

SETTING THE STAGE FOR *GRANTS PASS* (& A MORAL
CONSTITUTIONAL RECKONING)

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ABSTRACT

The U.S. Supreme Court's decision in City of Grants Pass v. Johnson marked a seismic shift in the legal landscape governing homelessness throughout the country. By permitting the criminalization of involuntary acts, such as sleeping or resting in public when no shelter is available, the Court foreclosed constitutional protections under the Eighth Amendment's Cruel and Unusual Punishments Clause and signaled judicial deference to punitive local policies targeting unhoused people. But Grants Pass was not spontaneous; it was seeded over time. This Article situates Grants Pass within the broader legal and nonlegal contexts that made its outcome possible. Part I explores how converging national crises, such as chronic housing shortages, systemic failures in health care and mental health systems, escalating climate crises, and the legacy of mass incarceration fuel contemporary homelessness and normalize its criminalization. Part II traces Grants Pass's doctrinal lineage, analyzing how Robinson v. California, Powell v. Texas, and Martin v. City of Boise shaped status-based punishment and Eighth Amendment protections. By grounding Grants Pass in these intersecting forces, this Article suggests a critical foundation for understanding the legal, moral, and societal implications of the Court's retreat from protecting some of the most vulnerable members of society.

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TABLE OF CONTENTS

INTRODUCTION	1127
I. HOW HOUSING, HEALTH CARE, CLIMATE, AND MASS INCARCERATION CRISES SET THE STAGE FOR THE HOMELESSNESS CRISIS AND FOR <i>GRANTS PASS</i>	1128
<i>A. The Housing Crisis Fuels Homelessness</i>	1130
<i>B. The Health Care Crisis Fuels Homelessness</i>	1132
<i>C. The Climate Crisis Fuels Homelessness</i>	1138
<i>D. The Mass Incarceration Crisis Fuels Homelessness</i> . . .	1142
<i>E. The Criminalization of Homelessness Further Reinforces the Crisis</i>	1146
II. HOW <i>ROBINSON, POWELL & MARTIN</i> SET THE STAGE FOR <i>GRANTS PASS</i>	1148
A. <i>Robinson v. California</i>	1149
B. <i>Powell v. Texas</i>	1153
C. <i>Martin v. City of Boise</i>	1157
CONCLUSION	1161

INTRODUCTION

On June 28, 2024, the U.S. Supreme Court decided *City of Grants Pass v. Johnson*, holding that local governments may fine or jail involuntarily homeless individuals for sleeping outdoors on public property, even when no shelter is available.¹ The ruling marked a dramatic turn in the legal treatment of homelessness, with the majority rejecting arguments that such punishment violates the Eighth Amendment's ban on cruel and unusual punishments.²

Yet *Grants Pass* did not arise out of thin air. Its permissive stance toward the criminalization of homelessness reflects a confluence of broader national crises—housing unaffordability, public health system collapse, accelerating climate disasters, and mass incarceration—that have rendered homelessness both more widespread and more visible, while simultaneously justifying increasingly punitive responses.³ At the same time, *Grants Pass*'s path was paved by decades of constitutional litigation, including *Robinson v. California*,⁴ *Powell v. Texas*,⁵ and *Martin v. City of Boise*,⁶ in which courts wrestled with the line between punishing conduct and criminalizing status.⁷

This Article examines these converging legal and nonlegal forces that set the stage for *Grants Pass*. Part I surveys America's housing, health care, climate, and mass incarceration crises that fuel contemporary homelessness and make the criminalization of homelessness, and cases such as *Grants Pass*, possible. It suggests these structural failures have driven and deepened the homelessness crisis in the United States; therefore, *Grants Pass* is situated within such intersecting systems of oppression. Part II traces the key Eighth Amendment precedents that shaped how courts have historically approached laws targeting unhoused individuals for involuntarily surviving in public space. Together, these Parts aim to provide the

1. 144 S. Ct. 2202, 2219-21, 2226 (2024).

2. *Id.* at 2216, 2218, 2220-21, 2226.

3. *See infra* Part I.

4. 370 U.S. 660, 666-67 (1962).

5. 392 U.S. 514, 530, 532-36 (1968).

6. 920 F.3d 584, 603, 615-18 (9th Cir. 2019).

7. *See infra* Part II.

necessary foundation for understanding how *Grants Pass* came to be and what it reveals about America's evolving relationship with poverty, punishment, and constitutional meaning.

Ultimately, *Grants Pass*'s path reveals the deep entanglement between the law and the structural conditions in which it unfolds—conditions that are not inevitable but are the product of human choices and values. The law does not operate above or apart from the other systems that humans build: It is shaped by them and, in turn, helps to shape them. Both law and the broader systems of housing, health care—and even punishment—are human creations, reflective of collective choices and values. Interrupting this mutually reinforcing dynamic requires more than doctrinal reform; it calls for a moral reckoning that reorients constitutional interpretation toward justice and human dignity. *Grants Pass* thus invites not only legal critique but a reassessment of the social and constitutional frameworks that enabled it.

I. HOW HOUSING, HEALTH CARE, CLIMATE, AND MASS INCARCERATION CRISES SET THE STAGE FOR THE HOMELESSNESS CRISIS AND FOR *GRANTS PASS*

America's mounting homelessness crisis set the stage for *Grants Pass*. A single night in January 2024 again marked the highest national homeless count ever, with at least “771,480 people—or about 23 of every 10,000 people in the United States—experienc[ing] homelessness,” an 18 percent increase over the prior year.⁸ Children under the age of eighteen “were the age group that experienced the largest increase in homelessness.”⁹ Indeed, every single category of homelessness spiked in 2024 compared to 2023, except for veteran homelessness,¹⁰ which continues to show persistent improvement due to the consistent funding and implementation of housing-centered evidence-based solutions.¹¹

8. TANYA DE SOUSA & MEGHAN HENRY, U.S. DEP'T OF HOUS. & URB. DEV., THE 2024 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS, at v (2024), <https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf> [<https://perma.cc/K5FX-PCVU>].

9. *Id.*

10. *Id.*

11. Press Release, Margot Kushel, Dir., Benioff Homelessness & Hous. Initiative, UCSF

The surge in homelessness rates can be misleading: it does not mean that evidence-based solutions to homelessness are not working. To the contrary, such interventions are helping more people exit homelessness than ever before.¹² Instead, this rise reflects a multitude of factors, including ending homelessness prevention programs put in place during the height of the COVID-19 pandemic, a worsening national affordable housing crisis, rising inflation, stagnating wages among middle and lower-income households, and the persisting effects of systemic racism.¹³

Today and throughout American history, homelessness disproportionately affects already marginalized groups, including Black, brown, disabled, gender nonconforming, and LGBTQ individuals, as well as immigrants and single-female-headed families.¹⁴ Accordingly, housing instability and homelessness exposes a long-standing history of structural and systemic discrimination.¹⁵ This plague befalls other vulnerable groups too, especially the elderly.¹⁶ More

(Dec. 28, 2024), <https://homelessness.ucsf.edu/resources/press-release/statement-Kushel-PIT-count> [<https://perma.cc/E2GH-XXPF>] (attributing the consistent decline to the fact that “[v]eterans are the only group for whom we have adequately scaled the evidence-based response: Housing First, or housing subsidies paired with appropriate services”).

12. See DANIEL SOUCY, MAKENNA JANES & ANDREW HALL, NAT’L ALL. TO END HOMELESSNESS, STATE OF HOMELESSNESS: 2024 EDITION (2024), <https://endhomelessness.org/resources/research-and-analysis/state-of-homelessness-2024-edition> [<https://perma.cc/59P6-NCCS>] (noting America’s homeless “response [s]ystems [w]ork [e]ffectively.... It increasingly serves more people, but needs more resources to combat the nationwide affordable housing crisis.”); *USICH Leaders and Staff Participate in 2024 Homelessness Count*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Jan. 26, 2024), <https://usich.gov/newsevents/news/usich-leaders-and-staff-participate-2024-homelessness-count> [<https://perma.cc/A7UP-GGEK>] (noting particular success with nonpunitive and evidence-based approaches to helping homeless veterans).

13. See SOUCY, JANES & HALL, *supra* note 12 (reporting a 23 percent increase in newly homeless individuals); *The Supreme Court Rules on Homelessness: What It All Means*, NAT’L ALL. TO END HOMELESSNESS: BLOG (July 1, 2024), <https://endhomelessness.org/blog/the-supreme-court-rules-on-homelessness-what-it-all-means/> [<https://perma.cc/C738-3PTM>] (citing new U.S. Department of Housing & Urban Development (HUD) System Performance Measure data); DE SOUSA & HENRY, *supra* note 8.

14. KAYA LURIE & BREANNE SCHUSTER, HOMELESS RTS. ADVOC. PROJECT, DISCRIMINATION AT THE MARGINS: THE INTERSECTIONALITY OF HOMELESSNESS & OTHER MARGINALIZED GROUPS at i, iv, 2 (Sara Rankin ed., 2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1002&context=hrap> [<https://perma.cc/747T-EVC3>].

15. See Sara Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 6-7 (2016) [hereinafter *The Influence of Exile*]; Sara Rankin, *Invidious Deliberation: The Problem of Congressional Bias in Federal Hate Crime Legislation*, 66 RUTGERS L. REV. 563, 627 (2014) [hereinafter *Invidious Deliberation*].

16. See DE SOUSA & HENRY, *supra* note 8.

than one in five Americans experiencing homelessness are aged fifty-five or older.¹⁷ Indeed, older Americans make up one of the fastest-growing segments of the unhoused population.¹⁸

This mounting homelessness crisis is not occurring in a vacuum; it is made possible by other persistent problems, including those relating to housing, health care, and the criminalization of poverty.

A. The Housing Crisis Fuels Homelessness

A housing crisis fuels the homelessness crisis. The single clearest driver of homelessness is housing market conditions, such as the availability and affordability of housing.¹⁹ Fundamentally, homelessness is a housing deprivation problem.²⁰

Housing affordability across the country is lower than ever.²¹ 2024 marked a record-high of cost-burdened renters, when nearly half of all renters struggled to pay for their housing.²² Meanwhile, only one in four renters eligible for federal rental assistance receives it.²³

17. TANYA DE SOUSA, ALYSSA ANDRICHICK, ED PRESTERA, KATHERINE RUSH, COLLETTE TANO & MICAIAH WHEELER, U.S. DEP'T OF HOUS. & URB. DEV., *THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 3* (Dec. 2023), <https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf> [<https://perma.cc/S58T-XJXB>].

18. SOUCY, JANES & HALL, *supra* note 12; *see* DE SOUSA & HENRY, *supra* note 8, at v, 84, 86, 88.

19. GREGG COLBURN & CLAYTON PAGE ALDERN, *HOMELESSNESS IS A HOUSING PROBLEM: HOW STRUCTURAL FACTORS EXPLAIN U.S. PATTERNS* 10 (2022).

20. *Id.* at 10-14, 29 (explaining that homelessness is driven primarily by housing market conditions and noting that high housing costs and low vacancy rates are significant contributors, while individual factors such as mental illness or addiction fail to account for regional differences).

21. *See* JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *AMERICA'S RENTAL HOUSING 2024*, at 2 (2024), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2024.pdf [<https://perma.cc/3KJH-VGPN>].

22. Anna Bahney, *Half of US Tenants Can't Afford to Pay Their Rent. Here's What's Ahead*, CNN (Jan. 30, 2024, at 16:04 ET), <https://www.cnn.com/2024/01/30/economy/rent-prices-dropping-2024-apartments> [<https://perma.cc/PAY5-NWJ3>].

23. Ann Oliva, *Focusing on Solutions: The Supreme Court and Housing Justice*, NAT'L LALL. TO END HOMELESSNESS: BLOG (May 24, 2024), <https://endhomelessness.org/blog/focusing-on-solutions-the-supreme-court-and-housing-justice/> [<https://perma.cc/VMD4-B8VM>]; NYU FURMAN CTR., *STATE OF THE CITY 2023: THE USE OF HOUSING CHOICE VOUCHERS IN NEW YORK CITY* (2024), <https://web.archive.org/web/20260113081202/https://www.furmancenter.org/stateofthecity/view/the-use-of-housing-choice-vouchers-in-new-york-city> [<https://perma.cc/V9EN-Q78D>].

Cities nationwide suffer a critical shortage of affordable housing²⁴. America faces a shortage of at least 7.3 million units of available and affordable housing for the lowest income households.²⁵ Accordingly, a renter working full-time at minimum wage cannot afford a modest two-bedroom apartment anywhere in the United States.²⁶ But the crushing cost burdens of housing are climbing the income brackets to affect middle-income households as well.²⁷

Unsurprisingly, many cities are experiencing unprecedented eviction rates.²⁸ Eviction filings are not only escalating but even surpassing “pre-pandemic levels in some major cities” across the country.²⁹ Countless renters teeter near the edge, as even a one hundred dollar increase in median rent results in a 9 percent spike in homelessness.³⁰

Even as greater numbers of Americans are falling into homelessness, the vast majority of cities sorely lack sufficient emergency shelter.³¹ In the context of a growing climate crisis, no city has the necessary shelter and housing to keep everyone safe from the dangers of extreme cold or heat.³² Given this dismal shortage, it is

24. See NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 15, 17-18 (2023), https://nlihc.org/sites/default/files/gap/Gap-Report_2023.pdf [<https://perma.cc/ZRC5-H96L>]; see also Jeffery Hayward, *U.S. Housing Shortage: Everything, Everywhere, All at Once*, FANNIE MAE: PERSPECTIVES BLOG (Oct. 31, 2022), <https://www.fanniemae.com/research-and-insights/perspectives/us-housing-shortage> [<https://perma.cc/7848-XX9G>].

25. NAT'L LOW INCOME HOUS. COAL., *supra* note 24, at 3.

26. NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 11 (2024), https://nlihc.org/sites/default/files/gap/2024/Gap-Report_2024.pdf [<https://perma.cc/RS4G-TL7B>]; NAT'L LOW INCOME HOUS. COAL., OUT OF REACH: THE HIGH COST OF HOUSING 3-4, 16-18 (2024), https://nlihc.org/sites/default/files/2024_OOR.pdf [<https://perma.cc/BM8K-XHBY>].

27. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *supra* note 21, at 34.

28. See Sarah Johnson, Lorae Stojanovic & Peter Hepburn, *Preliminary Analysis: Eviction Filing Patterns in 2024*, THE EVICTION LAB (Apr. 24, 2025), <https://evictionlab.org/ets-report-2024/> [<https://perma.cc/666D-DLX8>]; Matt Egan, *'It Was Humiliating.' Evictions in These Cities Are Worse than Before Covid*, CNN (July 24, 2024, at 19:34 ET), <https://www.cnn.com/2024/07/24/business/evictions-rent-housing-inflation> [<https://perma.cc/2DWJ-ADE4>].

29. Egan, *supra* note 28.

30. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-433, HOMELESSNESS: BETTER HUD OVERSIGHT OF DATA COLLECTION COULD IMPROVE ESTIMATES OF HOMELESS POPULATION 30 (July 2020), <https://www.gao.gov/assets/gao-20-433.pdf> [<https://perma.cc/SH9Q-XERB>].

31. *Unsheltered Homelessness: Trends, Causes, and Strategies to Address*, NAT'L ALL. TO END HOMELESSNESS (July 26, 2017), <https://endhomelessness.org/resources/research-and-analysis/unsheltered-homelessness-trends-causes-strategies-address/> [<https://perma.cc/GDZ3-C277>].

32. *States Most Impacted by the Climate Crisis Lack Sufficient Shelter and Housing for*

unsurprising that America continues to record the highest homelessness counts ever, year after year.³³

B. The Health Care Crisis Fuels Homelessness

Similar to housing and homelessness, homelessness and health are intimately intertwined. The strength of this relationship has given rise to the common phrase “housing is health care.”³⁴ The U.S. health care system, further weakened by the unprecedented toll of a global pandemic, now has a dire prognosis: Many Americans who need medical, behavioral, or mental health care are unable to receive it.³⁵ Aging populations, increasing chronic diseases, rising costs, inadequate insurance coverage, and systemic disparities are worsened by severe staffing shortages.³⁶ Demand for health care is

the Most Vulnerable, NAT'L ALL. TO END HOMELESSNESS (July 30, 2024), <https://endhomelessness.org/resources/sharable-graphics/states-most-impacted-by-the-climate-crisis-lack-sufficient-shelter-and-housing-for-the-most-vulnerable/> [<https://perma.cc/2TLP-HVDA>].

33. See DE SOUSA & HENRY, *supra* note 8; DE SOUSA ET AL., *supra* note 17, at 12.

34. See, e.g., John Lozier, *Housing is Health Care*, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL (2019), <https://nhhc.org/wp-content/uploads/2019/08/Housing-is-Health-Care.pdf> [<https://perma.cc/PV5G-NJV4>]; COMMUNITY SOLS., STATE PUBLIC HEALTH & HOMELESSNESS PLAYBOOK 36-37 (Mar. 2024), https://community.solutions/wp-content/uploads/2024/06/Final-Version_State-Public-Health-Playbook-June-2024.pdf [<https://perma.cc/8Z73-58PH>] (discussing housing as a public health intervention); Angela Hart, *Is Housing Health Care? State Medicaid Programs Increasingly Say 'Yes'*, CNN (Feb. 5, 2024, at 06:29 ET), <https://www.cnn.com/2024/02/05/health/housing-health-care-kff-health-news-partner> [<https://perma.cc/95A8-ZHDD>]; CTRS. FOR MEDICARE & MEDICAID SERVS., *Homelessness Initiatives*, MEDICAID.GOV, <https://www.medicare.gov/medicaid/long-term-services-supports/balancing-incentive-program/homelessness-initiatives> [<https://perma.cc/BR9S-QXSH>].

35. See *Increased Need for Mental Health Care Strains Capacity*, AM. PSYCH. ASS'N (Nov. 15, 2022), <https://www.apa.org/news/press/releases/2022/11/mental-health-care-strains> [<https://perma.cc/333Z-VRKH>] (reporting increased waitlists and reduced capacity among psychologists); Anne Schneider, *Impact on Health Systems from COVID-19 and the Role of Social Determinants of Health*, AM. ACAD. FAM. PHYSICIANS, Mar.-Apr. 2024, at 1 (noting worsening mental health among health care workers); Rishi Gidwani & Cheryl L. Damberg, *Changes in US Hospital Financial Performance During the COVID-19 Public Health Emergency*, 4 JAMA HEALTH F., July 14, 2023, at 1, 6, 9 <https://jamanetwork.com/journals/jama-healthforum/fullarticle/2807183> [<https://perma.cc/SHZ3-T6UW>] (finding a disproportionate impact on hospitals serving Hispanic communities); Tom Murphy, *Being a Patient is Getting Harder in a Strained and Complex US Health Care System*, AP NEWS (June 2, 2024, at 08:00 ET), <https://apnews.com/article/patient-care-insurance-denials-712af9c8ed1a644cc8ee13b9814b4fbb> [<https://perma.cc/KL5X-3PK7>] (discussing difficulties accessing care due to provider shortages and insurance complications).

36. Jeff DiLullo, *Vital Signs: America's Health Care Crisis and the Imperative of Accessible Care*, FORTUNE (June 18, 2024, at 14:00 ET), <https://fortune.com/2024/06/18/vital-signs->

surging while access to care is declining, including mental and behavioral health care.³⁷ These challenges prevent necessary or even basic access to care.³⁸

While this crisis broadly affects most Americans, unhoused people are especially disadvantaged, especially those experiencing unsheltered chronic homelessness.³⁹ Chronic homelessness, by definition, requires the presence of a disabling condition, such as a chronic health problem;⁴⁰ accordingly, this population is particularly demonstrative of the health hazards of homelessness. Of individuals who have experienced homelessness, those who experience chronic homelessness continues to grow, rising from approximately 23 percent in 2014 to nearly 30 percent in 2023.⁴¹ Put another way, U.S. Department of Housing and Urban Development (HUD) now estimates about one in three unhoused people have a chronically disabling condition,⁴² although the number may be higher.⁴³ This increase in chronic homelessness is both a symptom of and contributor to the nation's health care crisis.⁴⁴

americas-health-care-crisis-and-the-imperative-of-accessible-care/ [https://perma.cc/BKE4-XWYR] (discussing the strain on the U.S. health care system); Jacqueline Howard, *Concern Grows Around US Health-Care Workforce Shortage: 'We Don't Have Enough Doctors'*, CNN (May 16, 2023, at 11:00 ET), <https://www.cnn.com/2023/05/16/health/health-care-worker-shortage> [https://perma.cc/K4R6-Z9PE] (detailing rising shortages of medical professionals); Elaine K. Howley, *The U.S. Physician Shortage Is Only Going to Get Worse. Here Are Potential Solutions*, TIME (July 25, 2022, at 16:07 ET), <https://time.com/6199666/physician-shortage-challenges-solutions/> [https://perma.cc/6BEQ-M6RT] (explaining contributing factors to the physician shortage).

37. See DiLullo, *supra* note 36 (describing “surging” demand for health care as it becomes “increasingly elusive”); AM. PSYCH. ASS'N, *supra* note 35 (discussing how the demand for mental and behavioral health care has exceeded practitioners' capacity to provide care).

38. See DiLullo, *supra* note 36.

39. See COMMUNITY SOLS., *supra* note 34, at 3, 36.

40. See DE SOUSA & HENRY, *supra* note 8, at viii-ix.

41. *Id.* at vi, 60-61.

42. *Id.* at vi (describing the increase in chronic patterns of homelessness).

43. See *id.* at xi-xiv (explaining the methods of data collection and analysis, as well as factors influencing the data and limitations affecting the report's findings). See generally U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 30 (reporting findings on the limitations that impacted the HUD's Annual Homelessness Assessment Report accuracy in previous years).

44. LAVENA STATEN, HOMELESS RTS. ADVOC. PROJECT, PENNY WISE BUT POUND FOOLISH: HOW PERMANENT SUPPORTIVE HOUSING CAN PREVENT A WORLD OF HURT 4-5 (Rankin ed., 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3419187 [https://perma.cc/TQ5U-KRX9].

Poor health and medical debt drive many people into homelessness,⁴⁵ and once a person experiences homelessness, their existing health conditions get worse and new conditions emerge.⁴⁶ People who live without shelter rarely have access to health care, are more likely to struggle with substance use and mental health issues, and face hazards such as being exposed to dangerous weather and violence.⁴⁷ Research shows that homeless adults age faster, develop more serious health problems, lose physical and mental abilities, and face significantly higher death rates at younger ages than housed Americans.⁴⁸ Homelessness increases morbidity and mortality in comprehensive ways.⁴⁹

Homelessness generally has a “bi-directional relationship” with mental and behavioral health.⁵⁰ Homelessness and mental illness

45. See, e.g., Noam Levey, *Medical Debt Nearly Pushed This Family into Homelessness. Millions More Are at Risk*, NPR (Sep. 11, 2023, at 05:00 ET), <https://www.npr.org/sections/health-shots/2023/09/11/1198534328/medical-debt-housing-security-homelessness> [<https://perma.cc/X6PE-S25Z>]; Kim Eckart, *Trouble Paying Medical Bills Can Lead to Longer Episodes of Homelessness, New Study Shows*, UW NEWS (June 29, 2020), <https://www.washington.edu/news/2020/06/29/trouble-paying-medical-bills-can-lead-to-longer-episodes-of-homelessness-new-study-shows/> [<https://perma.cc/3NJG-BDXW>]; Natasha Khwaja, *How State Courts Can Help Address America's Medical Debt Problem*, PEW (July 25, 2023), <https://www.pew.org/en/research-and-analysis/articles/2023/07/19/how-state-courts-can-help-address-americas-medical-debt-problem> [<https://perma.cc/SSE6-N77H>].

46. See *About Homelessness and Health*, CDC (Oct. 15, 2024), <https://www.cdc.gov/homelessness-and-health/about/index.html> [<https://perma.cc/5JES-HCG2>]; *Homelessness & Health: What's the Connection?*, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL (Feb. 2019), <https://nhhc.org/wp-content/uploads/2019/08/homelessness-and-health.pdf> [<https://perma.cc/KBM8-RLF5>]; SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., BEHAVIORAL HEALTH SERVICES FOR PEOPLE WHO ARE HOMELESS 1-2 (2021), <https://yieldpro.com/pdf/infographics/2025/0304/pep20-06-04-003.pdf> [<https://perma.cc/KRP7-ECFP>].

47. Cheyenne Garcia, Kelly Doran & Margot Kushel, *Homelessness and Health: Factors, Evidence, Innovations That Work, and Policy Recommendations*, 43 HEALTH AFFS. 164, 165-66 (2024).

48. *Id.* at 165 (noting “[c]ompared to low-income populations with housing, people experiencing homelessness have a higher prevalence of acute and chronic physical and mental health conditions and higher mortality rates” and partly attributing this “disparity ... to evidence indicating that homelessness has direct and indirect deleterious impacts on health and that it interferes with access to primary health care”).

49. See, e.g., *id.*; Maria Y. Patanwala, Cheyenne M. Garcia & Margot Kushel, *Health Care for People Experiencing Homelessness*, 332 JAMA 70, 70 (2024); see also *Housing Supports Recovery and Well-Being: Definitions and Shared Values*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (2020), <https://library.samhsa.gov/sites/default/files/housing-supports-pep24-08-007.pdf> [<https://perma.cc/SV48-JN4G>] (explaining how supportive housing facilitates recovery from chronic conditions).

50. Deborah K. Padgett, *Homelessness, Housing Instability and Mental Health: Making the Connections*, 44 BJPSYCH BULL. 197, 197 (2020) (reviewing decades of literature on the

are not the same—most individuals without stable housing do not have severe and disabling mental illnesses.⁵¹ However, homelessness and housing instability are proven to negatively affect one’s mental and behavioral health, and vice versa.⁵² Individuals with severe mental illness are canaries in the coal mine for larger systemic issues that affect society more broadly, such as the dearth of affordable housing and health care.⁵³

The constant dislocation and transience associated with homelessness extracts incalculable tolls on physical, emotional, and psychological health. Encampment sweeps cause many harms, including severing the relationships forged with street medicine, mobile health, and other health care providers.⁵⁴ Such forced displacement causes higher rates of hospitalizations and premature deaths.⁵⁵ Unhoused people commonly suffer from acute levels of sleep disruption and deprivation,⁵⁶ posing a “critical risk factor for mental and physical health.”⁵⁷

“bi-directional relationship between mental ill health and homelessness”); see also José Giovanni Luiggi-Hernández, *The Housing Crisis Is a Growing Threat to Mental Health*, MAD IN AM. (Aug. 9, 2024), <https://www.madinamerica.com/2024/08/the-housing-crisis-is-a-growing-threat-to-mental-health/> [<https://perma.cc/5ZQ2-4DQM>] (summarizing research in the article’s title as “The Housing Crisis is a Growing Threat to Mental Health”).

51. See Eric Rafla-Yuan, Veronica L. Handunge, Jordan J. White & Enrico G. Castillo, *Housing, Homelessness, and Mental Health*, 54 PSYCHIATRIC ANNALS e202, e203-04 (2024) (exploring the complex interplay between homelessness, mental illness, and housing interventions).

52. Padgett, *supra* note 50, at 197.

53. See Rafla-Yuan et al., *supra* note 51, at e203.

54. *Impact of Encampment Sweeps on People Experiencing Homelessness*, NAT’L HEALTH CARE FOR THE HOMELESS COUNCIL (Dec. 2022), <https://nhchc.org/wp-content/uploads/2022/12/NHCHC-encampment-sweeps-issue-brief-12-22.pdf> [<https://perma.cc/9YLY-R77M>].

55. Joshua A. Barocas, Samantha K. Nall, Sarah Axelrath, Courtney Pladsen, Alaina Boyer, Alex H. Kral, Ashley A. Meehan, Alexandra Savinkina, David Peery, Michael Bien, Christine Agnew-Brune, Jesse Goldshear, Joey Chiang, Benjamin P. Linas, Gregg Gonsalves, Ricky N. Bluthenthal & Emily Mosites, *Population-Level Health Effects of Involuntary Displacement of People Experiencing Unsheltered Homelessness Who Inject Drugs in US Cities*, 329 JAMA 1478, 1483 fig. 2, 1484 (2023).

56. Mia Budescu, Anne Reid, Amanda Siesselman-Borgia, Nicole Holbrook, Dania Valera & Gina C. Torino, *Sleep and Mental Health Among Youth Experiencing Homelessness: A Retrospective Pilot Diary Study*, 10 SLEEP HEALTH 54, 54-55 (2024); Katherine Hoops Calhoun & Stephanie Chassman, *Sleep Quality and Quantity Among Adults Experiencing Homelessness: An Ecological Systems Approach*, 32 J. HUM. BEHAV. SOC. ENV’T 748, 799 (2022).

57. Nhu Huynh, Darla E. Kendzor, Chaelin K. Ra, Summer G. Frank-Pearce, Adam C. Alexander, Michael S. Businelle & David R. Samson, *The Association of Sleep with Physical and Mental Health Among People Experiencing Homelessness*, 10 SLEEP HEALTH 48, 48, 51 (2024).

Moreover, the stigmatization and exile unhoused people regularly endure not only manifests as profound psychological trauma, but also as severe physical pain and suffering.⁵⁸ The comprehensive stigmatization and othering inflicted on unhoused people, in every context, is staggering and devastating.⁵⁹

Most cities not only lack sufficient permanent and affordable housing, but they also lack sufficient emergency shelter.⁶⁰ Significant barriers to entry often leave people who want shelter unable to access it.⁶¹ Regardless, such limited, temporary resources are not healthy, long-term solutions to homelessness.⁶² Overcrowding,

58. See Danieli Evans, *Institutionalized Ostracism*, 29 MICH. J. RACE & L. 155, 158, 193-94 (2025).

59. See Nathan J. Kim, Jessica Lin, Craig Hiller, Chantal Hildebrand & Colette Auerswald, *Analyzing U.S. Tweets for Stigma Against People Experiencing Homelessness*, 8 STIGMA & HEALTH 187, 188 (2023); see also Rankin, *The Influence of Exile*, *supra* note 15, at 14.

60. SUZANNE SKINNER, HOMELESS RTS. PROJECT, SHUT OUT: HOW BARRIERS OFTEN PREVENT MEANINGFUL ACCESS TO EMERGENCY SHELTER 4-5 (Sara K. Rankin ed., 2016), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1004&context=hrap> [<https://perma.cc/ZW9L-JLPA>] (discussing the dearth of clear data on the number of shelter beds nationally, but showcasing available statistics that paint a dire shortage).

61. See *id.* at 12 (noting, for example, that faith-based shelters may require participation in religious activities); see also *Martin v. City of Boise*, 920 F.3d 584, 609-10 (9th Cir. 2019) (acknowledging that some shelters impose religious requirements); *Interim Guidance on People Experiencing Unsheltered Homelessness*, CDC (Feb. 10, 2022), <https://web.archive.org/web/20221128211702/https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html> [<https://perma.cc/MQ46-EXTA>] (noting the elevated risk of disease transmission in congregate shelters during the COVID-19 pandemic).

62. Emergency shelters are not housing. Generally, they are congregate settings that fail to solve the underlying problem of homelessness. Shelters are not expected to meaningfully reduce homelessness and, as such, make little long-term impact. See Cassie Blom, Guest Commentary, *Shelter vs. Housing: An Important Distinction in Solving Homelessness*, SANTA CRUZ SENTINEL (Feb. 18, 2021, at 05:00 PT), <https://www.santacruzsentinel.com/2021/02/18/guest-commentary-shelter-vs-housing-an-important-distinction-in-solving-homelessness/> [<https://perma.cc/ZY2U-AZVY>]. The limited impact of shelter is particularly stark when compared to noncongregate temporary housing. See GISELLE ROUTHIER, COAL. FOR THE HOMELESS, STATE OF THE HOMELESS 2021: HOUSING IS HEALTHCARE. A LESSON FOR THE AGES, at 1 (2021), <https://www.coalitionforthehomeless.org/wp-content/uploads/2021/04/StateOfTheHomeless2021.pdf> [<https://perma.cc/9G69-RJDJ>] (noting that “shelters do not solve homelessness”); see also Elior Cohen, *Housing the Homeless: The Effect of Housing Assistance on Recidivism to Homelessness Economic and Social Outcomes*, 16 AM. ECON. J., April 2024, at 130, 165 (finding that emergency shelter placement had virtually no effect on future housing prospects). In contrast, noncongregate hotel-based sheltering during the COVID-19 pandemic improved outcomes across a range of metrics. See Gregg Colburn, Rachel Fyall, Christina McHugh, Pear Moraras, Victoria Ewing, Samantha Thompson, Taquesha Dean & Sarah Argodale, *Hotels as Noncongregate Emergency Shelters: An Analysis of Investments in Hotels as Emergency Shelter in King County, Washington During the COVID-19 Pandemic*,

underfunding, and other problems create “unhealthy, unsanitary, and even dangerous conditions in some shelters.”⁶³ Aside from shelters increasing the risk of the transmission of sickness and disease,⁶⁴ shelter-based violence is a major issue, and shelter rules and conditions often traumatize individuals, making them feel less safe.⁶⁵ Some shelter rules even increase the risk of overdose.⁶⁶ LGBTQ individuals, who are among those disproportionately represented in homeless populations, are at an especially pronounced risk of being victimized in shelters.⁶⁷ Many unhoused people find congregate shelters are not restful or restorative places;⁶⁸ to the contrary, many learn that congregate shelters are traumatic places that can further exacerbate existing trauma, not places that restore one’s sense of humanity or dignity.⁶⁹

Both policymakers and the public fail to sufficiently prioritize and respond to the connections between housing and health.⁷⁰ For example, long-rejected treatment-first approaches—which deprioritize housing—are regaining favor despite being proven as ineffective and often inhumane.⁷¹ The link between housing and healthcare is

32 HOUS. POL’Y DEBATE 853, 871 (2022) (finding improvements in health, residential stability, and staff engagement).

63. See SKINNER, *supra* note 60, at 2; see also *Frequently Asked Questions: Coronavirus & Homelessness*, NAT’L LOW INCOME HOUS. COAL. (Apr. 21, 2020), https://nlihc.org/sites/default/files/FAQs_Coronavirus-Homelessness.pdf [<https://perma.cc/DCU2-MFNP>] (explaining how improper shelter increases the risk of transmission of infectious diseases, including COVID-19).

64. See Nick Kerman, Sean A. Kidd, Joseph Voronov, Carrie Anne Marshall, Branagh O’Shaughnessy, Alex Abramovich & Vicky Stergiopoulos, *Victimization, Safety, and Overdose in Homeless Shelters: A Systematic Review and Narrative Synthesis*, HEALTH & PLACE, Sep. 2023, at 1, 1, 14 (“[F]ears of violence and other forms of harm were prominent concerns for people experiencing homelessness when accessing shelters.”).

65. *Id.* at 10, 12.

66. *Id.* at 12-13.

67. *Id.* at 14.

68. See *No Return to Large Congregate Shelters in America*, NAT’L COAL. FOR THE HOMELESS (Apr. 15, 2021), <https://nationalhomeless.org/no-congregate-shelter/> [<https://perma.cc/G94K-NY7Y>].

69. See *id.*

70. See, e.g., *State of the State: California Disability Policy in 2024*, DISABILITY RTS. EDUC. & DEF. FUND (Oct. 29, 2024), <https://dredf.org/state-of-the-state-california-disability-policy-in-2024/> [<https://perma.cc/BTG5-5HFP>].

71. See, e.g., Yinan Peng, Robert A. Hahn, Ramona K.C. Finnie, Jamaica Cobb, Samantha P. Williams, Jonathan E. Fielding, Robert L. Johnson, Ann Elizabeth Montgomery, Alex F. Schwartz, Carles Muntaner, Veronica Helms Garrison, Beda Jean-Francois, Benedict I. Truman & Mindy T. Fullilove, *Permanent Supportive Housing with Housing First to Reduce*

so profound and evident, that the health care industry is increasingly investing in building housing as a sort of prescription to improve health.⁷² Ultimately, the fates of the health care and homelessness crises braid together, and progress in either area demands greater production of affordable housing.⁷³

C. The Climate Crisis Fuels Homelessness

The climate crisis intensifies homelessness both in the United States and globally. Climate-driven disasters—including extreme heat, hurricanes, wildfires, floods, and drought—escalate housing insecurity, strain emergency response systems, and amplify the vulnerability of people already experiencing homelessness.⁷⁴ Environmental breakdowns are inextricably tied to social inequality, challenging the limits of laws and policies seeking to address poverty and homelessness.

Climate-related events have increasingly become catalysts for homelessness by destroying housing infrastructure and accelerating displacement. The “climate change–homelessness nexus” is no longer theoretical; it is evident in communities facing recurring natural disasters and rising housing costs due to climate

Homelessness and Promote Health Among Homeless Populations with Disability: A Community Guide Systematic Review, 26 J. PUB. HEALTH MGMT. & PROC. 404, 407 (2020), (finding the vast majority of unhoused individuals remained unhoused after treatment-only programs); *Housing First: A Review of the Evidence*, U.S. DEP'T OF HOUS. & URB. DEV. (Spring/Summer 2023), <https://web.archive.org/web/20251219205501/https://archives.huduser.gov/portal/periodicals/em/spring-summer-23/highlight2.html> [<https://perma.cc/T6AT-U85N>] (surveying Housing First's efficacy); Staten, *supra* note 44 (highlighting cost-effectiveness and humane benefits of Housing First approaches).

72. See, e.g., Andrew Boozary, Catherine Varner & Andreas Laupacis, *Homelessness Is a Health Crisis: Why Hospitals Are Resorting to Building Housing*, 196 CMAJ E666, E666 (2024) (explaining how hospitals are building housing as a public health intervention); John Lorinc, *Hospitals Getting into the Housing Business*, GLOBE & MAIL (Feb. 6, 2025), <https://www.theglobeandmail.com/real-estate/article-hospitals-getting-into-the-housing-business/> [<https://perma.cc/45MP-RYXZ>].

73. See Jeremy Cygler, Opinion, “*Health Care for the Homeless*” Is Just a Start. *People Need Housing.*, HARV. PUB. HEALTH (June 20, 2024), <https://harvardpublichealth.org/policy-practice/affordable-housing-is-key-to-end-cycles-of-homeless-hospitalization/> [<https://perma.cc/4CGW-H2EK>] (discussing research linking permanent housing access with reduced hospitalization among unhoused populations).

74. Sean A. Kidd, Shakoor Hajat, Mariya Bezgrebelna & Kwame McKenzie, Climate-Homelessness Working Grp., Comment, *The Climate Change-Homelessness Nexus*, 397 THE LANCET 1693, 1693 (2021).

pressures.⁷⁵ Extreme weather events reduce available housing stock, increase repair and insurance costs, and drive gentrification and displacement in high-risk or rapidly changing zones.⁷⁶

Such impacts have serious implications for housing markets already under strain. A 2025 report from *First Street* found that climate change is projected to erase \$1.47 trillion in U.S. home values by 2055.⁷⁷ The losses are expected to result from increasingly unaffordable insurance premiums and population retreat from vulnerable regions, particularly coastal or fire-prone areas.⁷⁸ As rising insurance costs render homeownership untenable for many, more Americans risk falling into housing instability.⁷⁹

Los Angeles illustrates the tight connections between climate disasters and housing crises. Though the city recently reported modest gains in reducing visible homelessness—a 5.1 percent drop countywide and a 10.4 percent drop within the city limits, aided by a 45 percent increase in people moving from streets to permanent housing—these efforts are precariously undercut by unprecedented wildfires.⁸⁰ Such worsening fires threaten to reverse hard-won progress by destroying existing housing and overwhelming emergency systems.⁸¹ After major wildfires, the National Low Income Housing Coalition documented spikes in price gouging and unaffordable rents in impacted areas, particularly in regions already facing acute housing shortages.⁸²

75. *Id.*

76. Vanessa Williamson & Ellis Chen, *Rethinking Place-Based Economic Security in the Age of Climate Migration*, BROOKINGS (Jan. 31, 2025), <https://www.brookings.edu/articles/rethinking-place-based-economic-security-in-the-age-of-climate-migration/> [<https://perma.cc/8NNH-Y4UC>].

77. Nicole Friedman & Deborah Acosta, *Climate Change to Wipe Away \$1.5 Trillion in U.S. Home Values, Study Says*, WALL ST. J. (Feb. 3, 2025, at 00:01 ET), <https://www.wsj.com/real-estate/climate-change-to-wipe-away-1-5-trillion-in-u-s-home-values-study-says-60c6970b> [<https://perma.cc/7JGT-U2RE>].

78. *Id.*

79. *Id.*

80. Angela Hart, *Los Angeles County Has Cut Homelessness, but Wildfires Threaten to Erase That Gain*, KFF HEALTH NEWS (Feb. 26, 2025), <https://kffhealthnews.org/news/article/los-angeles-la-california-wildfires-homelessness-housing/> [<https://perma.cc/MH5P-7LMA>].

81. *Id.*

82. Memorandum from the Nat'l Low Income Hous. Coal. to Members, *Report Finds Emergency Declaration for Los Angeles Wildfires Was Followed by Rent Gouging*, (Feb. 3, 2025), <https://nlihc.org/resource/report-finds-emergency-declaration-los-angeles-wildfires-was->

Unhoused individuals also face unique vulnerability in climate disasters. Lacking shelter, transportation, and real-time access to emergency alerts, unsheltered people are often the last to evacuate and the most likely to suffer and die from exposure.⁸³ Unhoused people are more likely to experience heatstroke, dehydration, frostbite, and respiratory illness, especially when disasters hit urban centers with large homeless populations.⁸⁴ They are also frequently excluded from emergency response planning, and many disaster relief shelters are inaccessible due to space limitations or criminalization of homelessness.⁸⁵

Health risks to unhoused people are not only acute but cumulative. Repeated exposure to environmental hazards increases the risk of heart attacks, PTSD, infection, and death.⁸⁶ Wildfire smoke, for example, has been shown to worsen respiratory conditions such as COPD and asthma,⁸⁷ already common among unhoused populations.⁸⁸ Flooding and mold exposure can create or exacerbate chronic illnesses.⁸⁹ In many cities, these conditions are compounded by lack of access to health care and shelter, forcing unhoused individuals to endure the brunt of climate impacts without being seen or helped.⁹⁰

Climate change thus magnifies systemic inequities. As with homelessness more broadly, the burdens of climate change fall most heavily on historically marginalized communities. Low-income

followed-rent-gouging [<https://perma.cc/6LUC-JEYM>].

83. See Caitlin Mello, *How Climate Change Impacts Homelessness*, NAT'L ALL. TO END HOMELESSNESS: BLOG (Apr. 24, 2023), <https://endhomelessness.org/blog/how-climate-change-impacts-homelessness/> [<https://perma.cc/2L2L-VAPV>].

84. See *id.*

85. See *Homelessness and Climate Change: A Roundup of Resources for Communities Before, During, and After Disasters*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (June 13, 2023), <https://www.usich.gov/guidance-reports-data/federal-guidance-resources/homelessness-and-climate-change-roundup-resources> [<https://perma.cc/JYN6-HPBV>].

86. A. PRÜSS-USTÜN, J. WOLF, C. CORVALÁN, R. BOS & M. NEIRA, WORLD HEALTH ORG., PREVENTING DISEASE THROUGH HEALTHY ENVIRONMENTS: A GLOBAL ASSESSMENT OF THE BURDEN OF DISEASE FROM ENVIRONMENTAL RISKS 14-15, 52, 56-57 (2016), https://iris.who.int/bitstream/handle/10665/204585/9789241565196_eng.pdf [<https://perma.cc/R5ZN-C8F4>].

87. *Id.* at 61-62, 64-65.

88. BEHAVIORAL HEALTH SERVICES FOR PEOPLE WHO ARE HOMELESS, *supra* note 46, at 3.

89. See PRÜSS-USTÜN ET AL., *supra* note 86, at 65.

90. Sarae Lewis, *On the Connection Between Climate Change and Homelessness*, CMTY. SOLUTIONS (Jan. 30, 2024), <https://community.solutions/research-posts/on-the-connection-between-climate-change-and-homelessness/> [<https://perma.cc/HV7V-66SE>].

households and communities of color are more likely to live in flood-prone areas, wildfire zones, and mobile home parks vulnerable to storm damage.⁹¹ Yet, mobile homes, an important form of affordable housing, are particularly susceptible to climate extremes and often excluded from disaster mitigation funding.⁹² In many places, zoning laws prevent the construction of resilient or energy-efficient affordable housing, deepening the divide between climate “winners” and “losers.”⁹³

Globally, the associated scale of displacement due to climate disasters is staggering: An estimated 20 million people are displaced each year due to climate-related events.⁹⁴ As internal climate migration increases, even wealthy nations such as the United States must reckon with the fallout from climate displacement. Displaced populations, from wildfire survivors in California to hurricane survivors in Louisiana, often face long-term housing insecurity, with many falling into chronic homelessness after losing homes, jobs, or access to public benefits.⁹⁵

Therefore, legal and policy reforms must address the climate-homelessness link. Communities need better predisaster planning, increased investment in postdisaster transitional housing, and long-term strategies to expand affordable housing stock in climate-resilient areas.⁹⁶ Climate and housing policies can be integrated. For example, the Center on Budget and Policy Priorities argues that state governments can “raise revenue while confronting climate change,” such as by taxing corporate polluters and redirecting that revenue into climate adaptation and affordable housing

91. See Will Curran-Groome, Andrew Rumbach, Annie Rosenow, Esther Sullivan & Oriya Cohen, *Mobile Homes Are Vulnerable to Climate Extremes. Here's What Policymakers Can Do Before the Next Disaster*, URB. INST. (Jan. 31, 2025), <https://www.urban.org/urban-wire/mobile-homes-are-vulnerable-climate-extremes-heres-what-policymakers-can-do-next> [<https://perma.cc/H7MZ-RB7F>].

92. See *id.*

93. *Id.*

94. Johnny Wood, *The Cost of the Climate Crisis? 20 Million Homeless Every Year*, WORLD ECON. F. (Dec. 6, 2019), <https://www.weforum.org/stories/2019/12/extreme-weather-climate-change-displaced/> [<https://perma.cc/7NEA-JNMQ>].

95. Nicholas Slayton, *Los Angeles Has a Housing Crisis. These Fires Will Make It Worse*, THE NEW REPUBLIC (Jan. 9, 2025), <https://newrepublic.com/article/190011/los-angeles-fires-houses-homelessness> [<https://perma.cc/S5J6-86LN>].

96. *Homelessness and Climate Change*, *supra* note 85.

development.⁹⁷ But climate resilience must also extend beyond infrastructure to include protections for vulnerable populations through rent stabilization, insurance reform, climate migration planning, and legal protections for disaster survivors.⁹⁸

Moreover, constitutional and statutory frameworks should be re-assessed. The duty to provide for the general welfare and equal protection under the law could be extended to include protections against climate-induced displacement. Failing to do so will not only perpetuate homelessness but also exacerbate the deep inequalities that climate change reveals, which extend to other systemic crises, such as mass incarceration.

D. The Mass Incarceration Crisis Fuels Homelessness

America also increasingly criminalizes poverty.⁹⁹ Our city and state governments lock up more people per capita than any other nation in the world,¹⁰⁰ and those incarcerated are disproportionately Black, brown, poor, and disabled.¹⁰¹ The mass incarceration crisis is

97. Rachel Jacobson, *States Should Address Climate Change and Revenue Needs Together for Maximum Impact*, CTR. ON BUDGET & POLY PRIORITIES (March 3, 2025, at 14:42 ET), <https://www.cbpp.org/blog/states-should-address-climate-change-and-revenue-needs-together-for-maximum-impact> [<https://perma.cc/2P64-B899>].

98. *Id.*

99. See, e.g., Nazish Dholakia, *How the United States Punishes People for Being Poor*, VERA INST. OF JUST., (Sep. 21, 2023), <https://www.vera.org/news/how-the-united-states-punishes-people-for-being-poor> [<https://perma.cc/SUC2-TH76>] (explaining that local ordinances criminalize poverty by penalizing behaviors such as sleeping, sitting, and panhandling in public spaces, disproportionately impacting the homeless); *Criminalization of Poverty as a Driver of Poverty in the United States*, HUM. RTS. WATCH (Oct. 4, 2017, 00:00 ET), <https://www.hrw.org/news/2017/10/04/criminalization-poverty-driver-poverty-united-states> [<https://perma.cc/AW9L-U78H>] (noting that fines, fees, and cash bail systems disproportionately harm low-income individuals, creating cycles of debt and incarceration).

100. Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, Mass Incarceration: The Whole Pie 2024 (Mar. 14, 2014), <https://www.prisonpolicy.org/reports/pie2024.html> [<https://perma.cc/6Z2Y-ZDEN>] (providing an overview of the U.S. incarceration system and its disproportionate impact on low-income and marginalized communities).

101. See, e.g., *Connections Among Poverty, Incarceration, and Inequality*, INST. FOR RSCH. ON POVERTY, UNIV. OF WIS. MADISON (May 2020), <https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality/> [<https://perma.cc/S5W3-TWRG>] (explaining how systemic inequality links incarceration and poverty); Wes Moore, *The Links Between Mass Incarceration and Poverty*, BRENNAN CTR. FOR JUST. (Mar. 1, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/links-between-mass-incarceration-and-poverty> [<https://perma.cc/Y7DY-GXAD>] (detailing how incarceration contributes to economic instability); Press Release, Leah Wang, Prison Pol'y Initiative, Chronic Punishment:

racially and socioeconomically unequal.¹⁰² Research proves the devastating toll of fines, fees, and bail on people, especially those living in poverty; the discriminatory way people of color are burdened by civil and criminal debts; and the extensive collateral damage of engaging with the legal system.¹⁰³

The masses of people jailed in America often includes people who are too poor to pay fines for minor offenses,¹⁰⁴ such as parking tickets. Indeed, “[m]ore than 80% of all arrests are for low-level, nonviolent offenses,” and conduct related to poverty.¹⁰⁵ Even civil fines and fees are devastating to poor people.¹⁰⁶ Not only does a civil debt further impoverish someone who is unable to pay, but failure to pay often means a civil infraction, which can then mutate into a misdemeanor criminal charge.¹⁰⁷ Studies show “the consequences of being charged with a misdemeanor, whether you are guilty or not, can be life-changing, especially if you are poor.”¹⁰⁸

The Unmet Health Needs of People in State Prisons (June 2022), <https://www.prisonpolicy.org/reports/chronicpunishment.html> [<https://perma.cc/Q548-HPFH>] (highlighting the disproportionate incarceration of disabled individuals and lack of adequate health care in prisons).

102. See generally ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018) (arguing that misdemeanor prosecutions contribute significantly to systemic inequality and wrongful convictions); ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016) (examining how monetary sanctions in the criminal justice system burden the poor and perpetuate inequality).

103. See *Fines and Fees in American Courts*, NAT'L CTR. FOR ACCESS TO JUST., <https://ncaj.org/fines-and-fees-american-courts> [<https://perma.cc/856J-953L>] (highlighting how fines and fees disproportionately burden low-income individuals and contribute to cycles of poverty); see also Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L. L. REV. 367, 368-70 (2021) (arguing that municipal ordinances effectively criminalize homelessness through civil penalties and policing practices).

104. See Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson Over 'Debtors Prisons'*, NPR: CODE SWITCH (Feb. 8, 2015, 21:03 ET), <https://www.npr.org/sections/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons> [<https://perma.cc/WU7R-CMXS>].

105. See *Criminalization & Racial Disparities*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities> [<https://perma.cc/8KJ2-WF3H>].

106. See Rankin, *supra* note 103, at 378, 380.

107. *Id.* at 370.

108. Terry Gross, *'Punishment Without Crime' Highlights the Injustice of America's Misdemeanor System*, NPR (Jan. 2, 2019, 15:08 ET), <https://www.npr.org/2019/01/02/681606995/punishment-without-crime-argues-that-americas-misdemeanor-system-targets-the-poor> [<https://perma.cc/LWJ3-WB5D>].

Cities nationwide routinely impose fines and fees through civil and criminal means, further entrapping poor people in the legal system.¹⁰⁹ Financially vulnerable people are sucked into a vortex of punishment, including jail, adverse credit history, loss of driver's licenses, and the inability to get or maintain employment or housing.¹¹⁰ Such impacts, further compounded by a criminal record, increase the likelihood of being rearrested soon after release.¹¹¹ Some describe this clear reciprocal relationship between poverty and incarceration as the "poverty to prison pipeline."¹¹²

Given the nexus between incarceration and poverty, it is unsurprising that between 30-50 percent of unhoused people report histories of incarceration.¹¹³ People experiencing homelessness make up over 15 percent of inmates, although the percentage may be much higher.¹¹⁴ Indeed, at least fifty thousand people a year enter homeless shelters right after their release.¹¹⁵ People who have been incarcerated are also ten times more likely to experience homelessness than the general public, regardless of race, age, gender, or other demographics.¹¹⁶

109. See *Fines and Fees in American Courts*, *supra* note 103; Matthew Menendez, Lauren-Brooke Eisen, Noah Atchison & Michael Crowley, *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [https://perma.cc/NA3B-4VA8].

110. See, e.g., *Fines and Fees in American Courts*, *supra* note 103.

111. See Sawyer & Wagner, *supra* note 100; Press Release, Alexi Jones & Wendy Sawyer, Prison Pol'y Initiative, Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems (Aug. 2019), <https://www.prisonpolicy.org/reports/repeatarrests.html> [https://perma.cc/JF9K-BECD].

112. See Tihanne Mar-Shall, *The Poverty to Prison Pipeline*, LAW J. SOC. JUST. (Mar. 29, 2021), <https://lawjournalforsocialjustice.com/2021/03/29/the-poverty-to-prison-pipeline/> [https://perma.cc/XN3M-ZX8J]; Press Release, Bernadette Rabuy & Daniel Kopf, Prison Pol'y Initiative, Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned (Aug. 2019), <https://www.prisonpolicy.org/reports/income.html> [https://perma.cc/NUF3-WAM8].

113. Lurie & Schuster, *supra* note 14, at 34 (describing the results of a study conducted in California).

114. See Lucius Couloute, PRISON POL'Y INITIATIVE, NOWHERE TO GO: HOMELESSNESS AMONG FORMERLY INCARCERATED PEOPLE (2018), <https://www.prisonpolicy.org/reports/housing.html> [https://perma.cc/Q4W9-Q5NY].

115. BAILEY GRAY, DOUG SMITH & ALLISON FRANKLIN, RETURN TO NOWHERE: THE REVOLVING DOOR BETWEEN INCARCERATION AND HOMELESSNESS (2019), <https://texascje.org/system/files?file=publications/Return%20to%20Nowhere%20The%20Revolving%20Door%20Between%20Incarceration%20and%20Homelessness.pdf> [https://perma.cc/3B6Y-HP7J].

116. See Couloute, *supra* note 114.

Jails are punitive places, unsuitable for use as shelters.¹¹⁷ Incarceration is not associated with increased access to health care or other palliative outcomes;¹¹⁸ to the contrary, the carceral environment has been shown to inflict significant and lasting damage on one's physical and mental health.¹¹⁹ This toll is particularly pronounced for people experiencing chronic homelessness—who are most at risk for arrest.¹²⁰

Punishing poverty and homelessness through jail, fines, and other means is unjust and counterproductive.¹²¹ While this practice is deeply embedded in American history,¹²² it is possible to break the cycle between homelessness and jail.¹²³ Whether local governments choose to do so is another matter.

117. See *Jail Space as Shelter*, NAT'L LOW INCOME HOUS. COAL. (Feb. 26, 2020), <https://nlihc.org/resource/jail-space-shelter> [<https://perma.cc/V424-VMUW>] (noting the increasing practice of using former or unused jails as temporary overflow emergency shelters in some cities).

118. See *Incarceration and Health: A Family Medicine Perspective (Position Paper)*, AM. ACAD. FAM. OF PHYSICIANS, <https://www.aafp.org/about/policies/all/incarceration.html> [<https://perma.cc/266R-9EY2>].

119. See, e.g., JULIA ACKER, PAULA BRAVEMAN, ELAINE ARKIN, LAURA LEVITON, JIM PARSONS & GEORGE HOBOR, MASS INCARCERATION THREATENS HEALTH EQUITY IN AMERICA, (Dec. 1, 2018), <https://www.rwjf.org/en/insights/our-research/2019/01/mass-incarceration-threatens-health-equity-in-america.html> [<https://perma.cc/8UJN-62DM>] (discussing how incarceration increases chronic health conditions and decreases life expectancy); Michael Massoglia & Brianna Remster, *Linkages Between Incarceration and Health*, 134 PUB. HEALTH REPS. 8S, 9S-10S (2019), <https://pmc.ncbi.nlm.nih.gov/articles/PMC6505320/> [<https://perma.cc/SSX9-2C9Y>] (reviewing studies showing negative relationships between incarceration and physical health); Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POLY INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> [<https://perma.cc/CZ4N-PSS9>] (summarizing research on incarceration's long-term harm to mental health); Patricia Warth, *Unjust Punishment: The Impact of Incarceration on Mental Health*, N.Y. STATE BAR ASS'N (Dec. 5, 2022), <https://nysba.org/unjust-punishment-the-impact-of-incarceration-on-mental-health/> [<https://perma.cc/3NF7-ZP42>] (finding similar mental-health consequences of incarceration).

120. See Rankin, *supra* note 103, at 388-89.

121. *Id.* at 374-75.

122. See generally JAVIER ORTIZ & MATTHEW DICK, HOMELESS RTS. ADVOC. PROJECT, THE WRONG SIDE OF HISTORY: A COMPARISON OF MODERN AND HISTORICAL CRIMINALIZATION LAWS 2, 17-18, 27 (Sara Rankin ed., 2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1003&context=hrap> [<https://perma.cc/2WJM-MD7L>] (comparing modern anti-homeless criminalization statutes to earlier exclusionary laws).

123. See, e.g., Sarah Gillespie & Samantha Batko, *Five Charts That Explain the Homelessness-Jail Cycle—and How to Break It*, URB. INST. (Sep. 16, 2020), <https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it> [<https://perma.cc/F7K9-D5KV>] (highlighting statistical links between homelessness and incarceration and advocating for Housing First solutions to disrupt the cycle).

E. The Criminalization of Homelessness Further Reinforces the Crisis

Despite compelling evidence that homelessness is made worse by dislocating, jailing, and fining already vulnerable people, the criminalization of homelessness continues to proliferate, escalating before, throughout, and in the immediate wake of *Grants Pass*. The criminalization of homelessness “refers to [a broad range of] laws that prohibit or severely restrict [individuals’] abilit[ies] to engage in necessary life-sustaining activities in public, even when [they have] no reasonable alternative” because they are unhoused.¹²⁴ Criminalization laws punish unhoused people for doing nothing other than “sitting, standing, sleeping ... asking for help, or [even] protecting [themselves] from the elements.”¹²⁵ Any human being must engage in such activities to survive; however, most people can turn to businesses, homes, or some other legal and private place to do so. Unhoused people, by definition, do not have such options, so they are virtually guaranteed to violate the law simply by existing.¹²⁶ Criminalization, which I and others have discussed at great length elsewhere,¹²⁷ repeatedly has been proven to be the most expensive and least effective response to homelessness.¹²⁸ Yet, states

124. Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 106-07 (2019).

125. *Id.* at 107.

126. See 42 U.S.C. § 11302(a)(4); U.S. DEP’T OF HOUS. & URB. DEV.: OFF. CMTY. PLAN. & DEV., A GUIDE TO COUNTING UNSHELTERED HOMELESS PEOPLE 4 (2008); U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, ALL IN: THE FEDERAL STRATEGIC PLAN TO PREVENT AND END HOMELESSNESS 90-91 (2022), https://www.usich.gov/sites/default/files/document/All_In.pdf [<https://perma.cc/L6ZD-87VR>]; *Myths & Facts About Homelessness*, COUNCIL FOR THE HOMELESS, <https://www.councilforthehomeless.org/myths-facts-about-homelessness/> [<https://perma.cc/7DV5-PFJD>]; Ruth Gourevitch & Mary K. Cunningham, *Dismantling the Harmful, False Narrative that Homelessness Is a Choice*, URB. INST. (Mar. 27, 2019), <https://www.urban.org/urban-wire/dismantling-harmful-false-narrative-homelessness-choice> [<https://perma.cc/Q2C7-G3MV>].

127. See generally Briefs in Support of Respondents, *Johnson v. Grants Pass*, NAT’L HOMELESSNESS L. CTR., <https://johnsonvgrantspass.com/court-briefs>; Rankin, *supra* note 124, at 118; Chris Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penalty: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC. PROBS. 131, 132, 137 (2020); NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 42-43 (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/NHQ7-BPV3>] [hereinafter HNH 2019].

128. See Rankin, *supra* note 124, at 104, 122.

commonly prioritize investments in incarceration and other punitive responses over housing.¹²⁹

Accordingly, criminalization laws continue to increase and intensify. National studies show that, over the last decade, the number of criminalization laws have doubled or even tripled.¹³⁰ Well-funded and influential entities such as the Cicero Institute have fueled the proliferation of punitive criminalization laws across the country.¹³¹ Some jurisdictions recently enacted particularly aggressive laws, such as Kentucky decriminalizing a property owner's use of deadly force against unhoused people who are suspected of illegal camping,¹³² Tennessee making camping on public land a felony,¹³³ and Texas enacting a statewide camping ban, which not only imposes fines and penalties for sleeping in public spaces, but also threatens any community choosing not to enforce the camping ban with losing state funding.¹³⁴

The national obsession with punishing homelessness—through forced displacement, fines, incarceration, and other carceral means—is part of America's legacy. From its founding, this country has used the law as a punitive tool to run poor, disabled, Black and brown people out of town.¹³⁵ Even though individual factors such as mental illness, drug use, and poverty do not explain the regional variations in homelessness rates as clearly as housing-related factors,¹³⁶ Americans generally code people experiencing homelessness as blameworthy and culpable on an individual level.¹³⁷

129. See Jonathan Russell, LINKEDIN (June 27, 2024, at 22:04 ET), https://www.linkedin.com/posts/jrussell2_endhomelessness-housingforall-housingjustice-activity-7209003819320438785-Q4IB/ [<https://perma.cc/YGB2-68VL>].

130. HNH 2019, *supra* note 127, at 42–43.

131. Rebecca Burns, *How the Right Made Homelessness a Crime*, ROLLING STONE (Aug. 13, 2024), <https://www.rollingstone.com/politics/politics-features/joe-lonsdale-cicero-trump-leo-homeless-crime-1235078795/> [<https://perma.cc/5US6-HBZQ>].

132. Paige Oamek & Rohan Montgomery, *Kentucky Is About to Pass the Cruellest Criminal-Justice Bill in America*, THE NATION (Mar. 15, 2024), <https://www.thenation.com/article/society/kentucky-crime-bill/> [<https://perma.cc/R5RA-WM78>].

133. Ashley Hoak, *Public Camping in Tennessee Becomes a Felony, Homeless Seek Refuge*, WCYB (July 4, 2022, at 08:36 ET), <https://wcyb.com/news/local/public-camping-in-tennessee-becomes-a-felony-homeless-seek-refuge> [<https://perma.cc/9S5B-HSZY>].

134. NAT'L.HOMELESSNESS L. CTR., HOUSING NOT HANDCUFFS 2021: STATE SUPPLEMENT 8-9 (2021), <https://homelesslaw.org/wp-content/uploads/2021/11/2021-HNH-State-Crim-Supplement.pdf> [<https://perma.cc/J4X7-YT7R>].

135. See generally Ortiz & Dick, *supra* note 122 (discussing historical sundown towns).

136. Colburn & Aldern, *supra* note 19, at 10, 94.

137. Rankin, *supra* note 15, at 21, 35.

Accordingly, this deeply rooted impulse to punish and purge already marginalized people from view is codified into law, including laws that criminalize homelessness.¹³⁸

II. HOW *ROBINSON, POWELL & MARTIN* SET THE STAGE FOR *GRANTS PASS*

Before *Grants Pass*,¹³⁹ the Eighth Amendment seemed a fitting source of constitutional protection from the legislatively authorized banishment of unhoused people. After all, the fundamental purpose of the U.S. Constitution's Eighth Amendment is to protect people convicted of crimes from governmental abuse of power.¹⁴⁰ Accordingly, it prohibits the imposition of excessive bail, excessive fines, and cruel and unusual punishments.¹⁴¹ Systemic and structural oppression ensures that already marginalized groups—subject to various forms of discrimination, such as racism, “heterosexism, ableism, classism, ageism” and other points of stigmatization—are more likely to suffer such abuse.¹⁴² These points of intersectional and systemic discrimination are clear in homelessness, and as a result, are a persistent focus in homeless rights advocacy.¹⁴³

Because the case concerned the potential criminality of an “involuntarily homeless” individual who sleeps or camps in public due to

138. *Id.* at 48-49.

139. *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024).

140. *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 666 (1977); *Weems v. United States*, 217 U.S. 349, 372-73 (1910).

141. *Austin v. United States*, 509 U.S. 602, 609 (1993) (“The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government’s power to punish.”); *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019) (“Like the Eighth Amendment’s proscriptions of ‘cruel and unusual punishments’ and ‘[e]xcessive bail,’ the protection against excessive fines guards against abuses of government’s punitive or criminal-law-enforcement authority.” (alteration in original)).

142. *See Social Identities and Systems of Oppression*, NAT’L MUSEUM OF AFR. AM. HIST. & CULTURE, <https://web.archive.org/web/20220512195408/https://nmaahc.si.edu/learn/talking-about-race/topics/social-identities-and-systems-oppression> [https://perma.cc/R8KX-YU2B] (discussing structural and systemic discrimination); Dina Francesca Haynes, *Rule of Law Chronicles: Government Abuse of Power*, JURIST (Apr. 22, 2023, at 17:10 ET), <https://www.jurist.org/features/2023/04/22/the-rule-of-law-chronicles-government-abuse-of-power/> [https://perma.cc/KXA7-MQBM] (discussing how such discrimination is especially vulnerable to abuse by the state).

143. *See, e.g.*, Lurie & Schuster, *supra* note 14, at 2-30 (discussing how homelessness intersects with other forms of marginalization).

a city's lack of shelter,¹⁴⁴ *Grants Pass* was built on decades of precedent concerning the constitutionality of laws that target individuals for their involuntary status or condition, especially *Robinson*,¹⁴⁵ *Powell*,¹⁴⁶ and *Martin*.¹⁴⁷

A. *Robinson v. California*

Distinctions between status and conduct in Eighth Amendment jurisprudence originate from *Robinson v. California*.¹⁴⁸ *Robinson* held that a state statute criminalizing drug addiction violated the Eighth Amendment because it punished a status and not conduct.¹⁴⁹ After stopping Lawrence Robinson, a Black, twenty-five-year-old veteran,¹⁵⁰ for riding in a vehicle with an unilluminated license plate, officers observed “‘scar tissue and discoloration’ ... and ‘what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow’” on Robinson’s arms.¹⁵¹ One officer testified that, based on his narcotics investigations experience, such marks indicated drug use; although this circumstantial evidence suggested any potential use was at least “several days old” and not contemporaneous with the time of Robinson’s arrest.¹⁵² Officers also testified that while Robinson did not seem to be in withdrawal or under the influence, he admitted to using drugs in the past.¹⁵³ At trial, Robinson and two witnesses denied such use and the alleged admission; instead, Robinson insisted the marks “result[ed] from an allergic condition contracted during his military service.”¹⁵⁴ The trial judge instructed the jury that it “could convict Mr. Robinson even if it found no proof of actual

144. *Grants Pass*, 144 S. Ct. at 2236-37.

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

146. *Powell v. Texas*, 392 U.S. 514, 514 (1968) (plurality opinion).

147. *Martin v. City of Boise*, 902 F.3d 1031, 1031 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019); *City of Grants Pass*, 144 S. Ct. at 2218-19.

148. *See* 370 U.S. at 666-67.

149. *Id.*; *see also id.* at 660-61 n.1 (quoting Cal. Health & Safety Code § 11721 (Deering 1952 & Supp. 1959) (repealed 1972)).

150. Nancy Campbell, *Overdose, Police Science, and Lawrence Robinson’s Legacy*, THE MIT PRESS READER (Aug. 29, 2022), <https://thereader.mitpress.mit.edu/overdose-police-science-and-lawrence-robinsons-legacy/> [<https://perma.cc/2FL3-C8WB>].

151. *Robinson v. California* 370 U.S. 660, 661 (1962).

152. *Id.* at 662.

153. *Id.*

154. *Id.*

use of narcotics by him[,] so long as it found him an addict.”¹⁵⁵ Robinson was convicted.¹⁵⁶

Justice Stewart penned the majority decision, reversing.¹⁵⁷ He started by paying homage to federalism, clarifying that states have “broad power ... to regulate the narcotic drugs traffic” within their jurisdictions, such as criminalizing the manufacture, sale, or possession of drugs.¹⁵⁸ States, the Court observed, could even regulate substance addiction by imposing compulsory treatment and punishing failure to comply.¹⁵⁹

However, the majority distinguished the statute at issue as one that punished the status of addiction, rather than a requisite *actus reus*, such as the conduct of use.¹⁶⁰ Closely related to the status versus conduct distinction is the role of volition or choice in one’s potential culpability under the Eighth Amendment. The majority noted that addiction is “an illness which may be contracted innocently or involuntarily.”¹⁶¹ Instead of hewing to originalism, the *Robinson* majority opined that contemporary sensibilities rejected the criminalization of an individual’s status, particularly an involuntary illness, absent any volitional act:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease ... in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally

155. Campbell, *supra* note 150 (alteration in original) (quoting *Drug Addiction Ruled No Crime*, N.Y. TIMES, June 26, 1962, at 1).

156. *Robinson*, 370 U.S. at 663–65 (discussing the statute’s provisions criminalizing both drug use and addiction and noting the ambiguity of the jury’s basis for conviction).

157. *Id.* at 667–68.

158. *Id.* at 664; *see also* Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000) (holding that the City was “constitutionally allowed” to regulate where homeless people camped when spaces were readily available at the homeless shelter); *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1233–34 (E.D. Cal. 2009) (“The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime.”); *Joyce v. City of San Francisco*, 846 F. Supp. 843, 858 (N.D. Cal. 1994) (holding that homelessness was not a protected status, and to hold otherwise would be “an ... inappropriate intrusion into state and local authority”).

159. *Robinson*, 370 U.S. at 664–65.

160. *Id.* at 666–67.

161. *Id.* at 667.

thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.¹⁶²

Then, nodding to proportionality, the *Robinson* majority suggested that the Eighth Amendment might limit a state's power to define what can be a crime at all, observing in dicta that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."¹⁶³ Ultimately, the majority concluded California's law punished the mere status or condition of narcotic addiction, thus amounting to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.¹⁶⁴

The concurring justices emphasized similar themes. Leaning heavily on contemporary science categorizing addiction as an illness, Justice Douglas's concurrence likened addiction to insanity, further underscoring proportionality as a significant Eighth Amendment concern.¹⁶⁵ Justice Harlan opined that states might constitutionally treat addiction as something other than an illness, but it would still be unconstitutional to criminalize behavior absent a guilty act or *actus reus*.¹⁶⁶

Robinson's dissenting Justices drew lines that would—over sixty years later—inform the Court's majority decisions in *Powell* and *Grants Pass*.¹⁶⁷ Justice Clark dissented on the grounds that the

162. *Id.* at 666.

163. *Id.* at 667; *see also* *Weems v. United States*, 329 U.S. 349, 381 (1910) (holding fifteen-year chain-and-hard-labor sentence disproportionate to the crime committed); *O'Neil v. Vermont*, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting) (Eighth Amendment prohibits punishment "greatly disproportioned to the offen[s]e[.]"); *Graham v. Florida*, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment."); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) ("[W]e have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion))); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) ("[T]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment." (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting))).

164. *Robinson*, 370 U.S. at 666–67.

165. *Id.* at 676 (Douglas, J., concurring) ("A punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" (citing *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892))).

166. *Id.* at 678–79 (Harlan, J., concurring) ("Since addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.").

167. *Powell v. Texas*, 392 U.S. 514, 532 (1968) (plurality opinion) (distinguishing *Robinson* by upholding a conviction for public intoxication in which the offense was conduct-based rather than status-based); *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2218–19 (2024)

majority misconstrued the California statute as punitive instead of palliative; moreover, even if it were punitive, Clark persisted, the resulting incarceration “for 3 to 12 months is not unreasonable when applied to a person who has voluntarily placed himself in a condition posing a serious threat to the State.”¹⁶⁸ Justice Clark also generally grumbled on federalism grounds.¹⁶⁹ Justice White’s dissent equated addiction to “the regular use of narcotics,” obscuring any distinction between the two, and concluded that “it was within the power of the State of California to confine [Robinson] by criminal proceedings for the use of narcotics or for regular use amounting to habitual use.”¹⁷⁰ Similar to Justice Clark, Justice White also characterized the majority decision as a judicial subversion of federalism that substituted a locality’s legislative judgement for the majority’s “own notions of ordered liberty.”¹⁷¹

Even while some praised *Robinson* as essential to protect civil liberties, especially those who suffer from disabilities, criminal histories, poverty, and other marginalized statuses,¹⁷² the decision also sparked immediate criticism for usurping states’ ability to enact criminal law, essentially constitutionalizing an actus reus requirement.¹⁷³

(emphasizing the need to balance compassion with legitimate state interests and deference to local governance in regulating drug-related and public health issues).

168. *Robinson*, 370 U.S. at 685 (Clark, J., dissenting).

169. *Id.* at 684 (Clark, J., dissenting) (“Can this Court deny the legislative and judicial judgment of California that incipient, volitional narcotic addiction poses a threat of serious crime similar to the threat inherent in the purchase or possession of narcotics? And if such a threat is inherent in addiction, can this Court say that California is powerless to deter it by punishment?”).

170. *Id.* at 686-88.

171. *Id.* at 689; see also Kent Greenawalt, “Uncontrollable” Actions and the Eighth Amendment: Implications of Powell v. Texas, 69 COLUM. L. REV. 927, 929 n.14 (1969) (suggesting that the Court superseded the California legislature’s statutory intent by striking down the law in *Robinson*, thereby creating a de facto constitutional mens rea requirement). But see Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 418 (1975) (arguing *Robinson* does not constitutionalize mens rea but instead “bar[s] punishment for status only insofar as ... status excludes any act at all.”).

172. Ian Millhiser, *The Supreme Court Case That Could Turn Homelessness into a Crime, Explained*, VOX (Apr. 17, 2024, 07:00 ET), <https://www.vox.com/scotus/24121344/supreme-court-homeless-grants-pass-martin-crime-grants-pass-johnson> [<https://perma.cc/2HAK-WKHJ>].

173. See, e.g., Michael R. Asimow, *Constitutional Law: Punishment for Narcotic Addiction Held Cruel and Unusual—Robinson v. California (U.S. 1962)*, 51 CALIF. L. REV. 219, 220 n.7 (1963); Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted.” *The Original Meaning*, 57 CALIF. L. REV. 839, 843-44 (1969). The decision continues to be a punching bag

B. Powell v. Texas

Six years after *Robinson*, the Court revisited the status-act distinction in *Powell v. Texas*.¹⁷⁴ Police arrested and charged Leroy Powell for violating a state statute criminalizing public intoxication, a law under which he previously had been convicted approximately 100 times.¹⁷⁵ At trial, Powell produced evidence, including extensive testimony from a psychiatric expert, that he suffered from chronic alcoholism, and this compulsion to drink resulted in him being involuntarily intoxicated much of the time—including in public.¹⁷⁶ Arresting him for being intoxicated, Powell suggested, did not differ from arresting someone addicted to drugs simply for being addicted, because his intoxication was an involuntary compulsion resulting from his status as a chronic alcoholic.¹⁷⁷ Accordingly, Powell argued criminally punishing him “for that conduct would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments.”¹⁷⁸

The Supreme Court affirmed Powell’s conviction in a tight 5-4 plurality opinion.¹⁷⁹ Justice Marshall wrote the three-justice majority decision, rejecting Powell’s evidence as “premises of a syllogism transparently designed to bring this case within the scope of this Court’s opinion in *Robinson*.”¹⁸⁰ Marshall attacked the inadequacy of the evidentiary record, opining that neither the record nor “the current state of medical knowledge” supported Powell’s argument that his alcoholism amounted to an “irresistible compulsion to drink and to get drunk in public.”¹⁸¹ The majority recounted the complexity of alcoholism, observing it is “one of our principal

along these lines in legal scholarship to this day. See, e.g., Martin R. Gardner, *Rethinking Robinson v. California in the Wake of Jones v. Los Angeles: Avoiding the “Demise of the Criminal Law” by Attending to “Punishment”*, 98 J. CRIM. L. & CRIMINOLOGY 429, 430 (2008).

174. 392 U.S. 514, 532 (1968) (plurality opinion).

175. *Id.* at 555.

176. *Id.* at 517-18.

177. *Id.* at 518, 521.

178. *Id.* at 517.

179. *Id.* at 536-37.

180. *Id.* at 521.

181. *Id.* at 535. This conclusion is preceded by Justice Marshall wrestling with what he characterized as the deficiencies of the record and the state of medical knowledge at the time concerning alcoholism, stating: “We know very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell’s drinking problem, or indeed about alcoholism itself.” *Id.* at 521-22.

social and public health problems,” but “[t]here is as yet no known generally effective method for treating [it].”¹⁸² Facilities for treating alcoholism were “woefully lacking [across] the country,” so the Court suggested incarceration that may have some palliative benefits; wistfully reflecting that “[i]t would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides.”¹⁸³ But if no treatment is proven to succeed, Justice Marshall mused that by criminalizing public intoxication in the context of alcoholism, “we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading ‘hospital’—over one wing of the jailhouse.”¹⁸⁴ Deterrence was not a major goal of the statute because the threat of incarceration was not likely to stop a chronic alcoholic from public intoxication.¹⁸⁵

But gradually, Justice Marshall seemed to soothe such rhetorical handwringing by suggesting that jail terms for public intoxication were not that long.¹⁸⁶ Despite acknowledging “the law’s ‘revolving door’ of arrest, incarceration, release and re-arrest,” the majority reasoned that because it could see no other “clear promise of a better world for these unfortunate people,” it was “unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking c[ould] never be defended as rational.”¹⁸⁷ Then the majority went about the business of narrowing *Robinson*.¹⁸⁸

It first dismantled the argument that “*Robinson* stands for the ‘simple’ but ‘subtle’ principle that ‘[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.’”¹⁸⁹ Instead, it determined the “entire thrust” of *Robinson*

182. *Id.* at 526-27.

183. *Id.* at 528.

184. *Id.* at 529.

185. *Id.* at 531.

186. *Id.* at 529 (“One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole.”).

187. *Id.* at 530.

188. *Id.* at 533 (“[U]nless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.”).

189. *Id.* (quoting *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Tortas J., dissenting)).

was that the Eighth Amendment requires an actus reus.¹⁹⁰ According to the *Powell* majority, the Constitution does not care whether an act is related to a voluntary or involuntary condition.¹⁹¹

The majority distinguished *Robinson* by concluding that Powell was not convicted based on his status as a chronic alcoholic but rather based on his conduct of being drunk in public.¹⁹² After all, cities are free to criminalize such behavior because it threatens “substantial health and safety hazards ... [and] offends the moral and esthetic sensibilities of a large segment of the community.”¹⁹³

The Court’s holding, Justice Marshall wrote, was mandated under “[t]raditional common-law concepts of personal accountability and essential considerations of federalism.”¹⁹⁴ First, common law required “moral accountability of an individual for his antisocial deeds.”¹⁹⁵ Next, defining the scope of criminal law was clearly the “province of the States.”¹⁹⁶ The majority thus rejected any invitation to constitutionalize “some sort of insanity test” that might excuse Powell from being publicly intoxicated.¹⁹⁷ Besides, Justice Marshall warned, such a result would “freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold.”¹⁹⁸

Justices Black and Harlan’s joint concurrence emphasized similar points as the majority, such as the importance of federalism and stressed that legislatures retain broad power to create their criminal codes and the discretion to enforce them.¹⁹⁹ They also echoed the majority’s consolation that, while imperfect, incarceration might

190. *Id.*

191. *See id.* (stating that *Robinson* “does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, ‘involuntary’ or ‘occasioned by a compulsion.’”) The majority also scolded the dissent, suggesting it advocated for Eighth Amendment protections for defendants whose actions were compelled as a result of a disease. Such a slippery slope, the majority suggested, might excuse a sociopathic murderer who feels a compulsion to kill. *See id.* at 534.

192. *Id.* at 532.

193. *Id.*

194. *Id.* at 535.

195. *Id.* at 535–36 (citing Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932)).

196. *Id.* at 536.

197. *Id.*

198. *Id.* at 537.

199. *Id.* at 538 (Black, J., concurring).

be the most palliative and least punitive way for communities to address alcoholism.²⁰⁰

Justice White wrote a separate concurrence. Under *Robinson*, he concluded, “[i]f it cannot be a crime to have an irresistible compulsion to use narcotics,” then he could “not see how it c[ould] constitutionally be a crime to yield to such a compulsion [to drink alcohol].”²⁰¹ Indeed, White interpreted *Robinson* to stand for the proposition that “the use of narcotics by an addict must be beyond the reach of the criminal law.”²⁰² Still, White ultimately concurred on the basis that Powell was convicted of the different and distinct act of public intoxication: Even if Powell could not avoid drinking, White concluded, he could have remained at home.²⁰³

Much hay has been made about White’s observation that, had Powell been homeless, maybe the outcome would be different:

Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.²⁰⁴

However, Powell seemed to be housed, so while White accepted that punishment for a condition compelled by a disease would be unconstitutional, he concurred with the majority because Powell had not shown that he was compelled to be drunk in a public place.²⁰⁵ White may not have known how portentous his musings on Powell’s housing status would turn out to be.

200. *Id.* at 539-40.

201. *Id.* at 548 (White, J., concurring).

202. *Id.* at 548-49.

203. *Id.* at 550.

204. *Id.* at 551.

205. *Id.* at 548-49.

C. *Martin v. Boise*

After *Powell*, jurisprudence concerning the Cruel and Unusual Punishments Clause remained relatively quiet for about sixty years, until 2018, when the Ninth Circuit decided *Martin v. Boise*.²⁰⁶ I have written at length about *Martin v. Boise* elsewhere,²⁰⁷ but given the significance of the case to *Grants Pass*, a brief summary is warranted here.

In 2018, the Ninth Circuit addressed the question of whether cities can criminally punish homeless people for surviving in public space. The plaintiffs, a group of people experiencing homelessness in Boise, Idaho, alleged that the City violated their Eighth Amendment rights by enforcing ordinances outlawing sleeping or camping in public, even while the City failed to offer sufficient shelter.²⁰⁸

Mathematically, Boise seemed to have sufficient shelter across three shelters; however, only one allowed men, women, and children of all faiths without imposing religious requirements, and it was routinely full.²⁰⁹ The other two shelters, run by the Boise Rescue Mission (BRM), imposed restrictions; one allowed only men and the other only women and children.²¹⁰ Both locations imposed other restrictions including time-outs, in which shelter residents could only stay for a specific number of days before having to leave and wait for several days before returning; and check-in deadlines, on which residents had to report by a certain time of day to be admitted.²¹¹ Additionally, both BRM shelters exposed residents to religious messages.²¹² Both locations also took the position they would never

206. *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019).

207. See, e.g., Rankin, *supra* note 124, at 116-17; Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CAL. L. REV. 559, 561-62 (2021); Rankin, *supra* note 103, at 381-83.

208. *Martin*, 920 F.3d at 617 (“[A]s long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors ... on the false premise they had a choice in the matter.”); see also *id.* at 616 (discussing *Powell* and distinguishing between status and conduct); *id.* at 618 (describing how plaintiffs in *Martin* presented evidence that they had no access to shelter); *id.* at 616-17 (rejecting the idea that plaintiffs needed to show compulsive behavior and instead holding that conduct inseparable from a status—such as sleeping in public when homeless—could not be criminalized).

209. *Id.* at 605.

210. *Id.*

211. *Id.* at 605-06.

212. *Id.* at 605.

turn away anyone who complied with these restrictions, which meant that technically, they could never report as being full.²¹³

The *Martin* court reviewed many other cases on the Eighth Amendment, including *Robinson* and *Powell*. *Robinson*, the panel observed, “held a California statute that ‘ma[de] the “status” of narcotic addiction a criminal offense’ invalid under the Cruel and Unusual Punishments Clause.”²¹⁴ The panel then drew from *Powell*, which it distinguished from *Robinson*, that the Eighth Amendment permits punishment of conduct rather than status.²¹⁵

The *Martin* court then turned to the question of whether this precedent permitted punishment of involuntary conduct.²¹⁶ It reasoned that Justice White’s concurrence in *Powell*, read together with the four dissenting Justices’ opinions, stood for the proposition that “criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.”²¹⁷ This reading, the *Martin* court observed, aligned with other Ninth Circuit precedent, concluding the Eighth Amendment prohibits “punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being”²¹⁸ or the “universal and unavoidable consequences of being human.”²¹⁹ Such involuntary conduct is “inseparable from status— they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping.”²²⁰ The *Martin* court thus reasoned that the State cannot “‘criminalize conduct’ that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets.”²²¹ The Eighth Amendment’s prohibition against cruel and unusual punishments precluded enforcement of laws prohibiting homeless residents from conducting such activities in public when they had no reasonable alternative but to do so.²²² Accordingly, the panel held

213. *Id.* at 607.

214. *Id.* at 615 (alteration in original) (quoting *Robinson v. California*, 370 U.S. 660, 666 (1962)).

215. *Id.* at 616.

216. *See id.* at 615–18.

217. *Id.* at 616 (quoting *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting)).

218. *Id.* at 616–17 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135–36 (9th Cir. 2006)) (citing *United States v. Robinson*, 875 F.3d 1281, 1291 (9th Cir. 2017)).

219. *Id.* at 617 (quoting *Jones*, 444 F.3d at 1136).

220. *Id.* (quoting *Jones*, 444 F.3d at 1136).

221. *Id.* (quoting *Jones*, 444 F.3d at 1137).

222. *See id.* at 618.

that Boise could not “criminalize indigent, homeless people for sleeping outdoors, on public property, on the false pretense they had a choice in the matter.”²²³

Thus, *Martin* stood for the proposition that laws criminalizing homelessness are unconstitutional when (1) a city criminally charges a homeless person for engaging in necessary, life-sustaining activity in public; (2) that person has no reasonable alternative but to survive in public space; and (3) existing shelters are inadequate in number or are functionally inaccessible to their homeless population.²²⁴

Martin’s holding was significant because it was the first case to apply the Eighth Amendment to protect *involuntarily homeless* people from criminal prosecution for surviving in public; however, it also reflected an understanding that shelters throughout the country not only lack capacity, while countless others impose various barriers to entry, rendering them functionally inaccessible to many homeless people.²²⁵

The *Martin* court characterized its holding as “narrow.”²²⁶ It did not require cities to provide adequate shelter; allow anyone to occupy public space at any time or in any place; restrict a city’s ability to respond to immediate hazards, true obstructions, or threats to public health and safety; nor protect people who have access to adequate shelter because they would be considered *voluntarily* homeless and thus excluded from Eighth Amendment protection.²²⁷

The *Martin* decision triggered significant backlash, despite its limited scope.²²⁸ The City of Boise, supported by a phalanx of amici, sought U.S. Supreme Court review, which the Court denied without comment in December of 2019.²²⁹

While *Martin* provided unhoused people with a modicum of constitutional protection, its meaning and impact was vastly overestimated by detractors and homeless rights advocates alike.²³⁰ Even in *Martin*’s wake, the criminalization of homelessness

223. *Id.* at 617.

224. Rankin, *supra* note 124, at 117.

225. SKINNER, *supra* note 60, at 10-12.

226. *Martin*, 920 F.3d at 617.

227. *Id.* at 617 n.8.

228. Rankin, *supra* note 207, at 562-63.

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

230. *See* Rankin, *supra* note 207, at 564-66.

continued unabated in the Ninth Circuit. For example, despite the Centers for Disease Control and Prevention's (CDC) guidance for cities to pause sweeps during the height of the COVID-19 crisis in 2021,²³¹ the State of California actually used some COVID-19 funds to pay private companies over \$100 million to conduct sweeps during that same time period.²³² During the same period, while *Martin* was the law, Seattle's sweep rates tripled in one year from 2022-2023.²³³ Even while the machinery of criminalization powered along, policymakers continued to grouse that they needed the one stick *Martin* took away: the option of jailing or fining people who have no place to live. The din of policymakers' grievances about *Martin* had not yet reached its crescendo.

Robinson, *Powell*, and *Martin* were pivotal in setting the stage for *Grants Pass*. Each case contributed foundational principles and legal precedents relevant to understanding the constitutionality of laws that impact marginalized populations, particularly those experiencing homelessness. As demonstrated in the discussions of *Grants Pass* elsewhere,²³⁴ *Robinson* injected debates over the constitutionality of punishing someone on the basis of status, whether homelessness was a status, or whether the law was permissibly targeting conduct. *Powell* infused disputes over *Robinson*'s scope and Justice White's rhetorical reflections on how the decision might have turned out differently had Powell been homeless. *Martin* cast such precedent in the context of homelessness, deciding the Eighth Amendment prohibits cities from criminally punishing someone for involuntarily surviving in public space when that same city lacks adequate shelter. *Grants Pass*, then,

231. *Interim Guidance on People Experiencing Unsheltered Homelessness*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 7, 2021), <https://web.archive.org/web/20210702161031/https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html> [<https://perma.cc/F7ST-GAUA>].

232. Brian Barth, *Revealed: How Companies Made \$100m Clearing California Homeless Camps*, THE GUARDIAN (Apr. 16, 2024, at 10:00 ET), <https://www.theguardian.com/us-news/2024/apr/16/us-homeless-encampments-companies-profiting-sweeps> [<https://perma.cc/E45D-42J7>].

233. Guy Oron, *Sweeps Tripled in 2023: Inside Seattle's Extensive Policy of Sweeps and Forcible Displacement of Homeless People*, REAL CHANGE: NEWS (June 5, 2024), <https://www.realchangenews.org/news/2024/06/05/sweeps-tripled-2023> [<https://perma.cc/JA5N-9ZBY>].

234. See generally Sara Rankin & Laura Riley, *The Unavoidable Consequences of Homelessness*, 2025 UTAH L. REV. 1093 (critiquing the *Grants Pass* decision in detail).

posed the question of whether *Martin's* reasoning applied to civil sanctions for involuntary public survival.

While the Ninth Circuit's answer to this question was yes,²³⁵ the petitioners dropped the framing of the question around civil sanctions before the Supreme Court granted certiorari and rendered its staggering decision.²³⁶

CONCLUSION

The rest is history, but then again, history. The Supreme Court's decision in *Grants Pass* is more than a doctrinal misstep: it is a call for a moral reckoning.²³⁷ In permitting cities to fine and jail people for sleeping outside when no shelter is available, the Court turned away from the lived realities of poverty, the systemic crises fueling homelessness, and the Constitution's potential to serve as a bulwark against exclusion, oppression, and cruelty.²³⁸ Still, *Grants Pass* is the culmination of long-standing legal and societal failures, demonstrating a jurisprudence that is increasingly insulating itself from structural inequality, moral reasoning, and democratic responsibility.

This Article has traced those failures across multiple dimensions: a housing market that treats shelter as a commodity rather than a human necessity; a health care system that leaves millions untreated and unhoused; a climate crisis that displaces the vulnerable and deepens precarity; and a carceral state that punishes poverty rather than confronting its causes. Together, these forces expose

235. *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), *rev'd and remanded sub nom*, *City of Grants Pass v. Johnson*, 144 S. Ct. 679 (2024). Some detail regarding the earlier history of the *Johnson* case is available at Rankin, *supra* note 103, at 384–86.

236. *See, e.g.*, *City of Grants Pass v. Johnson*, FINES & FEES JUST. CTR. (June 28, 2024), <https://finesandfeesjusticecenter.org/articles/city-of-grants-pass-v-johnson/> [<https://perma.cc/KMM9-DBSU>] (explaining that the federal district court found *Grants Pass's* fines violated the Excessive Fines Clause; however, when the City appealed the decision to the Ninth Circuit, it did so on the basis of the Cruel and Unusual Punishments Clause only).

237. For an extensive critique of the doctrinal and moral errors of the Ninth Circuit's holding in *Grants Pass*, see Rankin & Riley, *supra* note 234, at 1114–17 (critiquing the *Grants Pass* decision in detail). For related critiques, see also MADIBA K. DENNIE, *THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE THE PEOPLE CAN TAKE IT BACK* 85–88 (2024) (arguing that originalism, such as that favored by the *Johnson* majority, functions as a form of moral abdication, allowing judges to hide behind projections and assumptions regarding the Founders' beliefs, rather than grappling with contemporary injustice).

238. *See* Rankin & Riley, *supra* note 234, at 1114–17.

homelessness as a structural inevitability, and *Grants Pass* compounds this injustice by greenlighting its criminalization.

Grants Pass is a moral failure because it is a jurisprudential choice: one that narrowed the Eighth Amendment's protections to exclude the most vulnerable among us, ensuring their continued persecution. The Court's refusal to recognize the punishment of involuntary survival as cruel or excessive reflects not legal necessity but moral abdication.²³⁹

Other more human-centered jurisprudential choices are possible. For example, Robert Dworkin urges us to read the Constitution as a moral document that demands justification in terms of justice, fairness, and equal concern.²⁴⁰ Robin West urges us to reject a vision of constitutionalism that is blind to the government's positive obligations to preserve life and human dignity.²⁴¹ James Boyd White reminds us that law is never neutral; instead, it is narrative and every judicial decision tells a story about who matters and who belongs.²⁴² Frank Michelman defends the Court's potential as a forum for democratic inclusion, especially when the political branches exclude those without power, property, or voice.²⁴³

Martha Fineman further carves this path forward, calling for a constitutional framework that begins with the reality of human vulnerability and the state's obligation to respond.²⁴⁴ Jedediah Purdy similarly insists that constitutional interpretation must confront the ecological, economic, and racial structures that define

239. The *Grants Pass* dissent expresses a similar conclusion. See *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2243-44 (2024) (Sotomayor, J., dissenting). Among its many critiques of the majority decision, the dissenting Justices criticized the majority for "focus[ing] almost exclusively on the needs of local governments," when the Court's role is to "safeguard those [baseline constitutional] rights even when, and perhaps especially when, doing so is uncomfortable or unpopular." *Id.* at 2228.

240. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

241. See ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 1-4* (1994); Robin West, *Re-Imagining Justice*, 14 *YALE J.L. & FEMINISM* 333, 341-42 (2002).

242. See JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 238-41 (1985); see also Joseph W. Dellapenna & Kathleen Farrell, *Law and the Language of Community: On the Contributions of James Boyd White*, *RHETORIC SOC'Y Q.*, Summer 1991, at 38, 41.

243. See FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 133-38 (1999); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 *HARV. L. REV.* 4, 40-41 (1986).

244. Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 256-59 (2011).

who bears the burdens of inequality,²⁴⁵ arguing for a democratic constitutionalism rooted in solidarity and shared responsibility. Katharine Young's work on economic and social rights demonstrates how constitutions, in the United States and abroad, can be read to guarantee housing, health care, and subsistence as essential conditions of dignity and democratic participation.²⁴⁶ Meanwhile, Amartya Sen and Martha Nussbaum urge us to evaluate constitutional success by asking whether people can lead dignified lives, requiring shelter, health, and freedom from degradation.²⁴⁷

Taken together, these legal minds—and so many others, including the Supreme Court justices who dissented in *Grants Pass*²⁴⁸—challenge the inevitability of *Grants Pass*'s cruel outcome and illuminate an alternative constitutional practice that is responsive to the material and structural conditions shaping human vulnerability. Such a practice would recognize that homelessness is not a crime, but a systemic crisis rooted in inequality, indifference, and punishment.

Thus, the challenge now is not only a legal but a moral one. In the wake of *Grants Pass*, reclaiming the Constitution as a source of humanizing justice will require more than litigation. It will require confronting the structures that produce homelessness and the legal doctrines that sustain its criminalization. It will require courts, lawmakers, and communities to ask: What kind of society punishes people for involuntarily surviving in public space, and what kind of constitutional order allows it?

The law has always been, and will always be, a human creation.²⁴⁹ If the Constitution is to retain any meaningful promise, it must do more than preserve formal rights. It must respond to human need, affirm human dignity, and stand against the normalization of

245. See, e.g., JEDEDIAH PURDY, *THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH* 131-32 (2019); Jedediah Purdy, *The Long Environmental Justice Movement*, 44 *ECOLOGY L.Q.* 809, 817-18 (2018).

246. See, e.g., KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* 1-2 (2012).

247. See, e.g., AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 3-4 (1999); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 29-32 (2011).

248. See *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2228 (2024) (Sotomayor, J., dissenting); Rankin & Riley, *supra* note 234 (discussing the dissent's critique).

249. See Sara K. Rankin, *Punishment, Cruelty & Justice: Critically Interrogating Grants Pass v. Johnson*, (forthcoming) (manuscript on file with the North Carolina Civil Rights Law Review).

punishing already vulnerable people for having no private place to live. *Grants Pass's* cruelty is neither accidental nor inevitable. It reflects legal and moral choices that can and should be reconsidered, challenged, and ultimately changed in the law and in society more broadly.