2015) (quoting Carter v. United States, 530 U.S. 255, 269 (2000)).

contrary interpretation—even if truer to the text of the statute—"would fail to protect the innocent actor."[99]

This approach to the innocence limit differs from *Robinson* because it technically fails to close the door completely on criminal punishment. On the face of decisions such as *Morissette*, the Court insists only that Congress pass a new law to express its intent to punish more clearly. If Congress were to do so, the *Morissette* presumption theoretically would not stand in the way of the exact same criminal prosecution. This version of the innocence limit, therefore, pushes off the difficult question of whether punishment, even under an undeniably clear law, would violate the Constitution. That said, the interpretive avoidance approach has been useful because it allows the Court to reject the prosecution of innocent conduct without having to explicitly lay down a constitutional limit on the state's authority to punish.

C. Deflecting with Due Process

Sometimes, however, the Court has been confronted by criminal prosecutions of innocent conduct that it cannot stop through creative statutory interpretation. In these cases, the Court has turned to another approach: reframing the problem in the language of the procedural guarantees of the Due Process Clause. By focusing on the requirements of due process, the Court can impose a lighter constitutional limit on criminal punishment—one that does not narrow the state's power of punishment categorically but rather rejects particular prosecutions that fail to meet certain procedural standards. Underlying this approach is a similar background assumption to the one behind *Morissette*: that criminal punishment should not reach innocent conduct, and a law containing "a standard so indefinite" that innocent behavior is criminalized is defective.[100]

1. Notice

One version of this approach is to reframe the problem around the requirement of fair warning. The Court employed that technique

99. *Carter*, 530 U.S. at 269.

100. Smith v. Goguen, 415 U.S. 566, 578 (1974).

five years before *Robinson* in *Lambert v. California*.[101] In that case, a Los Angeles ordinance criminalized "any convicted person['s]" presence in the city "for a period of more than five days without registering" with the city as a felon.[102] Virginia Lambert had lived in Los Angeles for over seven years, and at one point had been convicted of forgery.[103] She failed, however, to register herself as a felon.[104] Accordingly, she was convicted of violating the registration statute, despite offering evidence that she had no actual knowledge of the registration requirement.[105] The Court vacated Ms. Lambert's conviction because, in its view, she was "entirely innocent"—not in terms of meeting the requirements of the ordinance, but in terms of not having done anything wrong.[106]

The Court relied on Justice Holmes's writing: "A law which punished conduct *which would not be blameworthy* in the average member of the community would be too severe for that community to bear."[107] It pointed out that Ms. Lambert's "crime" was "conduct that is wholly passive—mere failure to register."[108] Her "mere presence in the city" was what subjected her to criminal sanction.[109] Based on how the state had prosecuted the offense, the Court "assume[d] that appellant had no actual knowledge of the requirement" that she register as a felon.[110] And in the Court's mind, her ignorance of the registration requirement was legitimate, as she was not responsible for "inquir[ing] as to the necessity of registration."[111]

In order to shield Ms. Lambert from prosecution, the Court framed the problem as one of notice:

> Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may

101. *See* 355 U.S. 225, 229-30 (1957).
102. *Id.* at 226.
103. *Id.*
104. *Id.*
105. *Id.* at 227.
106. *See id.* at 229.
107. *Id.* (emphasis added) (quoting OLIVER WENDELL HOLMES JR., THE COMMON LAW 50 (1881)).
108. *Id.* at 228.
109. *Id.* at 229.
110. *Id.* at 227.
111. *Id.* at 229.

> not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.[112]

Applied to Ms. Lambert, criminal punishment was not permitted because she had never been given an "opportunity to comply with the law and avoid its penalty."[113] Her "default," therefore, "was entirely innocent."[114] As a result, the conviction could not stand.[115]

Framing the issue in this way prevented the punishment the Court sought to avoid, but it did not fairly describe the real defect in the law. As the Court itself acknowledged, "ignorance of the law" is ordinarily no defense.[116] Even if it were, moreover, "[r]egistration laws are common and their range is wide," suggesting the "probability of such knowledge."[117] Ms. Lambert's lack of knowledge about the registration requirement, therefore—the lack of a mens rea with respect to the illegality of her behavior—was not what made her innocent.

Rather, the Court's focus was really on Ms. Lambert's conduct—her lack of an actus reus. Regardless of whether Ms. Lambert knew or should have known of the registration requirement, the Court concluded that Ms. Lambert had not done anything wrong: "[W]e deal here with conduct that is wholly passive—mere failure to register."[118] Ms. Lambert simply continued living in the city she had lived in for years. This was "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed."[119] In other words, it was not wrongful for Ms. Lambert to continue living where she had long lived, even as a person with a felony conviction. Criminal punishment was therefore inappropriate.

Rather than saying that Ms. Lambert's mere existence in the city could not be the subject of criminal punishment, however, the Court

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112. *Id.* at 229-30.
113. *Id.* at 229.
114. *Id.*
115. *See id.* at 229-30.
116. *Id.* at 228 (quoting Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910)).
117. *Id.* at 229.
118. *Id.* at 228.
119. *Id.*

recharacterized the problem in the language of advanced notice[120]—as if to suggest that Ms. Lambert could have been prosecuted if the law had been publicized widely enough to notify her of the registration requirement. Were the City to provide sufficient notice and then attempt the same prosecution, the Court would have to consider applying the categorical version of the innocence limit used in *Robinson*. It chose to push that decision off; similar to the interpretive avoidance approach, the Court's approach in *Lambert* left the harder question for another day, while still achieving the Court's goal of stopping the punishment of innocent conduct.

2. Vagueness

In a similar vein, the Court has treated a number of statutes as being too vague to support a prosecution against someone the Court believed was innocent of any wrongdoing.[121] Under the void-for-vagueness doctrine, statutes are unconstitutional if they are written so unclearly that they fail to "give fair notice of what acts will be punished."[122] Like *Morissette* and *Lambert*, the void-for-vagueness cases reflect the Court's assumption that criminal punishment cannot apply to something innocent.[123] As one scholar explained, "in the great majority of instances the concept of vagueness is an available instrument in the service of other more determinative judicially felt needs and pressures."[124]

For instance, in *Papachristou v. City of Jacksonville*, the Supreme Court invalidated a city vagrancy ordinance[125] that punished

120. *See id.* at 228-29.

121. *See* Guyora Binder & Brenner Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. 1527, 1529 (arguing that the void-for-vagueness doctrine "imposes a practical limit on what kinds of conduct can be criminalized").

122. Winters v. New York, 333 U.S. 507, 509-10 (1948).

123. *See, e.g.*, *id.* at 516 ("Where ... the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty." (quoting State v. Diamond, 202 P. 988, 991 (N.M. 1921))).

124. Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960).

125. For more on vagrancy laws and their history as tools of repression and social control, see RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016) [hereinafter VAGRANT NATION]. "Vagrancy was understood to be

a variety of politically disfavored people, from "[r]ogues and vagabonds," to "common gamblers" and "persons who use juggling or unlawful games or plays," to "common drunkards," "habitual loafers," and "persons able to work but habitually living upon the earnings of their wives or minor children."[126] Margaret Papachristou was arrested under this statute one morning while she and several companions were heading to a nightclub.[127] The arresting officer claimed that they had "stopped near a used-car lot which had been broken into several times."[128] No evidence ever surfaced, however, of a break-in on the night in question.[129] Instead, Ms. Papachristou and her companions were charged with "vagrancy—'prowling by auto.'"[130]

The Supreme Court struck down the ordinance as unconstitutionally vague in the sense that it "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct [was] forbidden by the statute."[131] The law certainly was vague in that sense. What distinguished a "common thief" from an "extraordinary" one the ordinance did not explain. What separated the contemptible "habitual loafer" from the acceptable "infrequent" or "occasional" loafer was left a mystery. Indeed, Ms. Papachristou's charge—"prowling by auto"—was "not even listed in the ordinance as a crime."[132]

But the Court was not simply concerned with imprecise drafting; the real problem was that the law targeted people who had done nothing wrong. The Court noted "from experience that sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result."[133] The Court pointed to the former Governor of Puerto Rico's declaration that "'loafing' was a national virtue in

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'one of the most effective weapons in the arsenal of law enforcement'—enabling the police to 'vag' anyone suspicious, troublesome, deviant, out of place, or just plain poor." Risa Goluboff & Richard Schragger, Grants Pass *and the Vagrancy Revolution Revisited*, 2024 S. CT. REV. 191, 197.

126. 405 U.S. 156, 156 n.1, 171 (1972) (quoting JACKSONVILLE, FLA. ORDINANCE CODE § 26-57 (1965)).

127. *Id.* at 158-59.

128. *Id.* at 159.

129. *Id.*

130. *Id.* at 158.

131. *Id.* at 162 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

132. *Id.* at 168 n.11.

133. *Id.* at 163.

his Commonwealth," not a criminal offense.[134] The Court also surmised that "[p]ersons able to work but habitually living upon the earnings of their wives" might be "unemployed pillars of the community who have married rich wives," not criminals.[135] The Court went so far as to describe the types of activities criminalized by the ordinance as being part of the "unwritten amenities" implicit in the Constitution and Bill of Rights.[136] The Court was appalled by a statute that threatened such basic "amenities of life."[137]

Given this view, the defect in the *Papachristou* ordinance would not have been cured by greater specificity. For example, the Court would not have been satisfied if the ordinance had stated explicitly: To be clear, this ordinance shall apply to the sleepless people who often walk at night; to those celebrating the national virtue of loafing; and to those unemployed pillars of the community who have married rich wives.[138] Calling the ordinance "vague" was an imprecise way of describing a deeper flaw in the statute: not its clarity, but its reach. Criminal punishment was simply not appropriate for these innocent acts.

Nevertheless, relying on the Due Process Clause allowed the Court to achieve its goal of stopping the prosecution of the innocent. And again, this approach allowed the Court to enforce the innocence limit without explicitly having to lay down any categorical restriction on the state's power to punish.

II. THE INNOCENCE LIMIT AS A CHECK ON PRETEXTUAL PUNISHMENT

One pattern in the Court's innocence-limit cases is that the Court consistently reaches for some version of the limit when the Court questions whether the state's claim that the defendant's behavior is immoral or culpable is a pretext for targeting disfavored people or groups for mistreatment. These people include the purveyors of

134. *Id.*
135. *Id.*
136. *Id.* at 164.
137. *Id.*
138. This is the sort of law that, by relying on the void-for-vagueness doctrine, the Court purported to invite "legislatures and city councils to draft." Risa L. Goluboff, Essay, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1374 (2010).

pornography in *X-Citement Video, Inc.*, people with felony convictions in *Lambert*, and the "habitual loafers" in *Papachristou*—groups whom society often judges, demeans, and casts moral opprobrium upon. When this hostility manifests in criminal laws that target these individuals, the Court has deployed an iteration of the innocence limit to prevent criminal punishment from being used as a tool to harm or outlaw those unwanted by society.

Robinson v. California itself is an example of this.[139] *Robinson* is often described as focusing on "the 'status' of narcotic addiction," without explaining why status is significant.[140] The law's unusual focus on the status of being addicted—even if the person had never actually used narcotics in the state—suggested that the real purpose of the law was to target a class of disfavored people. As the Court noted, the police had "accosted the appellant" on the streets of Los Angeles, even though "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."[141] What bothered the police was Mr. Robinson's appearance—the "'scar tissue and discoloration on the inside' of the appellant's right arm"—and his presence in the city.[142] Mr. Robinson tried to explain that "the marks on his arms" were the result of "an allergic condition contracted during his military service," and two witnesses corroborated this explanation.[143] But that did not stop the police, as it did not matter what Mr. Robinson had done during his stay in California; it simply mattered who they believed he was.[144]

Political majorities have long disliked people who are or have been addicted to drugs. Historically, "people with an addiction were thought to be morally flawed and lacking in willpower."[145] Justice Douglas, writing separately in *Robinson*, noted that criminal

139. 370 U.S. 660, 667-78 (1962) (noting that the "vicious evils" of narcotics warrant their regulation).

140. City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2217 (2024) (quoting *Robinson*, 370 U.S. at 666).

141. *Robinson*, 370 U.S. at 661 n.2.

142. *Id.* at 661.

143. *Id.* at 662.

144. *See id.* at 665 ("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.").

145. NAT'L INST. ON DRUG ABUSE, DRUGS, BRAIN, AND BEHAVIOR: THE SCIENCE OF ADDICTION 2 (2020).

punishment as a response to addiction "may trace back to the Old Testament belief that disease of any kind, whether mental or physical, represented punishment for sin."[146] And "those living in a world of black and white put the addict in the category of those who could, if they would, forsake their evil ways."[147]

With this in mind, the Court emphasized that the purpose of the law was not to stop individual uses, purchases, or sales of narcotics, or to stop "antisocial or disorderly behavior resulting from their administration."[148] It was not designed to ensure that individuals in need of medical treatment continued receiving it.[149] Its purpose instead was to punish a group for being anywhere in the State of California.[150]

Because the Court sensed this hostility to people like Mr. Robinson, the Court was emboldened to pronounce its critical moral judgment: that the "'status' of narcotic addiction" is like being "mentally ill, or a leper," or "afflicted with a venereal disease"—other conditions that society sometimes stigmatizes.[151] These conditions, the Court emphasized, "may be contracted innocently or involuntarily," and because simply having the characteristics of a group the political majority dislikes or rejects may not be the basis for criminal punishment, "[e]ven one day in prison" would constitute "cruel and unusual punishment."[152]

The Court's attentiveness to social stigma is consistent with other specific doctrines the Court has developed to guard against "prejudice against discrete and insular minorities."[153] Indeed, as scholar Risa Goluboff has noted, Justice Blackmun expressed concerns in *Papachristou* that the vagrancy ordinances "really reached non-criminal conduct or, if you will, protected conduct,"[154] and the defendants "were really convicted for racial intermingling."[155] But

146. *Robinson*, 370 U.S. at 669 (Douglas, J., concurring).
147. *Id.* at 669-70.
148. *Id.* at 666 (majority opinion).
149. *Id.*
150. *See id.*
151. *Id.*
152. *Id.* at 667.
153. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).
154. VAGRANT NATION, *supra* note 125, at 313 (quoting Justice Harry A. Blackmun, memorandum, December 7, 1971, Smith v. Florida, 405 U.S. 172 (1972) (No. 70-5055), box 144, Blackmun Papers).
155. *Id.*

the pattern and motivation observed by this Article differ from the antidiscrimination principles developed in the Court's equal protection doctrine. Many of the people involved in the Court's innocence-limit cases would have had a difficult time fitting themselves and their claims into the requirements of that doctrine. Instead, they sought, and the Court provided, protection not just from discrimination based on protected characteristics, but from the broader moral opprobrium that political majorities cast upon people and groups for a multitude of reasons.

For example, in *City of Chicago v. Morales*, the Supreme Court invalidated a "Gang Congregation Ordinance" enacted by the Chicago City Council because it gave the police unbounded discretion to round up and arrest a broad swath of politically disfavored groups.[156] The law was purportedly aimed at the "large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways."[157] The law forbade "criminal street gang membe[rs]" from "loitering"—which included "remain[ing]" in public "in any one place with no apparent purpose" after an officer gave an order to disperse.[158] In just three years' time, over forty-two thousand people were arrested for violating the ordinance.[159]

In enacting the law, the legislature did not "distinguish between innocent conduct and conduct threatening harm."[160] Instead, the legislature authorized punishment even for "[p]eople with entirely legitimate and lawful purposes"—"[f]or example, a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower"—if their purpose was not "apparent" to an officer.[161] The City's goal was to craft "an exceptionally broad ordinance which could be used to sweep" any people deemed "intolerable and objectionable gang members from the city streets."[162]

The Supreme Court recognized that the statute was written so broadly that it could reach "a substantial amount of innocent

156. 527 U.S. 41, 45-46, 51 (1999).

157. *Id.* at 51 (plurality opinion).

158. *Id.* at 47 (majority opinion) (second alteration in original) (quoting City of Chicago v. Morales, 687 N.E.2d 53, 58 (Ill. 1997)).

159. *Id.* at 49.

160. *Id.* at 57 (plurality opinion) (citing *Morales*, 687 N.E.2d at 61).

161. *See id.* at 51 n.14 (majority opinion) (quoting *Morales*, 687 N.E.2d at 60-61).

162. *Id.* at 51 n.15 (quoting *Morales*, 687 N.E.2d at 64).

conduct."[163] For example, an officer could arrest "a gang member and his father" if after being ordered to disperse by the officer, they continued loitering near Wrigley Field "just to get a glimpse of Sammy Sosa leaving the ballpark."[164] Standing around to "engage in idle conversation or simply to enjoy a cool breeze on a warm evening" were also within an officer's authority to arrest and prosecute.[165] "Friends, relatives, teachers, counselors, or even total strangers might unwittingly [have] engage[d] in forbidden loitering if they happen[ed] to engage in idle conversation with a gang member."[166] And these people would have had no defense to the law's application, "no matter how innocent and harmless their loitering might [have] be[en]."[167]

The Court could have treated this as the critical defect in the law; by reaching purely innocent conduct, the legislature had extended criminal punishment too far. A plurality even argued that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[168] Relying on a version of the innocence limit similar to the Eighth Amendment one applied in *Robinson*, the Court could have concluded that simply exercising one's right to choose "to remain in a public place" could not be punished as a crime.[169]

A majority of the Court, however, took a more limited approach. In their view, the fatal flaw in the law was that it provided "absolute discretion to police officers to decide what activities constitute loitering,"[170] the sole act prohibited by the statute. Because a person's liability under the statute turned on whether her purpose was "apparent" to a police officer, and whether the officer chose to issue a dispersal order, the police had the power to dictate whom they had grounds to arrest irrespective of the person's actual

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163. *See id.* at 60 (plurality opinion). *See also* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (discussing a law prohibiting "annoy[ing]" conduct, which required people to "guess" at what conduct was prohibited because "[c]onduct that annoys some people does not annoy others" (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926))).

164. *See Morales*, 527 U.S. at 60.

165. *Id.* at 62.

166. *Id.* at 63 (quoting City of Chicago v. Morales, 687 N.E.2d 53, 63 (Ill. 1997)).

167. *Id.* at 63-64.

168. *Id.* at 53 (plurality opinion).

169. *Id.* at 54.

170. *Id.* at 61 (majority opinion).

intentions or conduct.[171] The Court specifically alluded to an officer "conscious of the city council's reasons for enacting the ordinance"[172] as an example of someone who might manipulate the statute in order to target the people the city found "intolerable and objectionable,"[173] even if they were not gang members at all.[174]

This use of the void-for-vagueness doctrine was an adaptation of the doctrine's typical focus on "the moment-to-moment judgment of the policeman on his beat" and the "personal predilections" that might influence his decision-making.[175] In other cases, the Court described the doctrine as a protection against the caprice of an individual officer.[176] The *Morales* Court's concern, however, was not that officers would act capriciously, randomly, or unpredictably. To the contrary, the *Morales* Court was concerned with coordinated action at the direction of the city council and the political majority. It discussed how officers might choose to arrest people irrespective of the law's requirement that a person have "no apparent purpose," either by treating apparent purposes as "too frivolous" to count, or by simply ignoring the requirement entirely.[177] Such officers would be guided not by their own individual biases and preferences but by "the city council's reasons for enacting the ordinance."[178] The city council had announced its view "that gang members are too adept at avoiding arrest" based on actual crimes, and therefore that the council wished to use the ordinance "to sweep these intolerable and objectionable gang members from the city streets" without regard to whether there was proof of any particular crime.[179]

Robinson and *Morales* are examples of the Court relying on different iterations of the innocence limit in situations in which it sensed that hostility to certain people or groups had spurred the

171. *See id.* at 61-62.

172. *Id.* at 62.

173. *Id.* at 51 n.15 (quoting *Morales*, 687 N.E.2d at 64).

174. *Id.* at 62 ("[T]his ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to nongang members as well as suspected gang members.").

175. Kolender v. Lawson, 461 U.S. 352, 358, 360 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

176. *See* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (rejecting criminal statute "whose violation may entirely depend upon whether or not a policeman is annoyed").

177. *Morales*, 527 U.S. at 62.

178. *Id.*

179. *Id.* at 51 n.15 (quoting *Morales*, 687 N.E.2d at 64).

misuse of criminal punishment. The Court's intuition that the "conduct" purportedly addressed by each criminal law was perfectly innocent was corroborated by evidence that the real impetus for the prosecutions had little to do with wrongful behavior. And by using these different iterations of the innocence limit, the Court has maintained an essential boundary on the states' power to punish.

III. ABANDONING THE INNOCENCE LIMIT IN *GRANTS PASS*

Despite the Court's development of multiple ways to implement the innocence limit, only *Robinson* received consideration in *Grants Pass*.[180] The Court did not try to interpret the ordinances narrowly, or infer a lack of advance notice or other procedural protections, or draw on evidence in the record of an intent to ostracize or harm disfavored individuals. It asked only whether it was appropriate to extend *Robinson* to categorically rule out criminal prosecution for the "conduct" proscribed by the City under the Eighth Amendment.[181] The Court then rejected this cramped view of the innocence limit.

A. Background

In the two decades leading up to the Court's decision in *Grants Pass*, the City of Grants Pass, Oregon, experienced enormous population growth; from 2000 to 2020 the population increased by more than 70 percent.[182] But development and housing in the city failed to keep up with demand. In 2019, City Manager Aaron Cubic testified that there was "essentially ... no vacancy" in housing.[183] Similarly, Kelly Wessels, the Chief Operating Officer for United Community Action Network (UCAN), an organization that serves the county in which Grants Pass sits, testified that "affordable housing [in Grants Pass] has dwindled to almost zero."[184]

180. *See* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2217-21 (2024).

181. *See id.* at 2218-19.

182. *Oregon Blue Book: City Populations*, OR. SEC'Y OF STATE, https://sos.oregon.gov/bluebook/Pages/local/city-population.aspx [https://perma.cc/75DH-2AFF] (noting a population of 23,003 in 2000 and 39,249 in 2020).

183. Blake v. City of Grants Pass, No. 18-cv-01823, 2020 WL 4209227, at *2 (D. Or. July 22, 2020), *rev'd sub nom.*, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

184. Declaration of Kelly Wessels in Support of Plaintiffs' Reply on Their Motion for

The dearth of housing caused many—at least fifty, and potentially as many as six hundred, people—to become unhoused.[185] For these people, there were simply no adequate homeless shelters in Grants Pass.[186] Instead, there was an eighteen-bed facility for unaccompanied minors aged ten to seventeen.[187] There was also a "transitional housing" program, Gospel Rescue Mission, but it had the capacity to serve less than a quarter of the City's unhoused population.[188] In addition, Gospel Rescue Mission enforced a "lengthy list of rules," including requiring residents to participate in religious programming twice a day and work at the mission for six hours a day, six days a week.[189] There were no exceptions for those with disabilities or chronic medical or mental health issues who were unable to meet these requirements.[190]

As a result, the majority of unhoused individuals in Grants Pass had nowhere to live. Wessels explained,

> [A]lmost all of the homeless people in Grants Pass are involuntarily homeless.... They are not choosing to live on the street or in the woods. It is like a cruel game of musical chairs where there simply are not nearly enough affordable places for people to live or find shelter.[191]

Despite the lack of housing options, the City enforced several ordinances that prohibited sleeping and "camping" on public property. The antisleeping ordinance forbade sleeping "on public

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Certification of a Class ¶¶ 1-2, 7, *Blake*, No. 18-cv-01823, 2020 WL 4209227.

185. *See* Johnson v. City of Grants Pass, 72 F.4th 868, 874 (9th Cir. 2023), *rev'd*, 144 S. Ct. 2202 (2024).

186. *Blake*, 2020 WL 4209227, at *3 ("There are no homeless shelters in Grants Pass that qualify as 'shelters' under the criteria provided by [the U.S. Department of Housing and Urban Development].").

187. *Johnson*, 72 F.4th at 879.

188. As of 2019, there were approximately 602 individuals "currently homeless" in Grants Pass. Declaration of Kelly Wessels in Support of Plaintiffs' Reply on Their Motion for Certification of a Class, *supra* note 184, ¶ 6. The transitional housing program at the Gospel Rescue Mission had capacity for sixty women and children and seventy-eight men. *Blake*, 2020 WL 4209227, at *3.

189. *Blake*, 2020 WL 4209227, at *3. The mission explicitly avoided seeking government funding so that it could maintain these restrictive rules. *Id.*

190. *Id.*

191. Declaration of Kelly Wessels in Support of Plaintiffs' Motion for Certification of a Class ¶ 15, *Blake*, No. 18-cv-01823, 2020 WL 4209227.

sidewalks, streets, or alleyways at any time," as well as "in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk."[192] The anticamping ordinances prohibited occupying a "campsite" on any public property, including "parks, benches, or rights of way."[193] The ordinances broadly defined a "campsite" to include "any place where bedding, sleeping bag, or other material used for bedding purposes ... is placed, established, or maintained for the purpose of maintaining a temporary place to live."[194] The ordinance specifically noted that it was not necessary for there to be a "tent, lean-to, shack, or any other structure" for there to be a "campsite."[195] Even a blanket would suffice, if it was intended to "maintain[ ] a temporary place to live"[196]—even in the midst of winter, when the average low temperature in Grants Pass is about thirty-three degrees.[197]

These laws were backed by civil and criminal penalties. Violators of the ordinances were first subject to a civil fine, "repeat offen[ders]" could be issued an order temporarily barring them from a particular public space, and anyone who violated such an order could face up to thirty days in jail and a larger fine.[198] "From 2013 through 2018, the City issued a steady stream of tickets under the ordinances."[199]

In 2018, a resident of Grants Pass named Debra Blake filed a class-action lawsuit against the City, seeking to enjoin the anti-sleeping and anticamping ordinances.[200] Among other things, she alleged that the ordinances violated the Eighth Amendment's Cruel and Unusual Punishments Clause because, "[b]y punishing the acts of resting, sleeping or seeking shelter in public, without providing any legal place for most homeless [people] to conduct such activities, Grants Pass effectively punishe[d] the status of homelessness."[201]

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192. *Johnson*, 72 F.4th at 876 (quoting GRANTS PASS, OR., MUN. CODE § 5.61.020) (2024).

193. *Id.* (quoting GRANTS PASS, OR., MUN. CODE § 5.61.030) (2024).

194. *Id.* (quoting GRANTS PASS, OR., MUN. CODE § 5.61.010) (2024).

195. *See id.* (quoting § 5.61.010).

196. *See id.* (quoting § 5.61.010).

197. *See Weather*, GRANTS PASS: RESIDENT RESOURCES, https://www.grantspassoregon.gov/446/Weather [https://perma.cc/KAR4-L2RC] ("On average, ... [t]he coldest month is December with an average low of 33.2°F.").

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

199. *Johnson*, 72 F.4th at 876-77, 877 n.4.

200. *See id.* at 877.

201. Class Action Complaint for Injunctive and Declaratory Relief ¶ 49, Blake v. City of

Applying then-binding Ninth Circuit precedent, the district court granted the plaintiffs an injunction.[202] The court explained that, as the Ninth Circuit had interpreted *Robinson v. California*,[203] "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."[204] Applying *Robinson* to a similar set of anticamping ordinances in Boise, Idaho, the Ninth Circuit held that "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."[205] The district court in *Grants Pass* held that the Ninth Circuit's prior decision squarely governed.[206] In issuing its injunction, the court "remind[ed] governing bodies," such as Grants Pass, "that homeless individuals are citizens just as much as those fortunate enough to have a secure living space."[207]

On appeal from the district court's injunction, the Ninth Circuit affirmed the district court's holding, recognizing:

> [T]he City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go.[208]

The court explained that "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status."[209] The Ninth Circuit remanded, however, with instructions

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Grants Pass, No. 18-cv-01823, 2020 WL 4209227.

202. *See* Judgment at 2-3, *Blake*, No. 18-cv-01823, 2020 WL 4209227.

203. 370 U.S. 660 (1962). For a discussion of the Ninth Circuit's interpretation of *Robinson*, see Martin v. City of Boise, 920 F.3d 584, 616 (9th Cir. 2019) (first quoting Powell v. Texas, 392 U.S. 514, 551 (1968) (White, J., concurring in the judgment); then quoting *Powell*, 392 U.S. at 567 (Fortas, J., dissenting); and then quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1135 (9th Cir. 2006)) (citing United States v. Robertson, 875 F.3d 1281, 1291 (9th Cir. 2017)), *dismissing appeal from*, 902 F.3d 1031 (9th Cir. 2018).

204. *Blake*, 2020 WL 4209227, at *9 (quoting *Martin*, 920 F.3d at 616).

205. *See Martin*, 920 F.3d at 617.

206. *See Blake*, 2020 WL 4209227, at *8.

207. *See id.* at *17.

208. *See* Johnson v. City of Grants Pass, 72 F.4th 868, 896 (9th Cir. 2023), *rev'd*, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

209. *Id.* at 893.

for the district court to narrow its injunction to permit the regulation of nonessential conduct like the "use of stoves or fires, as well as the erection of any structures."[210] In doing so, the court ensured that the only conduct the city was prohibited from punishing was "the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in [a] car at night, when there is no other place in the City ... to go."[211] Those acts, the court held, were beyond the scope of constitutional criminal punishment.[212]

B. The Eighth Amendment and Grants Pass

As the Ninth Circuit recognized, *Grants Pass* was a prime candidate for applying the innocence limit. It was an easier case than *Powell v. Texas*, which divided the Court over whether any wrongful conduct had been committed because of the trial court's unusual findings of fact, the ambiguity in Mr. Powell's expert testimony, and the potential distinction between true "addiction" and the "condition" of chronic alcoholism.[213] *Grants Pass* did not present these complications. Similar to the statute in *Lambert v. California*, the *Grants Pass* ordinances punished the plaintiffs' "mere presence in the city."[214] These people were singled out because they were politically marginalized and disfavored, like the "night walkers" in *Papachristou v. City of Jacksonville*[215] and the "gang members" in *City of Chicago v. Morales*.[216] And like the law in *Robinson*, the ordinances punished the plaintiffs for who they were, not what they had done—for being people who needed to use public spaces as a temporary place to live.

Not one of the approaches in *Powell* for characterizing the proscribed conduct as wrongful would have succeeded in *Grants Pass*. For example, wrongfulness could not be found in the plaintiffs' basic condition because, as Justice Fortas would put it, the plaintiffs in *Grants Pass* suffered from "a condition which [they]

210. *See id.* at 895.
211. *Id.* at 896.
212. *See id.*
213. *See* 392 U.S. 514, 533-34 (1968).
214. 355 U.S. 225, 229 (1957).
215. 405 U.S. 156, 163 (1972).
216. 527 U.S. 41, 46 (1999).

could not control": homelessness.[217] Indeed, the class was specifically defined to include only the "involuntarily homeless individuals living in Grants Pass."[218]

As to Justice White's view, wrongfulness could not be found in the act of entering or remaining in a public area: "[A]voiding public places" was impossible for the plaintiffs in *Grants Pass* because they had nowhere else to go.[219] Indeed, the governing law in the Ninth Circuit required the court to determine whether "there [was] no option of sleeping indoors" because there were "a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]."[220] In upholding the injunction, the Ninth Circuit specifically held that the plaintiffs had "adequately demonstrated that there [was] no available shelter in Grants Pass."[221]

Finally, as to Justice Marshall's view, it was difficult even to identify an act[222]—much less a wrongful one—necessary to violate the ordinances.[223] Despite using the word "campsite,"[224] the anticamping ordinance reached well beyond lighting "stoves or fires" or erecting "any structures."[225] A campsite was "any place where bedding ... or other material used for bedding purposes" was "placed."[226] A blanket on the ground, therefore, could constitute a campsite, if a person was there with the "purpose of maintaining a temporary place to live."[227] As the Ninth Circuit recognized, there is no morally culpable actus reus in "the mere act of sleeping outside with rudimentary protection from the elements ... when there is no other place in the City ... to go."[228]

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217. *Powell*, 392 U.S. at 567 (Fortas, J., dissenting).

218. Johnson v. City of Grants Pass, 72 F.4th 868, 878 (9th Cir. 2023), *rev'd*, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

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

220. Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019) (alterations in original) (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006)), *dismissing appeal from*, 902 F.3d 1031 (9th Cir. 2018).

221. *Johnson*, 72 F.4th at 894.

222. *See supra* notes 36-46 and accompanying text.

223. *See Johnson*, 72 F.4th at 896.

224. *Id.* at 876 (quoting GRANTS PASS, OR., MUN. CODE § 5.61.030) (2026).

225. *Id.* at 895.

226. *Id.* at 876 (quoting GRANTS PASS, OR., MUN. CODE § 5.61.010) (2026).

227. *Id.*

228. *Id.* at 896.

C. Rejecting Robinson

Rather than apply the innocence limit, however, the Supreme Court in *Grants Pass* rejected an artifically cramped reading of *Robinson*. To do so, the Court characterized the law in *Robinson* as taking a "historically anomalous approach toward criminal liability."[229] The Court mused that it had "not encountered" a similar case "since *Robinson* itself."[230] The Court never mentioned any of the prior cases in which the Court had recognized iterations of the innocence limit—neither the interpretive avoidance cases nor the due process cases.[231] Instead, the Court discredited *Robinson* as "novel" and suggested its Eighth Amendment reasoning was faulty because the issue received "barely a paragraph" of briefing and "virtually no attention at oral argument."[232]

The Court's effort to characterize *Robinson* as anomalous was important because the Court's responses to *Robinson* and the innocence limit on the merits were weak. The Court feebly attempted to justify the ordinances by identifying wrongfulness in the plaintiffs' conduct, but none of its efforts were persuasive.

First, like Justice Marshall, the Court attempted to characterize homelessness as a voluntary act by embracing what one amicus dubbed "The Myth of 'Service Resistance.'"[233] The cities and governments supporting the Grants Pass ordinances pushed this narrative and claimed that a major percentage of unhoused people were affirmatively choosing not to utilize services provided by cities and other charitable organizations.[234]

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229. City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2218 (2024).

230. *Id.*

231. In a related vein, Professor Goluboff and Professor Schragger discuss *Grants Pass* as an erasure of a different kind: Erasing the history and jurisprudence around vagrancy laws. "*Grants Pass* erases the fact that there have always been large numbers of mobile poor people prior to the current moment and ignores the constitutional law that long allowed and then prevented their criminalization." Goluboff & Schragger, *supra* note 125, at 194. "The lack of historical awareness is striking," including "about the increased constitutional protection for the poor that had marked the late twentieth century." *Id.* at 205. "There is no mention of *Papachristou* or any of the vagrancy-related cases." *Id.* at 209.

232. *Grants Pass*, 144 S. Ct. at 2218 (quoting Robinson v. California, 370 U.S. 660, 689 (1962) (White, J., concurring in the judgment)).

233. Brief of the Western Regional Advocacy Project as Amici Curiae in Support of Respondents at 23, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175).

234. *See, e.g.*, Brief of Local Government Legal Center et al. as Amici Curiae in Support of

Putting aside the fact that the number of unhoused people in Grants Pass far outnumbered the available shelter space, the data put forth by the amici to support "The Myth of 'Service Resistance'" were not about Grants Pass.[235] For example, the Court pointed to a Department of Justice policing guide published fifteen years ago, which cited studies of two Los Angeles encampments published twenty-four and thirty-one years ago.[236] This guide did not address, moreover, the legitimate reasons why an individual might refuse to stay at a shelter.[237] For example, one unhoused resident of Grants Pass—and a named plaintiff in the litigation—noted that she had disabilities that prevented her from working, and therefore, she was prevented from staying at Gospel Rescue Mission because of their work requirement.[238] Another resident explained that she could not stay at that same shelter because they required her to relinquish her nebulizer, which she needed to use every four hours in order to breathe.[239] And similar to the Gospel Rescue Mission, many homeless shelters and outreach programs are run by, or associated with, religious organizations that either proselytize to residents[240] or

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Petitioner at 28 & n.26, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175); Brief of Amici Curiae League of Oregon Cities et al. in Support of Petitioner at 5, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175); Brief of Amici Curiae Thirteen California Cities in Support of Petitioner at 3, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175).

235. *See Grants Pass*, 144 S. Ct. at 2210 ("Surveys cited by the Department of Justice suggest that only '25-41 percent' of 'homeless encampment residents' 'willingly' accept offers of shelter beds."); *id.* ("60 percent of [Seattle's] offers of shelter have been rejected in a recent year.... [O]ver 70 percent of [Portland's] ... offers of shelter beds ... were declined.... '[T]he vast majority of [various cities'] homeless populations are not actively seeking shelter and refuse all services.'").

236. *See id.*; *see also* SHARON CHAMARD, U.S. DEP'T OF JUST., PROBLEM-ORIENTED GUIDES FOR POLICE: PROBLEM-SPECIFIC GUIDES SER. NO. 56, HOMELESS ENCAMPMENTS 36 (2010) (first citing MICHAEL R. COUSINEAU, A PROFILE OF URBAN ENCAMPMENTS IN CENTRAL LOS ANGELES (1993); and then citing BOB ERLENBUSCH, MATT MARR & PETE WHITE, LIFE ON INDUSTRIAL AVENUE: A PROFILE OF AN URBAN ENCAMPMENT IN DOWNTOWN LOS ANGELES WITH TEN POLICY RECOMMENDATIONS (2001)).

237. *See* CHAMARD, *supra* note 236, at 36.

238. *See* Declaration of Debra Blake in Support of Plaintiffs' Motion for Summary Judgment ¶¶ 1-2, 4, Blake v. City of Grants Pass, No. 18-cv-01823, 2020 WL 4209227 (D. Or. July 22, 2020).

239. Brief of the Disability Rights Education and Defense Fund et al. as Amici Curiae in Support of Respondents at 18, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175); *see also Grants Pass*, 144 S. Ct. at 2231 (Sotomayor, J., dissenting).

240. The Gospel Rescue Mission required residents to attend religious services twice a day and on Sundays, even residents who did not identify as Christian. *See* Brief for Respondents at 4-5, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175); Declaration of Edward Johnson in Support

impose restrictions based on religious beliefs,[241] or both. For these people, not staying at the shelter was not "voluntary" in the sense at issue in *Powell*.

Second, the Court tried to connect homelessness to wrongful conduct. It pointed to claims that an increase in "encampments in recent years ha[d] resulted in an increase in crimes both against the homeless and by the homeless."[242] It also quoted city officials who argued that "encampments facilitate the distribution of drugs."[243] Diseases, the Court insisted, such as typhus, shigella, and trench fever, "can sometimes spread in encampments and beyond them."[244] The Court even invoked the image of "used needles, human waste, and other hazards" on the streets and sidewalks.[245]

None of these claims ever connected back to the actual conduct proscribed by the ordinances, however. The district court's injunction never prohibited Grants Pass from criminalizing violence, harassment, or other crimes against or by unhoused people.[246] Nor did the district court prohibit Grants Pass from enforcing public-health measures or laws against "littering, public urination or defecation, obstruction of roadways, [or] possession or distribution of illicit substances."[247] And Grants Pass presented no evidence that the hundreds of violations it had cited under the ordinances were, in fact, prosecutions of violence, drug trafficking, or any other offense besides "camping."

At most, the Supreme Court's reference to these issues seemed to be a sort of propensity argument: that an unhoused person is more likely to commit other offenses or create public health problems, and

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of Plaintiffs' Motion for Summary Judgment, Exhibit 2, Deposition of Brian Bouteller at 33-34, *Blake*, No. 18-cv-01823, 2020 WL 4209227 (testimony from Gospel Rescue Mission's Director of Operations confirming that shelter residents of different religious denominations must "attend a Christian church as well": "they could attend a Jehovah's Witness church, they could attend a synagogue; they just also have to attend a Christian church").

241. For example, many religious shelters openly refuse to serve members of the LGBTQI+ community. *See, e.g.*, Brief of Amici Curiae Center for Constitutional Rights et al. in Support of Respondents at 13, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175).

242. *Grants Pass*, 144 S. Ct. at 2209.

243. *Id.*

244. *See id.*

245. *See id.*

246. *See* Blake v. City of Grants Pass, No. 18-cv-01823, 2020 WL 4209227, at *15 (D. Or. July 22, 2020), *rev'd sub nom.*, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

247. *Id.*

therein lies their culpability. Such a theory would be shocking in multiple ways. As a factual matter, it would be shocking in its prejudiced stereotyping and failure to appreciate the complex relationship between poverty, homelessness, public health, and crime. And as a legal matter, the theory would be shocking in its endorsement of "punishment for a mere propensity"—a sort of thought crime, or perhaps guilt by association.[248]

Finally, the Court interpreted *Robinson* to create a narrow distinction between the punishment of "status" and the punishment of an "act," such that criminal punishment was forbidden, at most, when it was based solely on "mere status."[249] The Court distinguished the Grants Pass ordinances by characterizing them as "laws addressing actions."[250] These forbidden actions, the Court claimed, would be punished "whether the charged defendant [was] homeless, a backpacker on vacation passing through town, or a student who abandon[ed] his dorm room to camp out in protest on the lawn."[251] Accordingly, the ordinances were not an unconstitutional punishment of the status of homelessness; they were an acceptable "policy response[ ]" to the "complex" problem of homelessness.[252]

As an initial matter, the Court's attempt to characterize the ordinances as targeting an "action" independent of the status of the person engaging in it was belied by the evidence. In the district court, for example, officers testified specifically to the types of hypotheticals the Court offered, admitting that those with homes would not be punished for "laying on a blanket enjoying the park" or bringing a sleeping bag to look at the stars.[253] Indeed, the Deputy Chief of Police Operations testified that he could not recall "any non-homeless person ever getting a ticket for illegal camping in

248. *See* Powell v. Texas, 392 U.S. 514, 543 (1968) (Black, J., concurring).

249. *Grants Pass*, 144 S. Ct. at 2217, 2218 (citing *Robinson*, 370 U.S. 660, 664, 666 (1962)).

250. *Id.* at 2220.

251. *Id.* at 2218.

252. *Id.* at 2226.

253. *See* Declaration of Edward Johnson in Support of Plaintiffs' Motion for Summary Judgment, Exhibit 7, Deposition of Tim Artoff at 5, *Blake*, No. 18-cv-01823, 2020 WL 4209227 (officer testifying that "laying on a blanket enjoying the park" would not violate the ordinances); Declaration of Edward Johnson in Support of Plaintiffs' Motion for Summary Judgment, Exhibit 5, Deposition of McGinnis at 19-20, *Blake*, No. 18-cv-01823, 2020 WL 4209227 (officer testifying that bringing a sleeping bag to look at the stars would not be punished, but testifying that someone would, however, violate the ordinance if he did not "have another home to go to").

Grants Pass."[254] Against this evidence, the Court's characterization of the law as blind to a person's circumstance fell flat.[255]

In addition, the deeper problem with the Court's status versus act distinction is that it failed to address the fundamental purpose of the innocence limit: asking whether there is anything wrongful about the subject of criminal punishment. Both statuses and acts can be innocent; neither the status of being unhoused nor the act of using a blanket to stay warm in a public space is culpable, and therefore the mere fact that the Grants Pass ordinances arguably targeted an "act", as opposed to a status, did not necessarily mean the ordinances identified a permissible basis for criminal sanction. Yet, by treating the status versus act distinction as dispositive, the Court sidestepped the critical question of innocence entirely.

Ultimately, the Court declined to rely fully on any theory of culpability, instead concluding that some measure of wrongfulness is not required at all. "The Eighth Amendment," it claimed, "provides no guidance to 'confine' judges in deciding what conduct a State or city may or may not proscribe."[256] The use of criminal law, the Court indicated, was entirely a matter of "experimentation" by legislatures.[257] Thus, the Court declared that "questions about whether an individual who has committed a proscribed act with the requisite mental state should be 'reliev[ed of] responsibility' ... due to a lack of 'moral culpability' ... are generally best resolved by the people and their elected representatives."[258]

D. Pretextual Punishment in Grants Pass

By looking solely to *Robinson*, the Court failed to consider the broader network of cases applying different versions of the innocence limit—especially in cases of pretextual criminal punishment.

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254. Declaration of Edward Johnson in Support of Plaintiffs' Motion for Summary Judgment, Exhibit 4, Deposition of Jim Hamilton at 93, *Blake*, No. 18-cv-01823, 2020 WL 4209227.

255. *See also* Martin v. City of Boise, 920 F.3d 584, 603 (9th Cir. 2019) ("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." (quoting ANATOLE FRANCE, THE RED LILY 91 (1894))).

256. *Grants Pass*, 144 S. Ct. at 2224 (citing *Powell*, 392 U.S. at 534 (plurality opinion)).

257. *Id.* (quoting *Powell*, 392 U.S. at 537 (plurality opinion)).

258. *Id.* at 2206 (first alteration in original) (quoting Kahler v. Kansas, 140 S. Ct. 1021, 1030-31 (2020)); and then quoting *id.* at 1031).

If the Court had considered these other cases, it would have seen that *Grants Pass* fell very much in the category of cases in which the Court has felt empowered to express the moral judgment that certain conduct is entirely innocent, and that the state may not mislabel something as "criminal" in order to stigmatize and ostracize disfavored people or groups.

The evidence of hostility towards unhoused people in *Grants Pass* was startling. The record indicated that, instead of investing in development for affordable housing or building additional and accessible temporary shelter, the City decided simply to eliminate the presence of unhoused people, using the pain of criminal sanctions. The City Council met with community partners in 2013 to discuss the city's "vagrancy problems."[259] Minutes from this meeting show that one of the "strategies and actions" proposed was simply to "[t]ake them out of town."[260] One meeting attendee questioned why the City could not "driv[e unhoused individuals] out of town and leav[e] them there," but it turned out the City had already tried "buying [unhoused] person[s] a bus ticket ... only to have them returned to Grants Pass with a request from the other location to not send them there."[261] Other proposals suggested just withdrawing services, including "food, clothing, bedding, [and] hygiene," on the theory that "if you stop feeding them then they will stop coming, eventually."[262] One councilor made it clear that "the point is to make it uncomfortable enough for them in our city so they will want to move on down the road."[263]

The legal filings by the City gave further indication that the City's plan was to use criminal punishment instrumentally in order to force unhoused people to leave the city limits. In its motion for summary judgment, for example, the City argued there was plenty of legal camping "around the City's limits," in areas "west of the City[ ], ... within a few miles of the city[,]" and "[a]pproximately four miles north of the city."[264] What is more, the City argued that

259. Declaration of Kelly Wessels in Support of Plaintiffs' Motion for Summary Judgment, Exhibit 1, City Council Community Roundtable at 1, *Blake*, No. 18-cv-01823, 2020 WL 4209227.

260. *Id.* at 2.

261. *Id.*

262. *Id.* at 6-7.

263. *Id.* at 2.

264. Defendant's Joint Motion for Summary Judgment and Response to Plaintiffs' Motion

unhoused residents could move to the federally managed land outside of the city limits, where "numerous people" camp, and "[i]t is common knowledge" that "neither the County nor the federal government pursues enforcement" of anyone overstaying a fourteen-day limit on camping.[265] Faced with relentless enforcement in the city, at least one city officer's warning to unhoused people was that they should simply "leave town."[266] "[T]here [was] nowhere in Grants Pass" that unhoused people could "legally sit or rest."[267]

Thus, as Justice Sotomayor recognized, unhoused people in Grants Pass were vulnerable—"the most vulnerable among us"—to the will of the political majority.[268] The ordinances were "enforced exactly as intended: to criminalize the status of being homeless" and "drive homeless people out of town."[269]

This evidence called to mind *Papachristou*'s warning that vagrancy statutes "are nets making easy the roundup of so-called undesirables."[270] And the stated goal of forcing unhoused people to leave Grants Pass echoed the exclusionary purpose of the statute in *Robinson*. As the Solicitor General noted, using criminal punishment to make it painful or impossible to stay is "akin to a form of banishment, a measure that is now generally recognized as contrary to our Nation's legal tradition."[271]

Had the Court recognized the pretextual use of criminal punishment in *Grants Pass*, perhaps it would have been emboldened to adjudge that the supposedly "criminal activities" at issue were perfectly innocent.[272] People who have nowhere to live are not

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for Summary Judgment at 11-12, *Blake*, No. 18-cv-01823, 2020 WL 4209227.

265. *Id.* at 11.

266. Declaration of Debra Blake in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 238, ¶ 5.

267. *Id.*; *see also* Declaration of Edward Johnson in Support of Plaintiffs' Motion for Summary Judgment, Exhibit 4, Deposition of Jim Hamilton at 16, 18, *Blake*, No. 18-cv-01823, 2020 WL 4209227 (documenting deputy police chief's testimony that, anywhere on public property, a person could not sleep with a sleeping bag, with a blanket, or in a vehicle, without violating the ordinances).

268. City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2244 (2024) (Sotomayor, J., dissenting).

269. *Id.* at 2236-37.

270. Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972).

271. *See* Brief for the United States as Amicus Curiae in Support of Neither Party at 21, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) (citing City of Chicago v. Morales, 527 U.S. 41, 53 (1999) (plurality opinion)).

272. *Papachristou*, 405 U.S. at 163.

immoral or culpable, and they have not done anything wrong when they use a blanket to stay warm in the middle of the Oregon winter in the only place they have left to go: a public sidewalk, a city park, or, if they are lucky, a vehicle parked on the side of the road. Because of the evidence of hostility motivating the ordinances, *Grants Pass* was the kind of case in which the Court was most suited to make that kind of pronouncement and apply the innocence limit.

The Supreme Court's decision to allow prosecutions under Grants Pass's ordinances was a remarkable breach of the innocence limit. For decades, the Court maintained an outer boundary on the state's power to punish, stopping prosecutions of people who had done nothing culpable or morally blameworthy. Even when it did not apply the limit explicitly or categorically, it ensured that criminal punishment was not permitted against something wholly innocent. In *Grants Pass*, however, the Court allowed a city to punish people not for doing anything wrong, but for being people without a place to live in a city that did not want them.

IV. THE FUTURE OF THE INNOCENCE LIMIT

So, what is left of the innocence limit after *Grants Pass*? It appears that many municipal governments believe that the Court's decision has given them carte blanche to use criminal sanctions for improper purposes, like exclusion, rather than look to any of the other "'tools in the policy toolbox' to 'tackle the complicated issues of housing and homelessness.'"[273] Although the number of unhoused people has grown,[274] cities—including Grants Pass—have paused or fully canceled the construction of new shelters, or cut funding from or closed existing ones.[275] Less than a year after the Supreme

273. *See Grants Pass*, 144 S. Ct. at 2211.

274. TANYA DE SOUSA & MEGHAN HENRY, U.S. DEP'T OF HOUSING & URB. DEV., THE 2024 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS at vi (2024), https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf [https://perma.cc/JJH7-FGER] (showing an 18 percent increase in the number of people experiencing homelessness nationwide over the last year).

275. See Mollie Bryant, *Grants Pass' New Mayor and Councilors Scaled Back Housing Efforts as Most Residents Can't Afford Rent*, STREET LIGHT NEWS (Jan. 9, 2025), https://streetlightnews.org/grants-pass-cost-burdened/ [https://perma.cc/X659-LHAC]; *see, e.g.*, Evey Weisblat, *Salvation Army Abruptly Closes Fayetteville Homeless Shelter*, CITYVIEW (Apr.

Court's decision, the City of Grants Pass reneged on building a new shelter.[276] Just a few months after the Court's ruling, the Kalispell, Montana, City Council revoked the zoning permit for one of the city's warming centers.[277] The Irvine City Council in California backed out of a purchase of two properties that would have been the site of a proposed homeless shelter, even though it meant forfeiting a $1 million nonrefundable deposit.[278] These are just a few of the

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15, 2025), https://www.cityviewnc.com/stories/salvation-army-abruptly-closes-fayetteville-homeless-shelter/ [https://perma.cc/KA5P-LTDT]; Kacie Sinton, *Grand Junction's Largest Homeless Shelter Closes on Weekends Indefinitely Due to Funding Cuts*, KJCT (Oct. 10, 2025, at 14:40 MT), https://www.kjct8.com/2025/10/10/grand-junctions-largest-homeless-shelter-closes-indefinitely-due-funding-cuts/ [https://perma.cc/D97G-T3K3]; Katie Fairbanks, *Missoula to Close Johnson Street Homeless Shelter by August*, MONT. FREE PRESS (Mar. 7, 2025), https://montanafreepress.org/2025/03/07/missoula-to-close-johnson-street-homeless-shelter-by-August/ [https://perma.cc/S4NL-TNHX]; Maggy Wolanske, *Loveland Cuts Shelter Services Despite ACLU Pushback, Community Outcry*, DENVER7 (Sep. 29, 2025, at 17:22), https://www.denver7.com/news/front-range/loveland/loveland-homeless-shelter-closes-this-week-leaving-people-in-the-community-concerned [https://perma.cc/B4WG-D9E6].

276. Bryant, *supra* note 275. Subsequently, the Grants Pass City Council "approve[d] a notice of intent to award the contract for a $1.2 million homelessness grant." Jane Vaughan, *Grants Pass Intends to Give $1.2 Million Homelessness Grant to Roseburg Developer*, JEFFERSON PUB. RADIO (Nov. 21, 2025, 06:25 PT), https://www.ijpr.org/poverty-and-homelessness/2025-11-21/grants-pass-intends-to-give-1-2-million-homelessness-grant-to-roseburg-developer [https://perma.cc/Q3FN-FJYJ]; *see* John Oliver, *Grants Pass Advances Shelter Plan from Debate to Development*, GRANTS PASS TRIBUNE (Jan. 7, 2026), https://www.grantspasstribune.com/grants-pass-advances-shelter-plan-from-debate-to-development/ [https://perma.cc/SHL7-4NAR].

277. Aaron Bolton, *Cities Find a New Incentive to Close Homeless Shelters*, NPR (Dec. 30, 2024, at 17:13 ET), https://www.npr.org/2024/12/17/nx-s1-5227085/cities-find-a-new-incentive-to-close-homeless-shelters [https://perma.cc/AVT5-C4EX]. Kalispell also not only removed bus benches in order to stop the homeless from sleeping on them but removed the city bus stops altogether, instead requiring a potential rider to call the bus via an app on their phone linked to a credit card; because unhoused people do not always have functioning phones or credit cards, they are effectively prohibited from riding the bus. Andrew Gumbel, *A Montana Town Is Waging War on Its Unhoused Citizens. One Shelter Is Fighting Back*, THE GUARDIAN (Jan. 27, 2025, at 10:00 ET), https://www.theguardian.com/us-news/2025/jan/27/kalispell-montana-homelessness [https://perma.cc/4YT3-VE2U]. The City later reached a settlement agreement with the warming center after a preliminary injunction was entered by a federal court. Maggie Dresser, *Flathead Warming Center Reaches Agreement with City of Kalispell to Remain Open*, FLATHEAD BEACON (Feb. 26, 2025), https://flatheadbeacon.com/2025/02/26/flathead-warming-center-reaches-agreement-with-city-of-kalispell-to-remain-open/ [https://perma.cc/NS7X-FBBG].

278. Noah Biesiada, *Irvine Backs Out of Proposed Homeless Shelter at 11th Hour*, VOICE OF OC (Nov. 5, 2024), https://voiceofoc.org/2024/11/irvine-backs-out-of-proposed-homeless-shelter-at-11th-hour/ [https://perma.cc/RW3L-T85H].

many proposed shelters around the country that are no longer being built.[279]

In addition, in the past two years, cities around the country have introduced over 320 anticamping bills—similar to the one at issue in *Grants Pass*—and nearly 220 of them have passed.[280] There is no longer any illusion about the goal of these laws; as one county supervisor who spearheaded an anticamping law noted, the point was to make it "uncomfortable"—for example, by requiring people living outside "to move at least 300 feet every hour."[281] The Trump administration's recent executive order, moreover, proposes extensive changes to federal homelessness policy, including prioritizing funding for states that enforce prohibitions on camping and loitering, effectively incentivizing the push to criminalize those who are unhoused.[282]

These laws are hardly the only laws targeting unhoused populations.[283] As of 2021, sixteen states had statewide laws restricting "loitering," "loafing," or "vagrancy," and twenty-four had similar laws restricting the same vaguely defined behavior in particular public places.[284] A growing number of cities have passed laws making it illegal for members of the public to feed unhoused people.[285] In 2023, an estimated seventy cities had enacted food-

279. *See, e.g.*, Dan Boyce, *Alamosa City Council Votes to Cancel Plans for New Homeless Shelter After Public Feedback*, KRCC (Nov. 12, 2024, at 17:00 ET), https://www.cpr.org/2024/11/12/alamosa-city-council-cancels-new-homeless-shelter-plans/ [https://perma.cc/FX2S-SP69]; Angel Green, *Orlando Drops Plans for Controversial SODO Homeless Shelter*, WFTV (Mar. 10, 2025, at 17:03 ET), https://www.wftv.com/news/local/ orlando-drops-plans-controversial-sodo-shelter/O6O7JB6EG5FXTPUPQDEHYR3L3U/ [https://perma.cc/CX34-EMPC].

280. *See One Year Since Grants Pass: Tracking the Criminalization of Homelessness*, ACLU (June 23, 2025), https://www.aclu.org/one-year-since-grants-pass-tracking-the-criminalization-of-homelessness [https://perma.cc/9N7B-KS8H].

281. Jennifer Ludden, *100-Plus US Cities Banned Homeless Camping This Year After Grants Pass Ruling*, OR. PUB. BROAD. (Dec. 26, 2024, at 10:10 ET), https://www.opb.org/article/2024/12/26/homeless-camping-ban-grants-pass/ [https://perma.cc/W63M-X5NT].

282. Exec. Order No. 14,321, 90 Fed. Reg. 35,817 (July 24, 2025).

283. *See* NAT'L HOMELESSNESS L. CTR, HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT 11 (Nov. 2021), https://homelesslaw.org/wp-content/uploads/2021/11/2021-HNH-State-Crim-Supplement.pdf [https://perma.cc/N2L8-KPP7].

284. *Id.*

285. Ashlie D. Stevens, *"Criminalizing the Samaritan": Why Cities Across the US Are Making It Illegal to Feed the Homeless*, SALON (Aug. 7, 2023, at 12:01 ET), https://www.salon.com/2023/08/07/criminalizing-the-samaritan-why-cities-across-the-us-are-making-it-illegal-to-feed-the-homeless/ [https://perma.cc/J82H-WARM].

sharing bans.[286] These laws echo the thought of one Grants Pass city councilor: "Maybe they aren't hungry enough."[287]

This reaction—from cities and states to ramp up laws restricting sitting, sleeping, and even eating—is deeply misguided. As concerning as the Court's rejection of *Robinson* was, *Grants Pass* did not close the door on the Constitution's innocence limit. At most, it closed the door on the most narrow version of the limit: *Robinson*'s categorical approach under the Eighth Amendment. The *Grants Pass* Court echoed the *Powell* Court's concern that the Eighth Amendment lacks administrable standards for declaring a type of conduct in general as categorically innocent, forcing courts to act as "the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."[288] *Grants Pass* refused to create "abstract rules" that would "prove[ ] all but impossible to administer in practice."[289]

But this exact problem—the difficulty the Court has with squarely announcing a categorical view of morality—is what drove the Court to innovate its other approaches to the innocence limit. Interpretive avoidance and due process allowed the Court to effectuate its moral judgments without having to lay down categorical rules. And it made use of those alternatives in cases in which the need to intervene was greatest: when criminal punishment and claims of "immorality" were used as pretexts for singling out and ostracizing those unwanted by the political majority.

These alternatives remain available and important. As Justice Sotomayor took care to note in her dissent, ordinances like those in Grants Pass "may still raise a host of other legal issues."[290] She emphasized that the Court specifically "[did] not decide whether the Ordinances violate the Due Process Clause."[291] As a result, the Court's decision should not be read "as closing the door on such claims."[292]

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286. *See id.*

287. Declaration of Kelly Wessels in Support of Plaintiffs' Motion for Summary Judgment, Exhibit 1, City Council Community Roundtable, *supra* note 259, at 7.

288. Powell v. Texas, 392 U.S. 514, 533 (1968) (plurality opinion).

289. City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2222 (2024).

290. *Id.* at 2241 (Sotomayor, J., dissenting).

291. *Id.* at 2242.

292. *Id.* at 2241.

CONCLUSION

Contrary to the Supreme Court's pronouncements in *Grants Pass*, federal courts do have a role to play in guarding the outer boundaries of criminal punishment against misuse and abuse. This Article identifies several approaches the Court has taken to this repeated problem, demonstrating how the innocence limit has played an integral role in the Court's criminal law jurisprudence. *Robinson* and the Court's other innocence-limit cases could have served as guides for *Grants Pass* to embrace and apply one of the Court's innocence limit frameworks. But as Justice Sotomayor penned, "[t]he Court's misstep today is confined to its application of *Robinson*."[293] Although the Court missed the opportunity to effectuate the innocence limit, and the Court's rejection of *Robinson* as an outlier was wrong, the innocence limit still lives on and can still be used to guard the outer boundary of criminal punishment.

293. *Id.* at 2243.