Stanford Law Review

Volume 70 May 2018

NOTE

A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-homeless Ordinances

Hannah Kieschnick*

Abstract. In the face of affordable housing crises and increasingly visible homeless populations, many cities have enacted anti-homeless ordinances that regulate public behavior largely performed by homeless individuals. These ordinances prohibit necessary and life-sustaining behavior, such as sleeping and camping in public, for those without housing in cities that lack sufficient shelter space. Although the U.S. Supreme Court in the 1960s established the "status crimes" doctrine—which provides that the Eighth Amendment prohibits subjecting a person to criminal punishment based on her status—the Court has left unaddressed the full reach of that doctrine. Some advocates for homeless people have argued that the status crimes doctrine protects against the criminalization of conduct that homeless individuals have no choice but to perform in public. Lower courts and state courts considering constitutional challenges brought by these advocates have divided on the issue, left to conjure up limiting principles without guidance from the Court.

This Note argues that the status crimes doctrine and the substantive protections of the Eighth Amendment should extend to this kind of conduct. It proposes a test to aid advocates, courts, and local legislators. In addition, it addresses standing and other procedural concerns that have plagued homeless plaintiffs seeking to challenge sleeping and camping bans.

* Thank you to David Alan Sklansky for supervising this work and maintaining faith in my research and in me. Thank you to my friends and first readers, Zoe Friedland, Duncan Pickard, and Jimmy Xi, for giving me just enough constructive feedback. Thank you to the *Stanford Law Review* editing team for patiently editing each draft of this Note. And finally, thank you to my parents, who taught me early on the power of leaving out a welcome mat for all.

Table of Contents

Introduction

Everyone has basic human needs, including a place to sleep and food to eat. For people who are homeless, satisfying these basic needs may require breaking the law. Nationwide, there has been a proliferation of local regulations—often called "quality of life" or "anti-homeless" ordinances—that prohibit public conduct associated with being homeless, including sleeping, sitting, and sharing food.[1] In California, approximately 500 anti-homeless ordinances have been passed in recent years.[2] And across the country, the number of citywide camping bans increased by 69% from 2006 to 2016.[3]

Cities are responding to a perceived homelessness crisis. The number of homeless individuals in the United States increased slightly between 2016 and 2017, for the first time in seven years.[4] Homelessness rates are directly correlated with rising housing costs and decreasing availability of affordable options in most metropolitan areas.[5] "[U]pend[ing] the stereotypical view of people out on the streets as unemployed," some homeless individuals are more

1. *See, e.g.*, COAL. ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 5-6 (2015), https://perma.cc/NJ58-8Y8R (explaining that "quality of life" laws target behavior like drinking in public, littering, and smoking in parks and that "anti-homeless" laws target life-sustaining conduct that homeless people perform in public like sleeping and resting).

2. POLICY ADVOCACY CLINIC, UNIV. OF CAL. BERKELEY SCH. OF LAW, CALIFORNIA'S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE 8 (2015), https://perma.cc/4D9G-LJDV.

3. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 22 (2016), https://perma.cc/2SS5-2V67. The National Law Center on Homelessness and Poverty has tracked 187 cities since 2006 to monitor changes in laws that criminalize behavior associated with homelessness, finding that the number of other anti-homeless ordinances also increased dramatically during this period. *See id.* at 22-23, 25 (finding that sleeping-in-public bans increased by 31%, citywide panhandling bans increased by 43%, and living-in-vehicles bans increased by 143%).

4. *See* MEGHAN HENRY ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 1; POINT-IN-TIME ESTIMATES OF HOMELESSNESS 1 (2017), https://perma.cc/3M83-S2U6. Since 2007, however, there has been a 14.4% decrease in the number of homeless individuals across the country. *Id.* at 9.

5. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 19 (finding a 7.2-million-unit shortage of affordable rental units available to the nation's lowest-income renters); *see also* APPLIED SURVEY RESEARCH, SAN FRANCISCO HOMELESS POINT-IN-TIME COUNT & SURVEY: COMPREHENSIVE REPORT 39 (2015), https://perma.cc/6PXV-BV6L. The increase in housing costs and the related increase in homelessness rates are not limited to urban centers but have also spread to rural areas that are inexperienced with accommodating a homeless population. *See* Kevin Fagan & Alison Graham, *California's Homelessness Crisis Expands to Country*, S.F. CHRON. (Sept. 13, 2017, 1:02 PM), https://perma.cc/T534-54LC.

accurately described as the working poor who have been displaced by rising costs of living.[6] In addition, homelessness is simply more visible than in years past because there are increasingly more *unsheltered* homeless individuals who must sleep in public.[7] This varies by state but is felt most acutely in California, where many of the regulations discussed in this Note have been passed: In 2017, the Golden State accounted for 49% of all unsheltered individuals in the United States.[8] Finally, construction, especially by the tech industry in California, has meant that office buildings now fill the empty lots where homeless people used to be able to sleep "in seclusion," away from the public's eye.[9]

Cities across the country are engaged in what the *New York Times* has called "civic soul-searching" regarding the efficacy of these regulations in response to the increasingly visible homeless population.[10] Some of this soul searching is forced into the public sphere through the judicial system. There are two main vehicles by which the constitutionality of an anti-homeless ordinance comes before a court. A homeless defendant may argue that an ordinance is unconstitutional as a defense in a criminal prosecution under the ordinance. A homeless plaintiff or a class of homeless individuals may also bring an affirmative civil challenge seeking retrospective and prospective relief, arguing that as applied to them, the ordinance is unconstitutional.[11]

The U.S. Supreme Court has not addressed the constitutionality of regulations that present homeless people with a Cornelian dilemma, forcing them to choose between survival and compliance. Without guidance, lower and state courts are divided over such ordinances' legality on both substantive and procedural grounds. Courts facing these challenges have struggled to answer two central questions: In civil cases, do these plaintiffs have standing? And in both civil and criminal cases, are these anti-homeless ordinances vulnerable to

6. *See* Janie Har, *"We Still Need to Eat": Tech Boom Creates Working Homeless*, U.S. NEWS & WORLD REP. (Nov. 7, 2017, 11:12 PM), https://perma.cc/44YD-VEAZ.

7. *See* HENRY ET AL., *supra* note 4, at 1, 10 ("An increase in people staying in unsheltered locations accounted for the entire increase in people experiencing homelessness between 2016 and 2017."). For instance, there was a significant increase in nonemergency complaints regarding homelessness in San Francisco between 2015 and the first five months of 2016—but not a concomitant increase in citations or arrests. This suggests that the "spike in such grievances may not reflect a growing homeless population, just a more visible one." *See* Joaquin Palomino, *How Many People Live on Our Streets?*, S.F. CHRON. (June 28, 2016), https://perma.cc/JQ5A-8WV7.

8. HENRY ET AL., *supra* note 4, at 12.

9. *See* Daniel Duane, Opinion, *The Tent Cities of San Francisco*, N.Y. TIMES (Dec. 17, 2016), https://perma.cc/L356-J9QG.

10. *See* Jack Healy, *Rights Battles Emerge in Cities Where Homelessness Can Be a Crime*, N.Y. TIMES (Jan. 9, 2017), https://perma.cc/2URT-L68F.

11. *See, e.g.*, *infra* text accompanying note 44. These constitutional challenges are often brought in an affirmative, civil posture because, as explained in Part III below, enforcement practices by most localities insulate these ordinances from judicial review.

Eighth Amendment challenges? This Note wades into this morass to answer both questions.

This Note proceeds in three Parts. Part I provides a primer on the anti-homeless ordinances that are the focus of this Note: ordinances that regulate sleeping in public either in the form of a general "sit-lie" law or a more specific ban on tents and other semipermanent structures. Using three cities as examples, Part I describes the cycle of criminalization that can result from enforcement of these kinds of ordinances.

Part II then presents the case for an Eighth Amendment challenge to such anti-homeless regulations. Advocates for homeless people have relied on the "status crimes" doctrine from the Supreme Court's decision in *Robinson v. California*[12] to argue that by criminalizing conduct homeless individuals must perform in public, localities effectively criminalize the status of being homeless in violation of the Eighth Amendment. In *Robinson*, the Court held that it was cruel and unusual punishment to criminalize the "status" of simply being a drug addict.[13] Advocates' reliance on *Robinson* and the status crimes doctrine has had mixed success; for more than five decades, courts have divided over whether *Robinson* ever extends to conduct. After providing some background on status crimes and updating the legal landscape to include recent cases not discussed in previous scholarship, this Note distills a new, three-part test to determine when *Robinson*'s substantive limit extends to proscribed conduct.

Some courts considering Eighth Amendment challenges to anti-homeless ordinances identify procedural barriers and avoid reaching the merits altogether. Part III presents the first comprehensive analysis of these barriers.[14] Many cities enforce anti-homeless ordinances through warnings and citations but stop short of criminal prosecution. Part III.A examines the first procedural barrier: when the Eighth Amendment's substantive protection attaches. Because, as argued in Part II, that protection "governs the criminal law process as a whole,"[15] this Note concludes that homeless plaintiffs should have standing

12. 370 U.S. 660 (1962).

13. *See id.* at 666-67.

14. While a court would typically address standing before reaching the merits, this Note tackles these questions in reverse order. This is because the status crimes framework is a lesser-known strain of Eighth Amendment jurisprudence, and any analysis of standing necessarily entails an understanding of the underlying constitutional right. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1392 (1988) ("Analytically, then, standing doctrine is neither a series of rules about when a court will reach the merits nor a shill for a decision on the merits. It is a determination that, regardless of the blinders we employ, necessarily entails considerations that go to the merits.").

15. *See* Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1226 (E.D. Cal. 2009) (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1128 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007)).

to invoke the Eighth Amendment for retrospective damages as soon as any part of the criminal process has been instigated against them, not only after conviction. This Note then catalogs the injuries courts have required of plaintiffs who seek to show standing in an affirmative challenge. Part III.B turns to the second obstacle—standing to seek prospective relief—and explains why homeless plaintiffs should have standing to seek an injunction against an anti-homeless ordinance that has been applied against them.

While the Court's silence on the reach of *Robinson* persists, lower and state courts have struggled to define the substantive and procedural contours of the Eighth Amendment. The silence and confusion become only more salient as localities continue to pass new anti-homeless ordinances to address the perceived homelessness crisis and as legal organizations continue to bring constitutional challenges to these ordinances. Where, as here, ordinances target particularly vulnerable communities largely shut out of the political process, judicial oversight is imperative. In the face of this ambiguity, this Note aims to serve as a guide for three relevant groups: litigants challenging these regulations, courts considering these challenges, and legislators drafting anti-homeless regulations.

I. A Primer on Anti-homeless Ordinances

This Part provides a brief introduction to one method by which cities have sought to address the perceived homelessness crisis: tent bans and "sit-lie" laws. A basic understanding of the way these laws are enforced and the impact they have on homeless people is crucial to understanding the viability of the Eighth Amendment challenge discussed in Part II and the procedural problems discussed in Part III.

San Francisco's sit-lie law exemplifies the typical result of anti-homeless regulations: a "cycle of criminalizing homelessness."[16] Section 168 of San Francisco's Police Code makes it "unlawful to sit or lie down upon a public sidewalk" "during the hours between seven (7:00) a.m. and eleven (11:00) p.m."[17] Without anywhere to go during the day, many homeless individuals risk violating the law simply by appearing in public. After an initial warning, police may issue a citation for a first offense.[18] An individual with a citation has two options: pay $50 to $100 (or the equivalent in community service) or

16. *See* ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, YALE LAW SCH., "FORCED INTO BREAKING THE LAW": THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 5, 12 (2016), https://perma.cc/D8VA-6KBN.

17. S.F., CAL., POLICE CODE § 168(b) (2017).

18. *See id.* § 168(a), (d).

"appear in court to protest the citation."[19] Both options present challenges for homeless individuals, leading to more severe consequences. In San Francisco, fines were paid in less than 10% of anti-homeless citation cases in 2000.[20] And while about 21% of homeless individuals attempt to protest the citation in court, appearing in court is challenging without housing.[21] An individual must schedule a court date, attend arraignment, participate in community service or receive social services through formal programs, and then reappear in court to present a signed document confirming the hours spent performing or receiving services.[22] This process means traveling to and from court, leaving personal items unattended, missing work, and potentially losing a spot on an emergency shelter's long waiting list.

For the majority of individuals who fail to pay or appear in court, the court may issue a bench warrant, which can lead to arrest at the discretion of an officer or an additional $300 fine.[23] Section 168 also authorizes police to arrest an individual for a second, misdemeanor offense if committed within twenty-four hours of the first citation.[24] However, there is little reason to expect a homeless person to be able to avoid resting in public just one day after initial contact with the police. Second offenses bring fines of up to $500 or up to ten days in jail, and subsequent offenses bring even more fines or up to thirty days in jail.[25] Thus, a person may incur significant fines for sitting or lying in public without a formal trial or plea process. Almost by definition, that fine is out of reach for homeless people. And if a homeless person is arrested or convicted, criminal records can make obtaining housing, employment, and social services nearly impossible.[26]

Completing the cycle, an initial citation for sitting in public during the day entrenches homelessness, giving that person few options but to continue sitting in public during the day, risking another citation. The number of reported incidents due to homeless individuals violating this quality-of-life ordinance and similar ordinances has increased in recent years, suggesting even

19. *See id.* § 168(f)(1); *see also* POLICY ADVOCACY CLINIC, *supra* note 2, at 19. One report found that the average fine for violations of anti-homeless ordinances is $150. COAL. ON HOMELESSNESS, *supra* note 1, at 37.

20. POLICY ADVOCACY CLINIC, *supra* note 2, at 19.

21. *See* ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, *supra* note 16, at 2 ("But without an address or reliable transportation, [homeless individuals] often fail to receive notice and do not appear in court."); COAL. ON HOMELESSNESS, *supra* note 1, at 37.

22. *See* COAL. ON HOMELESSNESS, *supra* note 1, at 37.

23. *See id.* at 38; POLICY ADVOCACY CLINIC, *supra* note 2, at 19. This happens in over 60% of cases. COAL. ON HOMELESSNESS, *supra* note 1, at 38.

24. S.F., CAL., POLICE CODE § 168(f)(2).

25. *See id.*

26. *See* ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, *supra* note 16, at 2.

further entrenchment.[27] In 2013, for example, there were 7134 reported violations of section 168; this number rose to 8053 in the first eleven months of 2015.[28]

With over twenty anti-homeless ordinances, San Francisco has "well above the state average of nine,"[29] and it recently added another controversial one to the roster. Proposition Q, codified as Police Code section 169 and passed in November 2016, authorizes the city to clear tent encampments with a day's notice and an offer of shelter.[30] Section 169 cannot be enforced when no shelter beds are available,[31] and with San Francisco's over-1000-person waiting list for emergency shelter, it is rarely used.[32] Former mayor Ed Lee described the proposition as "symbolic" and meant to "reassure [the public] that we are headed in the (right) direction" in addressing the perceived homelessness crisis.[33] Opponents, on the other hand, describe the measure as symbolizing the city's efforts "to further criminalize homelessness" because it cannot be enforced in the current housing climate and is "redundant" with the existing sit-lie law.[34]

San Francisco is not alone in turning to regulations to respond to an increasingly visible homeless population. In California's Central Valley, for instance, the Fresno City Council responded to constituents' demands for action by approving the controversial Unhealthy and Hazardous Camping Act in August 2017.[35] The Act makes camping on public or private lands without

27. *See* Memorandum from Budget & Legislative Analyst's Office, City & Cty. of S.F., to Supervisor Mar, Budget & Legislative Analyst's Office, City & Cty. of S.F., at 14 exhibit 6 (June 1, 2016), https://perma.cc/N53C-E9KD.

28. *See id.* In addition, these figures likely underestimate the number of citations and arrests issued to homeless people. *See id.* at 19.

29. *See* POLICY ADVOCACY CLINIC, *supra* note 2, at 17.

30. *See* S.F., CAL., POLICE CODE § 169. The ordinance does not specify for how many nights the shelter must be available.

31. *See id.* § 169(d).

32. *See SF Tent on Sidewalk Prohibition Has Been Enforced 152 Times*, KTVU (Sept. 12, 2017, 12:00 PM PDT), https://perma.cc/MN8C-D4TL (reporting that 152 Proposition Q notices were issued over the summer of 2017 during a pilot program when beds were available at a new homeless shelter); *Shelter Reservation Waitlist*, SF311, https://perma.cc/9P6Z-ESM4 (archived Apr. 7, 2018).

33. *See* Kevin Fagan & Emily Green, *SF's Voter-Approved Camp-Sweep Measure More Symbol Than Substance*, S.F. CHRON. (Mar. 27, 2017, 8:34 AM), https://perma.cc/YZ8V-ML6T.

34. *See, e.g.*, Caleb Pershan, *Prop Q, Voter-Approved Anti-homeless Encampment Law, Hasn't Been Used Once*, SFIST (Mar. 27, 2017, 12:20 PM), https://perma.cc/26LB-GTR9.

35. *See* FRESNO, CAL., CODE OF ORDINANCES §§ 10-1700 to -1706 (2018); *see also, e.g.*, Stephen D. Malm, Letter to the Editor, *Fresno Homeless Anti-camping Law a "Misguided Waste,"* FRESNO BEE (Aug. 21, 2017, 1:16 PM), https://perma.cc/AQM4-4F8Z (describing the ordinance as "sadly misguided and a waste of public funds" in the fight to combat homelessness).

permission a misdemeanor with the possibility of a $1000-per-violation fine and confinement up to six months in jail.[36] In theory, an individual found illegally camping, "in lieu of being taken to jail[,] may, at the election of the citing police officer and with the consent of the individual, be taken to a facility providing social services related to mental health, housing, or substance abuse treatment."[37] However, by its terms, this alternative to criminalization is left to the discretion of the arresting officer and the availability of social services. Indeed, although the Fresno police department reported to a local newspaper that "enforcing and citing is a last resort," the department has begun making arrests.[38]

This response is not unique to California. In April 2017, the city of Houston passed Ordinance No. 2017-261,[39] which makes camping in any public place in the city punishable as a misdemeanor.[40] After issuing a written warning and giving "a reasonable time" for the individual to relocate, a police officer may issue a criminal citation for unlawful camping.[41] Alternatively, if the individual has not complied, the officer may arrest the individual if the officer first "attempted to ascertain whether the person [was] in need of emergency medical . . . or social services" and, if so, made "reasonable efforts" to "obtain the assistance contemplated."[42] In other words, arrest is permissible if the officer tries but fails to obtain supportive assistance for the homeless individual. Arrest is also permissible if the person does not accept the offered services.[43] The same day the encampment ban went into effect in May 2017, the American Civil Liberties Union (ACLU) filed a lawsuit on constitutional grounds, challenging that ordinance as well as two others related to panhandling and public storage of personal items.[44] As of August 2017, police had begun issuing warnings under the ordinance.[45]

---

36. *See* FRESNO, CAL., CODE OF ORDINANCES § 10-1703(a).

37. *See id.* § 10-1703(b).

38. *See* Christina Tetreault, *First Transient Arrest in Fresno After Homeless Camping Ban*, YOURCENTRALVALLEY.COM (Oct. 6, 2017, 6:51 PM PDT), https://perma.cc/A5PR-2CTB.

39. HOUS., TEX., CODE OF ORDINANCES §§ 21-61 to -64 (2018).

40. *See id.* § 21-62.

41. *See id.* § 21-63(a).

42. *See id.* § 21-63(c).

43. *See id.*

44. *See* Complaint ¶¶ 98-122, Kohr v. City of Houston, No. 4:17-cv-01473 (S.D. Tex. May 12, 2017); *see also* Andrew Kragie & Mike Morris, *Houston's Panhandling, Camping Ordinances Violate Rights, Lawsuit Says*, HOUS. CHRON. (May 15, 2017, 6:42 PM), https://perma.cc/4AM9-KDWQ.

45. *See* Corrected Memorandum of Law in Support of Plaintiffs' Emergency Motion for Temporary Restraining Order at 3-4, Kohr v. City of Houston, No. 4:17-cv-01473, 2017 WL 3605238 (S.D. Tex. Aug. 17, 2017) [hereinafter *Kohr* Corrected Memorandum].

II. Anti-homeless Ordinances and the Eighth Amendment's Substantive Limit

Laws targeting homeless conduct have their origins in vagrancy and loitering laws, which criminalized wandering or appearing in public without visible means of support.[46] After the U.S. Supreme Court struck down these early vagrancy and loitering laws as unconstitutionally vague in violation of the Fourteenth Amendment's Due Process Clause,[47] cities "changed the form, but not the substance, of official efforts to control the homeless."[48] These modern anti-homeless ordinances regulate public behavior performed almost exclusively by homeless people, including sleeping, sitting, and camping.[49]

Advocates for homeless people argue that criminalizing this public, life-sustaining behavior in a city without sufficient shelter to accommodate its homeless population effectively criminalizes the status of homelessness itself, in violation of the Eighth Amendment. The success of this argument depends on whether the Court's "status crimes" doctrine extends beyond status to related conduct. Part II.A below provides the legal background to this doctrine, which the Court has not addressed since it was announced in *Robinson v. California* in 1962[50] and refined in *Powell v. Texas* in 1968.[51] Part II.B discusses the entrenched division between the lower and state courts that have extended *Robinson* to limited forms of conduct and those that have not. Part II.C concludes that homelessness should be a cognizable status under *Robinson* and that the doctrine can be extended to some forms of conduct that are inseparable from a cognizable status, subject to appropriate limiting principles as set forth in a new, three-part test.

A. The Eighth Amendment Status Crimes Doctrine

The Eighth Amendment prohibition against cruel and unusual punishment not only limits "the kinds of punishment that can be imposed on those

46. *See* Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 633-34 (1992).

47. *See* Kolender v. Lawson, 461 U.S. 352, 361-62 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 171 (1972).

48. Simon, *supra* note 46, at 634; *see also* KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 24 (2010) (describing the development of "civility codes" and prohibitions on "sitting or lying on a sidewalk, engaging in aggressive panhandling, or sleeping in parks" as local responses to the Court's striking down vagrancy laws).

49. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 52-70 (listing ordinances by city and state and the proscribed conduct).

50. 370 U.S. 660 (1962).

51. 392 U.S. 514 (1968).

convicted of crimes" and the proportionality of that punishment to the crime, but also "imposes [a] substantive limit[] on what can be made criminal and punished as such."[52] The Court first set forth the scope of that substantive limit in 1962, holding that laws criminalizing "status" were cruel and unusual.[53] In *Robinson*, the Court struck down a California law that criminalized "be[ing] addicted to the use of narcotics."[54] Writing for the majority, Justice Stewart explained that targeting the "status" of narcotic addiction would be akin to making it "a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease."[55] Criminalizing illness, reasoned Justice Stewart, would "be universally thought to be an infliction of cruel and unusual punishment" because illness, like addiction, "may be contracted innocently or involuntarily."[56]

Soon after *Robinson*, a *Harvard Law Review* note offered three possible constitutional rationales to support the decision: a "pure status" rationale, a "status one cannot change" rationale, and an "involuntariness" rationale.[57] Distilled to the basic issue, the current circuit split over whether the status crimes doctrine applies to the conduct prohibited by anti-homeless ordinances turns on which rationale justified or continues to justify the decision in *Robinson*. Accordingly, the useful theoretical framework set forth in that prescient note is a helpful way to think about the considerations courts across the country are balancing.

The pure status rationale "relies solely upon the distinction between a status and an act," drawing a sharp line between the two.[58] Under this theory, as long as the statute in question targets *some* act, it will be constitutional under *Robinson*. This represents the narrowest rationale for *Robinson*, restricting its substantive reach to the few statutes that fail to proscribe any conduct.

The status-one-cannot-change rationale extends *Robinson* further. This interpretation moves beyond the formalistic status-conduct distinction and instead asks whether the individual is "free voluntarily to quit his condition."[59] An individual who cannot change his illness or addiction cannot be deterred, so

52. *See* Ingraham v. Wright, 430 U.S. 651, 667 (1977).

53. *See Robinson*, 370 U.S. at 666.

54. *Id.* at 660, 667 (quoting CAL. HEALTH & SAFETY CODE § 11721 (repealed 1972)); *see also id.* at 666 ("This statute . . . is not one which punishes a person for the *use* of narcotics . . . . Rather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense . . . ." (emphasis added)).

55. *See id.* at 666.

56. *See id.* at 666-67.

57. *See* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 650-55 (1966).

58. *See id.* at 646, 650.

59. *See id.* at 648, 651.

punishing that status accomplishes nothing.[60] Such empty punishment would be "morally repugnant."[61] Under this rationale, "the question arises whether a prohibition against punishment for the condition would also extend to certain acts closely related to the condition."[62] To use the note's example, if it is unconstitutional to punish someone for having a cold, it would make little sense to permit a legislature to punish that person for sneezing.[63] The Note also anticipated later courts' critique of such an extension, cautioning that without a limiting principle, this sweeping rationale would threaten to swallow notions of criminal culpability altogether.[64]

Finally, the involuntariness rationale looks to "whether the defendant was ultimately responsible for acquiring his condition."[65] This interpretation may require additional, burdensome litigation regarding the complex psychological processes of acquiring an addiction or illness, as well as detailed inquiry into the factual circumstances of an individual's addiction or illness.

In light of these competing rationales for *Robinson*, it was unclear whether states could constitutionally punish an individual for conduct derivative of, or compelled by, her status. Six years later, in *Powell*, the Court seemed poised to hold that conduct directly caused by a protected status likewise could not be criminalized under the Eighth Amendment.[66] Instead, the Court eschewed that opportunity and issued a divided decision that left the substantive limit on status and derivative-conduct crimes murky at best.

Leroy Powell was convicted for appearing in public while intoxicated.[67] He argued that his public intoxication was the involuntary, inevitable result of his being a chronic alcoholic.[68] As such, criminalizing behavior he could not

60. *See id.* at 648.

61. *See id.*

62. *Id.* at 651.

63. *Id.*

64. *See id.* at 651-53.

65. *See id.* at 654.

66. Before *Powell* was decided, many scholars anticipated that the Court would extend *Robinson* to include involuntary acts related to a protected status. *See, e.g.*, Gary V. Dubin, Mens Rea *Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 387 (1966) ("If it is a violation of the eighth and fourteenth amendments to punish one for being in an involuntary status, such as drug or alcoholic addiction or insanity, then it would be equally unconstitutional to punish the involuntary acts that may flow from that status."); Walter W. Steele, Jr., *The Status of Status Crime*, 52 JUDICATURE 18, 19 (1968) (writing following oral argument in *Powell* but before the Court's opinion that "[t]here can be little doubt of the outcome—the Supreme Court will extend the illness defense doctrine laid down in *Robinson*").

67. Powell v. Texas, 392 U.S. 514, 517 (1968) (plurality opinion).

68. *See id.*

avoid—being drunk—amounted to criminalizing his status as an alcoholic in violation of the Eighth Amendment.[69]

A four-Justice plurality upheld Powell's conviction, narrowly interpreting *Robinson* to prohibit criminalizing status alone, consistent with the pure status rationale. Writing for the plurality, Justice Marshall concluded that Texas "has not sought to punish a mere status" but instead "has imposed upon [Powell] a criminal sanction for public *behavior*."[70] The plurality understood that its narrow interpretation of *Robinson* "br[ought] this Court but a very small way into the substantive criminal law."[71] Otherwise, the Court feared it would become "the ultimate arbiter of the standards of criminal responsibility" traditionally set by states and localities.[72] The plurality also declined to extend *Robinson* without a clear limiting principle for identifying which involuntary actions would receive constitutional protection: If "Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual . . . suffers from a 'compulsion' to kill."[73]

Writing in dissent, Justice Fortas rejected the plurality's emphasis on pure status and instead embraced the status-one-cannot-change rationale for *Robinson*: "Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[74] Justice Fortas also addressed the plurality's fear that a *Robinson*-style defense in Powell's case would extend to offenses like drunk driving or murder by proposing a "symptomatic" limiting principle: "Such offenses require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism."[75] Under this logic, a state would still be able to punish a chronic alcoholic for drunk driving because driving is not "a characteristic and involuntary part of the pattern" of alcoholism.[76]

69. *See id.*

70. *See id.* at 532 (emphasis added).

71. *See id.* at 533.

72. *See id.*; *see also id.* at 537 (Black, J., concurring) ("To adopt [the dissent's] position would significantly limit the States in their efforts to deal with a widespread and important social problem and would do so by announcing a revolutionary doctrine of constitutional law that would also tightly restrict state power to deal with a wide variety of other harmful conduct.").

73. *Id.* at 534 (plurality opinion) (quoting Commonwealth v. Phelan, 234 A.2d 540, 547 (Pa. 1967), *overruled by* Commonwealth v. Walzack, 360 A.2d 914 (Pa. 1976)).

74. *See id.* at 567 (Fortas, J., dissenting).

75. *See id.* at 559 n.2.

76. *See id.*

Justice White was the fifth Justice to look beyond pure status and consider the volitional nature of the conduct.[77] Despite this agreement with the dissent, he concurred in the judgment on the factual ground that Powell failed to offer sufficient evidence that he could not avoid appearing in public while intoxicated.[78] Justice White suggested, however, that for chronic alcoholics who were *homeless*, "[f]or 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."[79] For those individuals, "a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible."[80] Looking beyond the text of the particular ordinance to its practical effect, Justice White concluded that "[a]s 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."[81]

As discussed in greater detail below, advocates for homeless people have since seized upon this language, arguing that when a homeless person has nowhere else to go, the Eighth Amendment forbids a locality to punish him for conduct he cannot avoid.

B. Courts Disagree About Whether *Robinson* Applies to Anti-homeless Ordinances

Without a majority for the pure status theory following *Powell*, lower and state courts have lacked clear guidance on whether and when to apply *Robinson* to conduct related to a protected status. In the almost five decades since *Powell*, decisions from at least seven federal courts and some state courts have recognized that *Robinson* can be extended to some involuntary conduct related to the protected status of homelessness,[82] while four federal courts and some

77. *See id.* at 549 (White, J., concurring in the result) ("[T]he chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.").

78. *See id.* at 549-50.

79. *See id.* at 551.

80. *Id.*

81. *See id.* Justice Blackmun likewise relied on this interpretation in his dissent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to suggest that "the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on [same-sex] attraction" given that "[h]omosexual orientation may well form part of the very fiber of an individual's personality." *See id.* at 203 n.2 (Blackmun, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). Justices Brennan, Marshall, and Stevens joined Justice Blackmun's dissent in *Bowers*. *Id.* at 199. However, the argument did not gain traction, and the Court has not addressed the status crimes doctrine since.

82. *See, e.g.*, Jones v. City of Los Angeles, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007); Kohr v. City of Houston, No. 4:17-cv-1473,
footnote continued on next page

state courts have concluded that *Robinson* is limited to status and does not apply to conduct.[83] In other words, these courts have divided along lines similar to the competing justifications set forth in the 1966 *Harvard Law Review* note: Courts that have extended *Robinson* embrace a combination of the status-one-cannot-change and involuntariness rationales, while courts that have declined to extend the doctrine embrace the pure status rationale.[84]

1. Courts that extend *Robinson* to conduct

The first case to address this issue, *Pottinger v. City of Miami*,[85] set the general framework by which subsequent courts have extended *Robinson* to some conduct. In *Pottinger*, a class of homeless individuals brought an as-applied challenge to the city of Miami's practice of "arresting homeless individuals for inoffensive conduct, such as sleeping or bathing, that they are forced to perform in public."[86] The district court acknowledged that *Powell* left ambiguous "whether involuntary conduct that is inextricably related to [a] status may be punished."[87] Nonetheless, the court held that "arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless" in violation of the Eighth Amendment.[88] *Powell* did not foreclose such a holding, the court concluded, because the *Powell* plurality was "not confronted with a critical distinguishing factor that is

2017 WL 3605238, at *2 (S.D. Tex. Aug. 22, 2017), *temporary restraining order dissolved*, 2017 WL 6619336 (S.D. Tex. Dec. 28, 2017), *appeal docketed*, No. 18-20129 (5th Cir. Dec. 28, 2018); Cobine v. City of Eureka, No. C 16-02239 JSW, 2016 WL 1730084, at *6 (N.D. Cal. May 2, 2016); Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009); Spencer v. City of San Diego, No. 3:04-cv-02314-WVG, at *3-4 (S.D. Cal. Jan. 12, 2006); Johnson v. City of Dallas, 860 F. Supp. 344, 349-50 (N.D. Tex. 1994), *rev'd*, 61 F.3d 442 (5th Cir. 1995); Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992); Oregon v. Wicks, Nos. Z711742 & Z711743, slip op. at 11 (Or. Cir. Ct. Multnomah Cty. Sept. 28, 2000); City of Everett v. Bluhm, Nos. CRP 7006 et al., slip op. at 6 (Wash. Everett Mun. Ct. Snohomish Cty. Jan. 12, 2016).

83. *See, e.g.*, Glover v. City of Laguna Beach, No. 8:15-cv-01332-AG-DFM, slip op. at 6-7 (C.D. Cal. Feb. 10, 2016); Ashbaucher v. City of Arcata, No. CV 08-2840 MHP (NJV), 2010 WL 11211481, at *6 (N.D. Cal. Aug. 19, 2010), *recommendation adopted by* 2010 WL 11211527 (N.D. Cal. Dec. 1, 2010); Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009); Joyce v. City & County of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994), *vacated as moot*, No. 95-16940, 1996 WL 329317 (9th Cir. June 14, 1996); Tobe v. City of Santa Ana, 892 P.2d 1145, 1166-67 (Cal. 1995); Allen v. City of Sacramento, 183 Cal. Rptr. 3d 654, 669-71 (Ct. App. 2015).

84. *See supra* text accompanying notes 57-65.

85. 810 F. Supp. 1551.

86. *See id.* at 1554.

87. *See id.* at 1563.

88. *See id.* at 1564.

unique to the plight of the homeless": "[T]hey have no realistic choice but to live in public places."[89]

First, the *Pottinger* court concluded that homelessness, like illness or addiction, is a cognizable status under the Eighth Amendment.[90] The court then interpreted *Robinson* and *Powell* to stand for the proposition that "voluntariness of the status or condition is the decisive factor."[91] Applying that factor to the homeless plaintiffs, the court concluded that "their homeless condition compels them to perform certain life-sustaining activities in public."[92] The conduct was involuntary because the homeless plaintiffs, like all people, must perform certain activities, like sleeping, that are life sustaining.[93] And the location was involuntary because the city did not have sufficient "low-income housing or alternative shelter."[94] Therefore, the court concluded, "The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless."[95] From the opinion, it is clear that the court also found it compelling that the plaintiffs were engaging in what the court viewed as "harmless" and "inoffensive" behavior: "[A]t the time of the arrest, [a plaintiff] and the others were doing nothing more than sleeping."[96]

The Ninth Circuit—the only federal court of appeals to have reached the merits of this question[97]—framed the inquiry differently to reach a similar

89. *See id.* at 1563 (citing Powell v. Texas, 392 U.S. 514, 551 (1968) (White, J., concurring in the result)).

90. The court deemed it "well-established" that the Eighth Amendment protects "involuntary status" and emphasized expert testimony explaining that "people rarely choose to be homeless." *See id.* ("[H]omelessness is due to various economic, physical or psychological factors that are beyond the homeless individual's control.").

91. *See id.* at 1562.

92. *See id.* at 1563.

93. *See id.* at 1564 ("Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct *involuntary*, *life-sustaining* activities in public places." (emphasis added)); *id.* at 1565 ("For plaintiffs, resisting the need to eat, sleep or engage in other life-sustaining activities is impossible.").

94. *See id.* at 1564. At the time of trial, there were approximately 700 shelter beds available for approximately 6000 homeless individuals living in Miami. *Id.*

95. *Id.*

96. *See id.* at 1560, 1564, 1582.

97. In *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), the Eleventh Circuit declined to reach the merits of the plaintiff's Eighth Amendment claim on factual grounds. The court held that unlike in *Pottinger* and *Johnson v. City of Dallas*, 860 F. Supp. 344, 349-50 (N.D. Tex. 1994), *rev'd*, 61 F.3d 442 (5th Cir. 1995), the city in *Joel* "presented unrefuted evidence" that its homeless shelter "ha[d] never reached its maximum capacity and that no individual ha[d] been turned away because there was no space available or for failure to pay the one dollar nightly fee." *Joel*, 232 F.3d at 1362; *see also infra* note 122 (discussing *Johnson*). The panel concluded that even if it were to follow the legal reasoning in *Pottinger* and *Johnson*, "this case is clearly distinguishable." *See Joel*, 232 F.3d at 1362.

conclusion in *Jones v. City of Los Angeles*, a decision that was ultimately vacated after the parties reached a settlement.[98] Six homeless individuals challenged the enforcement of a citywide, all-hours ban on sitting, lying, or sleeping on public streets and sidewalks.[99] Writing for the panel, Judge Wardlaw distilled the Eighth Amendment inquiry under *Robinson* and *Powell* down to "two considerations."[100] First, given "*Robinson*'s holding that the state cannot criminalize pure status," "is the distinction between pure status—the state of being—and pure conduct—the act of doing."[101] In between those poles, however, is conduct that is "inextricably linked to one's status, such that punishing the conduct is indistinguishable from punishing the status."[102] The second consideration "is the distinction between an involuntary act or condition and a voluntary one."[103] Judge Wardlaw based this on a vote count: "[F]ive justices in *Powell* understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being."[104] Her opinion can be understood as building a rubric based on two spectrums: the sliding scale between status and conduct and the sliding scale between involuntariness and voluntariness.

Under this rubric, the Ninth Circuit in *Jones* relied on considerations similar to those in *Pottinger*. For example, the court found that "the conduct at issue here is involuntary and inseparable from status—they are one and the same, given that human beings are biologically compelled to rest."[105] This underscores that the conduct is both an involuntary product of being human and symptomatic of being homeless, such that criminalizing the conduct criminalizes the status. Furthermore, "at the time they were cited or arrested, [the plaintiffs] had no choice other than to be on the streets" because of the "substantial shortage of shelter" in Los Angeles.[106] Therefore, just as in *Pottinger*, sleeping in public was an unavoidable consequence of being

98. 444 F.3d 1118 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007).

99. *See id.* at 1120.

100. *See id.* at 1136.

101. *Id.*

102. *See, e.g.*, Statement of Interest of the United States at 8-9, Bell v. City of Boise, No. 1:09-cv-540-REB (D. Idaho Aug. 6, 2015) (describing *Jones*'s focus on the relationship between the prohibited conduct and the protected status); *see also Jones*, 444 F.3d at 1136-38 (explaining why the criminalized conduct was inextricably linked to homeless status).

103. *Jones*, 444 F.3d at 1136.

104. *See id.* at 1135 (considering Justice White's concurrence and Justice Fortas's dissent, which was joined by Justices Douglas, Brennan, and Stewart).

105. *Id.* at 1136.

106. *See id.* at 1132, 1137.

homeless.[107] Although the *Jones* court did not precisely specify how each factor fit under its two considerations, it came to the same conclusion as the *Pottinger* court: As applied to homeless people, enforcement of the citywide public sleeping ban violated the Eighth Amendment because it effectively criminalized homelessness itself.[108]

Many advocates and courts have simply followed *Jones*,[109] which they interpret to base the Eighth Amendment analysis largely on the voluntariness of the proscribed conduct. For example, in 2015, the U.S. Department of Justice (DOJ) filed a statement of interest in an ongoing challenge to the city of Boise's anti-camping ordinance to clarify that "the *Jones* framework is the appropriate legal framework for analyzing [the homeless plaintiffs'] Eighth Amendment claims."[110] For the DOJ, as in *Jones*, the inquiry largely turned on the voluntariness of the proscribed conduct: When homeless individuals are "unable to secure shelter space," an anti-camping ordinance like Boise's is "akin to the ordinance at issue in *Robinson*" but, "[w]hen adequate shelter space exists, individuals have a choice" and so can be penalized for camping in public.[111]

The ACLU's recent litigation challenging Houston's camping ban likewise focuses on the voluntariness of the proscribed conduct.[112] In August 2017, the

107. *See id.* at 1137-38.

108. *See id.* at 1138.

109. *See, e.g.*, Cobine v. City of Eureka, No. C 16-02239 JSW, 2016 WL 1730084, at *5-6, *8 (N.D. Cal. May 2, 2016) (relying on *Jones* in enjoining the city from enforcing ordinances and removing homeless encampments without complying with court-imposed conditions, including the provision of emergency shelter to plaintiffs); Spencer v. City of San Diego, No. 3:04-cv-02314-WVG, slip op. at 1 (S.D. Cal. May 5, 2006) (denying the defendant city's motion to dismiss an Eighth Amendment challenge to the city's ban on public sleeping by citing *Jones* without further explanation).

110. *See* Statement of Interest of the United States, *supra* note 102, at 4. The DOJ first took this position in the mid-1990s, when it filed amicus briefs in *Joyce v. City & County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994), *vacated as moot*, No. 95-16940, 1996 WL 329317 (9th Cir. June 14, 1996), and *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995), both discussed in Part II.B.2 below. *See* Statement of Interest of the United States, *supra* note 102, at 9. Thus, while it is generally not clear whether and to what extent the DOJ's position will change under the Trump Administration, this interpretation of the Eighth Amendment has already held steady across different administrations.

111. *See* Statement of Interest of the United States, *supra* note 102, at 12. In holding that the plaintiffs lacked standing to bring a constitutional challenge to Boise's tent ban, the district court did not address the merits of the Eighth Amendment claim or even refer to the United States's statement of interest. *See* Martin v. City of Boise, No. 1:09-cv-00540-REB, 2015 WL 5708586, at *6-7 (D. Idaho Sept. 28, 2015), *appeal docketed*, No. 15-35845 (9th Cir. Oct. 29, 2015). The plaintiffs' appeal as to standing and whether their claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), is currently pending before the Ninth Circuit. *See* Brief of Plaintiffs-Appellants Robert Martin et al. at 8-10, Martin v. City of Boise, No. 15-35845 (9th Cir. Jan. 24, 2017).

112. *See supra* text accompanying note 44.

ACLU filed a motion for a temporary restraining order in response to Houston's issuing warnings to homeless individuals who were in violation of the camping ban, which is a necessary predicate to either citation or arrest under the ordinance.[113] The ACLU explained that courts, and especially the Ninth Circuit in *Jones*, "have treated involuntariness of acts accompanying status as 'the critical factor' for triggering Eighth Amendment protection."[114] In Houston, "an unsheltered person's presence in public is . . . involuntary" because "Houston's emergency shelter beds are full."[115] The district court agreed, at least for purposes of the temporary restraining order.[116]

Other courts following *Pottinger* or *Jones* have focused on additional considerations beyond voluntariness, consistent with a combination of the involuntariness and status-one-cannot-change rationales. In *Anderson v. City of Portland*, for example, the district court denied the city's motion to dismiss, finding that the plaintiff class had adequately stated a claim under the Eighth Amendment.[117] As in *Pottinger*, the *Anderson* plaintiffs argued that as applied to Portland's homeless population, enforcement of a no-camping ordinance "extends beyond the limits of 'what can be made criminal' under the Eighth Amendment."[118] The court appreciated "the reluctance" of courts that had declined to "extend blanket constitutional protection to involuntary acts derivative of status" without further direction from the Supreme Court.[119] To assuage this concern, the court looked to both the "involuntariness" of the conduct and the "equally important factor" of "the nature of the prohibited conduct."[120] Relying on language from *Jones* and *Pottinger*, the court concluded that the Eighth Amendment distinguishes between harmless conduct and

113. *See Kohr* Corrected Memorandum, *supra* note 45, at 3-4.

114. *See id.* at 11 (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1132 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007)).

115. *Id.* at 13.

116. *See* Kohr v. City of Houston, No. 4:17-cv-1473, 2017 WL 3605238, at *2 (S.D. Tex. Aug. 22, 2017) ("The evidence is conclusive that they are involuntarily in public, harmlessly attempting to shelter themselves—an act they cannot realistically forgo, and that is integral to their status as unsheltered homeless individuals."), *temporary restraining order dissolved*, 2017 WL 6619336 (S.D. Tex. Dec. 28, 2017), *appeal docketed*, No. 18-20129 (5th Cir. Feb. 28, 2018).

117. *See* No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009). After discovery, the court ultimately denied the plaintiffs' motion for summary judgment and class certification on their Eighth Amendment claims because they failed to offer specific evidence proving that they had been engaged in only innocent behavior, such as sleeping, when arrested, and that the city did not have adequate shelter. *See* Anderson v. City of Portland, No. 08-1447-AA, 2011 WL 6130598, at *1-3 (D. Or. Dec. 7, 2011).

118. *See Anderson*, 2009 WL 2386056, at *5 (quoting Ingraham v. Wright, 430 U.S. 651, 667 (1977)).

119. *See id.* at *6.

120. *See id.* at *7.

"conduct that society has an interest in preventing."[121] Because sleeping is "innocent conduct," the court concluded that the plaintiffs had adequately stated a claim under the Eighth Amendment.[122]

2. Courts that limit *Robinson* to pure status

Not every court has found the *Jones* and *Pottinger* line of reasoning compelling. The leading case to advance a narrow interpretation of the Eighth Amendment consistent with the pure status rationale was decided two years after *Pottinger*: *Joyce v. City & County of San Francisco*.[123] The district court denied the plaintiff class's motion for a preliminary injunction for "two independent reasons," one of which is relevant here: The plaintiffs could not show a likelihood of success on the merits of their Eighth Amendment claim.[124]

The court explained that to find for the plaintiffs, it would first need to recognize homelessness as a cognizable status under the Eighth Amendment and *then* extend *Robinson* to protect "acts derivative of a 'status' of homelessness."[125] The court stopped after step one because "[d]epicting homelessness as

121. *See id.* (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1139 (9th Cir. 2006) (Rymer, J., dissenting), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007)).

122. *See id.* So too in *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd*, 61 F.3d 442 (5th Cir. 1995). In *Johnson*, the district court struck down a public sleeping ordinance as applied to the homeless class because it barred life-sustaining and involuntary conduct that was an integral part of being homeless: The plaintiffs "must be in public," and "they must sleep." *See id.* at 350. The court held that "[b]ecause being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless, a status forcing them to be in public." *Id.* As discussed more fully in Part III.A below, the Fifth Circuit reversed the district court, holding that the Eighth Amendment does not apply to claims without a predicate conviction. Because the plaintiffs had not been convicted under the sleeping ban, the Fifth Circuit vacated the district court's opinion and remanded the case to be dismissed for lack of standing. *See* Johnson v. City of Dallas, 61 F.3d 442, 445 (5th Cir. 1996). In so doing, the Fifth Circuit did not address the merits of the Eighth Amendment claim.

123. 846 F. Supp. 843 (N.D. Cal. 1994), *vacated as moot*, No. 95-16940, 1996 WL 329317 (9th Cir. June 14, 1996). The Ninth Circuit vacated the case as moot because San Francisco's mayor eliminated the enforcement program targeted at homeless people. *See* Joyce v. City & County of San Francisco, No. 95-16940, 1996 WL 329317, at *1 (9th Cir. June 14, 1996). This was a decade before the Ninth Circuit reached the merits of the Eighth Amendment claim in *Jones*. *See supra* text accompanying notes 98-108.

124. *See Joyce*, 846 F. Supp. at 851. The plaintiffs advanced a very similar argument to that of the plaintiffs described in Part II.B.1 above, maintaining that because they "are compelled to be on the street involuntarily, enforcement of laws which interfere with their ability to carry out life sustaining activities on the street must be prohibited" under the Eighth Amendment. *See Joyce*, 846 F. Supp. at 853.

125. *See Joyce*, 846 F. Supp. at 856.

'status' is by no means self-evident."[126] *Pottinger* was wrong, explained the *Joyce* court, because "status cannot be defined as a function of the discretionary acts of others."[127] Because cities are under no obligation to provide shelter for the indigent, courts cannot hold them constitutionally accountable for regulating what people do when they lack shelter.[128]

The *Joyce* court attempted to articulate a definition for a protected status under the Eighth Amendment: "While the concept of status might elude perfect definition, certain factors assist in its determination, such as the involuntariness of the acquisition of that quality (including the presence or not of that characteristic at birth) and the degree to which an individual has control over that characteristic."[129] According to the court, "Examples of such 'status' characteristics might include age, race, gender, national origin and illness."[130] Illness falls into this category because it can "be contracted involuntarily."[131] While recognizing that "homelessness can be thrust upon an unwitting recipient," "the distinction between the ability to eliminate one's drug addiction as compared to one's homelessness is a distinction in kind as much as in degree."[132] The two were not comparable, explained the court, because labeling homelessness a status would be "to deny the efficacy of acts of

126. *See id.* Some state courts have likewise rejected Eighth Amendment claims by declining to recognize homelessness as a cognizable status for Eighth Amendment purposes. *See, e.g.*, Tobe v. City of Santa Ana, 892 P.2d 1145, 1167 (Cal. 1995) (rejecting a facial challenge and emphasizing the "analytical difficulty" in recognizing homelessness as a status); Allen v. City of Sacramento, 183 Cal. Rptr. 3d 654, 669-71 (Ct. App. 2015) (rejecting an as-applied challenge and concluding that "being homeless is not necessarily equivalent to an involuntary condition or status").

127. *See Joyce*, 846 F. Supp. at 857.

128. Other courts have expressed a similar wariness of compelling cities to provide for homeless people. For example, in *Glover v. City of Laguna Beach*, another case brought by the ACLU, the district court denied the homeless plaintiffs' motion for a preliminary injunction even while recognizing "the stakes of th[e] case": not only "the plight of the homeless" but also "whether the judiciary can impose a legal obligation on a city to address problems affecting the homeless." *See* No. 8:15-cv-01332-AG-DFM, slip op. at 1-2 (C.D. Cal. Feb. 10, 2016). The *Glover* court declined to apply the reasoning of the vacated *Jones* decision. *See id.* at 7-8. The court further noted that while the plaintiffs "may persuade the Court at a future point that the law and the facts justify a limitation on substantive criminal law" in line with *Robinson*, the plaintiffs failed to present evidence supporting their claim that there was insufficient shelter for the homeless population in Laguna Beach. *See id.* at 8-9. The court ultimately granted without analysis the city's motion for summary judgment on the Eighth Amendment claim. *See* Glover v. City of Laguna Beach, No. 8:15-cv-01332-AG-DFM, slip op. at 2 (C.D. Cal. June 25, 2017).

129. *See Joyce*, 846 F. Supp. at 857 (citation omitted).

130. *Id.*

131. *See id.*

132. *Id.*

social intervention to change the condition of those currently homeless."[133] This would, by implication, be in contrast to the status of being addicted, which persists throughout life, even if the addict is presently sober. As discussed more fully below, it is not clear that homelessness would not satisfy *Joyce*'s definition of status even if such a definition were in fact accurate.[134]

The *Joyce* court's decision seems to be animated by three concerns. First, the court emphasized that the Supreme Court had never explicitly "invoked the Eighth Amendment in order to protect acts derivative of a person's status."[135] Without a limiting principle or clear guidance from the Court to distinguish kinds of involuntary conduct, such a reading of *Robinson* would be "staggering," extending "constitutional protection to any condition over which a showing could be made that the defendant had no control."[136] In the absence of a direct command to do so, the *Joyce* court refused to extend *Robinson* beyond the bounds of that opinion.[137] Second, recognizing homelessness as a protected status would constitute "an untoward excursion . . . into matters of social policy," implicating separation of powers concerns.[138] Third, extending *Robinson* would have a "devastating impact on state and local law enforcement efforts," encroaching on the federal-state balance.[139]

Subsequent courts have likewise declined to extend *Robinson* and *Powell* without further direction from the Supreme Court. For example, in *Lehr v. City of Sacramento*, the district court wrote that "in light of the drastic differences of opinion emanating from the *Powell* Court, and the sound logic supporting the plurality opinion, this Court is reluctant to now extend the original *Robinson* rationale any further than is absolutely necessary."[140] Although the plaintiffs

133. *See id.*

134. This Note explains below that homelessness would satisfy the *Joyce* court's definition because the ability to "cure" a status is not dispositive, structural forces leading to homelessness mean that its "acquisition" is often involuntary, and those same structural forces ensure that few homeless individuals have control over changing their "characteristic" of homelessness. *See infra* note 156 and accompanying text; *see also* ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, *supra* note 16, at 10 (explaining that the current "leading causes" of homelessness "include poverty and a lack of affordable housing, the aftershock of the foreclosure crisis, domestic violence, mental illness, and substance dependence").

135. *See Joyce*, 846 F. Supp. at 857.

136. *See id.* at 858.

137. *See id.*

138. *See id.*; *see also id.* at 853 (describing such an extension as an "improper reach . . . into matters appropriately governed by the State of California and the City of San Francisco").

139. *See id.* at 858 ("To adopt this position would significantly limit the States in their efforts to deal with a widespread and important social problem . . . ." (quoting Powell v. Texas, 392 U.S. 514, 537 (1968) (Black, J., concurring))).

140. 624 F. Supp. 2d 1218, 1229 (E.D. Cal. 2009).

produced evidence that Sacramento's shelters could not accommodate its entire homeless population each night, the *Lehr* court declined to follow the Ninth Circuit in *Jones* and go beyond a pure status reading of *Robinson*.[141]

Likewise, in *Ashbaucher v. City of Arcata*, the district court (adopting the recommendations of a federal magistrate judge) dismissed the homeless plaintiffs' facial and as-applied challenges to the city's camping ban because the ordinances "proscribe conduct, not status."[142] The court declined to follow *Anderson* and *Jones*, as urged by the plaintiffs, because the Supreme Court has not "announced a test to weigh the involuntariness of the targeted conduct or the nature of that prohibited conduct."[143] Without a test to direct its analysis, the district court opted to follow the *Joyce* and *Lehr* courts' narrower, pure status interpretation of the Supreme Court's precedent.[144]

C. The Argument for Extending the Eighth Amendment's Substantive Limit to Anti-homeless Ordinances

This Note contends that there is a viable Eighth Amendment challenge to anti-homeless ordinances. First, homelessness constitutes a cognizable status under the Eighth Amendment. Second, *Robinson* can be extended to protect particular categories of conduct in a principled and limited way. Drawing from, among other cases, the *Pottinger* and *Jones* opinions and considering the concerns of the *Joyce* and *Lehr* courts, this Note offers a three-part inquiry that incorporates sufficient limiting principles to prevent criminalizing homeless people for conduct like sleeping without decriminalizing culpable conduct society has an interest in preventing.

1. Homelessness as a protected status under the Eighth Amendment

As a threshold matter, homelessness should constitute a cognizable status under the Eighth Amendment's substantive limit set forth in *Robinson*. In practice, this view should be uncontroversial because few if any ordinances criminalize the status of being homeless without also criminalizing at least some attendant conduct.

Although it did not articulate a definition of a cognizable status in either *Robinson* or *Powell*, the Supreme Court's primary focus in *Robinson* was on

141. *See id.* at 1222, 1234.

142. *See* No. CV 08-2840 MHP (NJV), 2010 WL 11211481, at *12 (N.D. Cal. Aug. 19, 2010), *recommendation adopted by* 2010 WL 11211527 (N.D. Cal. Dec. 1, 2010). The district court adopted the magistrate's report and recommendation in full. *See* Ashbaucher v. City of Arcata, No. C 08-02840 MHP, 2010 WL 11211527, at *1 (N.D. Cal. Dec. 1, 2010).

143. *See Ashbaucher*, 2010 WL 11211481, at *10.

144. *See id.* at *9, *11.

whether the status "may be contracted innocently or involuntarily."[145] Although purporting to provide a more definite standard for identifying a protected status than the *Robinson* Court, the *Joyce* court also emphasized the "involuntariness of the acquisition of that quality."[146]

As the *Pottinger* court concluded based on expert testimony, "people rarely choose to be homeless."[147] This conclusion is consistent with the shift over the last few decades in our understanding of the root causes of homelessness. In the 1980s, scholars believed homelessness was caused by "individual failings."[148] Scholars have since shifted to understand the problem of homelessness as a structural one brought on by poverty and the "virtual decimation of the low income housing supply in most large American cities."[149] Today, homelessness is best understood as "the result of multiple and compounding causes," including job loss (the most commonly reported cause of homelessness in San Francisco in 2015),[150] "poverty[,] . . . a lack of affordable housing, the aftershock of the foreclosure crisis, domestic violence, mental illness, and substance dependence."[151]

By focusing on voluntariness, the Court did not require that a cognizable status be held at birth or be immutable in order to warrant Eighth Amendment protection. Accordingly, the *Joyce* court's conclusion that "[t]o argue that homelessness is a status . . . is to deny the efficacy of acts of social intervention to change the condition of those currently homeless"[152] has no basis in the Court's jurisprudence. Even if social interventions may ultimately change the condition of a person experiencing homelessness, the length of time that person is homeless is irrelevant to whether he is currently homeless or

145. *See* Robinson v. California, 370 U.S. 660, 667 (1962).

146. *See* Joyce v. City & County of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994), *vacated as moot*, No. 95-16940, 1996 WL 329317 (9th Cir. June 14, 1996).

147. *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992).

148. *See* JAMES D. WRIGHT, ADDRESS UNKNOWN: THE HOMELESS IN AMERICA, at vi (Transaction Publishers 2009) (1989).

149. *See id.* at xxvii (quoting *id.* at 37); Farida Ali, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL'Y 197, 202-04 (2014) ("Despite the diversity of historically relevant and individual contributing factors, the salient fact is that *poverty* is the near-universal condition among homeless persons in California as elsewhere." (emphasis added)).

150. *See* APPLIED SURVEY RESEARCH, *supra* note 5, at 38 & fig.20.

151. *See* ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, *supra* note 16, at 10. *But see* Ali, *supra* note 149, at 202 n.30 (acknowledging "a population of homeless Californians who choose to be homeless as a 'lifestyle choice'").

152. Joyce v. City & County of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994), *vacated as moot*, No. 95-16940, 1996 WL 329317 (9th Cir. June 14, 1996).

whether his homelessness is currently a cognizable status.[153] Furthermore, the same logic applies to drug addiction and illness, which the Court recognized are cognizable statuses.[154] That drug addiction or illness are statuses does not deny the efficacy of medical interventions to change the conditions of those currently suffering. Nor can the potential availability of housing in the future rob homeless people of protected status in the meantime.

Likewise, the *Joyce* court's consideration of "the degree to which an individual has control over that characteristic"[155] is not rooted in *Robinson*. Even under that factor, however, homelessness satisfies the *Joyce* court's definition of status because people experiencing homelessness have little control over their circumstances given that the same structural forces that lead to homelessness persist on the street.[156]

153. *See* Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the* Robinson *Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 327-28 (1996) ("The relevant inquiry regarding changing a status is not *how quickly* a status can be changed but whether leaving the status is within the defendant's power.").

154. *See supra* text accompanying notes 52-56.

155. *Joyce*, 846 F. Supp. at 857.

156. *See* Statement of Interest of the United States, *supra* note 102, at 14 (explaining that "[r]egardless of the causes of homelessness, individuals remain homeless involuntarily" because of the "shortage of affordable housing"). The argument that homelessness should not be a cognizable status because people experiencing homelessness can simply move to a city with more affordable housing stock or jobs is problematic for a number of reasons. In many cases, if an individual lacks the resources to find shelter in a particular city, it belies logic to assume that she will possess the funds necessary to relocate and start anew. At the same time, some cities do have relocation programs, such as San Francisco's Homeward Bound program started in 2005, which offer homeless individuals a one-way bus ticket out of the city contingent upon confirmation that the individual has someone waiting for her at the end of the bus ride. *See Bussed Out: How America Moves Its Homeless*, GUARDIAN (Dec. 20, 2017), https://perma.cc/2FGE-3ZAK. Busing individuals away is part of the solution to the homelessness crisis but should not be considered a panacea. There is very little follow-up with individuals who have taken advantage of these programs to see whether they are successfully housed in their destination cities. *See id.* And some individuals may be returning to living situations that drove them to leave home in the first place, perhaps due to domestic violence. *See id.* In addition, according to Arnold Cohen, president and CEO of the Partnership for the Homeless in New York City—the city with the most active relocation service—most individuals who qualify for relocation come from areas with little or no support systems and "little or no economic prospects to lift themselves up beyond their current circumstances." *See id.* In other words, "Moving them out to other struggling neighborhoods is just another way of neglecting the root issues that continue to drive the problem." *Id.* Finally, many homeless individuals are homeless in the cities they are from. *See id.* According to the director of a nonprofit addressing homelessness in Los Angeles, "People don't go to be homeless somewhere else." *See* Hillel Aron, *7 Myths About Homelessness in Los Angeles*, LA WKLY. (Nov. 26, 2016, 12:41 PM), https://perma.cc/77QY-NDL4 (quoting Greg Spiegel of the Inner City Law Center). For example, in Los Angeles, 72% of homeless adults were housed residents of the city before becoming homeless. *See id.*

Finally, in contrast to the *Joyce* court's limited definition of status, early judicial treatment of vagrancy laws following *Robinson* provides a broad conception of cognizable statuses. In *Goldman v. Knecht*, for example, the district court reasoned: "If addiction to narcotics is a status . . . under *Robinson*, it follows that the Colorado attempt to declare idleness or indigency coupled with being able-bodied must also (indeed even more) be held beyond the power of the state legislative body. The statute . . . deals with condition."[157] So too in *Wheeler v. Goodman*, where the challenged statute criminalized "only indigency and idleness, coupled with the ability to work."[158] By definition, a "vagrant" within the meaning of these statutes had the ability to change his circumstances but declined to do so. Despite the individual's capacity to change, the three-judge district court in *Wheeler* concluded that the statute "attempt[s] to punish economic status."[159] The court struck down the statute because "[i]dleness and poverty should not be treated as a criminal offense."[160] If vagrancy constitutes a protected status, homelessness must as well, not only because punishing homelessness would by proxy punish economic status but also because, as described, most homeless people do not have the "ability" to change their status.

2. A three-part test for extending *Robinson* to conduct when criminalizing that conduct effectively criminalizes homelessness

Accepting that homelessness is a cognizable status, the analyses in *Pottinger* and *Jones*, among other cases, provide a starting point for extending *Robinson* to some, but not all, public conduct. *Pottinger* relied on a variety of considerations to conclude that the challenged police practices violated the Eighth Amendment: the voluntariness of both the conduct (as essential, life-sustaining human behavior) and the condition (in a city without adequate shelter) as well as the relative harmlessness of the conduct in question (mere sleeping). *Jones* attempted to impose structure, narrowing the focus to "two considerations": the distinction between status and conduct and "the distinction between an involuntary act or condition and a voluntary one."[161] For both these decisions, as well as their progeny, the dispositive factor was voluntariness. This Note attempts to clarify what voluntariness actually means. Then, this Note provides two additional factors as an answer to the problem identified in *Powell*: While a majority of Justices in *Powell* rejected the pure status approach

157. *See* 295 F. Supp. 897, 908 (D. Colo. 1969).

158. 306 F. Supp. 58, 62 (W.D.N.C. 1969), *vacated mem.*, 401 U.S. 987 (1971).

159. *See id.*

160. *See id.* at 63 (citing Robinson v. California, 370 U.S. 660 (1962)); *see also Goldman*, 295 F. Supp. at 908.

161. *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007).

to the status crimes doctrine, they struggled to identify a limiting principle that would satisfy the rest of the Court.

Voluntariness: First, the court should consider whether the conduct is voluntary. Voluntariness here is twofold: Must the homeless person appear in public, and is it possible for the homeless person to avoid the conduct?

The former factor focuses on whether homeless people have access to alternative locations to perform the proscribed conduct. While some of the Justices in *Powell* were troubled by the possibility of a "complex, psychological" inquiry to determine voluntariness,[162] "the ability of homeless persons to avoid sleeping in public involves a relatively straightforward factual inquiry":[163] whether a city has enough shelter beds to accommodate its homeless population.

This inquiry is administrable. For instance, the Eleventh Circuit rejected the Eighth Amendment claim in *Joel v. City of Orlando* because it was "unrefuted" that the city of Orlando's shelter "never reached its maximum capacity" and that no one had ever "been turned away" because of space or failure to pay.[164] If a particular plaintiff resides in a city with sufficient shelter beds, he may still be able to satisfy this showing by establishing that as applied to him, the city's shelter beds are not available based on particular eligibility requirements.[165] For example, San Francisco adult shelters allow individuals to stay for no more than ninety days.[166] An individual no longer eligible for shelter would be able to prove as a factual matter that shelter was not available to him. Likewise, with sufficient facts, an individual could be able to prove as a factual matter that a shelter is unavailable to him not because of specific shelter requirements but for other reasons, such as a lack of access to public transportation coupled with the inability, perhaps due to physical incapacity, to cross a city by foot.

However, this Note generally cautions against a more detailed factual inquiry into the voluntariness of a particular plaintiff's conduct in place of this

162. *See* Powell v. Texas, 392 U.S. 514, 541 (1968) (Black, J., concurring).

163. *See* Simon, *supra* note 46, at 663.

164. *See* 232 F.3d 1353, 1362 (11th Cir. 2000).

165. *Cf.* Statement of Interest of the United States, *supra* note 102, at 3 n.8, 4 (describing maximum-stay limits, religious requirements, and accessibility problems). Recently, the Coalition for the Homeless issued a "report card" for New York City's and New York state's shelter processes and conditions. *See* COAL. FOR THE HOMELESS, STATE OF THE HOMELESS 2017: REJECTING LOW EXPECTATIONS; HOUSING IS THE ANSWER 9 (2017), https://perma.cc/Q4FP-L47K (capitalization altered). Both received Ds for shelter intake and eligibility because of recent changes to eligibility requirements that have led to the "lowest eligibility approval rate [for shelter] since 2011." *See id.* at 9, 21.

166. *See Emergency Shelter*, DEP'T HOMELESSNESS & SUPPORTIVE HOUSING, https://perma.cc/72KL-933P (archived Apr. 11, 2018).

simple number-of-beds-versus-number-of-homeless inquiry. The focus of this Note's analysis is a potential *as-applied* challenge to an anti-homeless ordinance under the Eighth Amendment. With good reason, the test proposed in this section would not serve to protect individuals who choose to sleep outside in violation of a sleeping or camping ban. After all, the Supreme Court has cautioned that the substantive limit of the Eighth Amendment is "to be applied sparingly."[167] A budget tourist or thrill seeker who voluntarily opts for the outdoors in a city with a sleeping ban cannot be said to be criminalized based on her status; she has chosen to break the law, and the law as applied to her is not criminalizing by proxy her "status" as thrill seeker or budget traveler.

The *Joyce* court argued that considering the overall availability of shelter beds in a city unconstitutionally compels cities to provide shelter.[168] This misses the mark. A city need not provide shelter beds for its population. At the same time, a city cannot absolve itself from complying with the Constitution when enforcing its regulations.[169] This means that if a city exercises its discretion not to provide shelter, it cannot enforce an anti-homeless ordinance that criminalizes sleeping in public if its homeless population has no other options. This is consistent with other constitutional limits on the ways cities exercise their powers. For example, a city need not provide certain health services to its citizens. But if it decides to so provide, it cannot do so in a discriminatory manner, providing health benefits to members of one religion but not another.

The second part of this Note's voluntariness inquiry focuses not on the location of the conduct but on whether the conduct is biologically compelled. The *Jones* court articulated this as whether the proscribed conduct is "an unavoidable consequence of being human and homeless,"[170] which combines this Note's voluntariness inquiry with its definitional overlap inquiry (as described below). Again, an inquiry into biological compulsion is administrable: It is, for example, beyond debate that humans are biologically compelled to sleep, regardless of location. This is consistent with the *Pottinger* court's focus

167. *See* Ingraham v. Wright, 430 U.S. 651, 667 (1977).

168. *See* Joyce v. City & County of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994), *vacated as moot*, No. 95-16940, 1996 WL 329317 (9th Cir. June 14, 1996).

169. *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006) ("There is obviously a 'homeless problem' in the City of Los Angeles, which the City is free to address in any way that it sees fit, *consistent with the constitutional principles we have articulated*." (emphasis added)), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007); Johnson v. City of Dallas, 860 F. Supp. 344, 351 (N.D. Tex. 1994) ("Although as a matter of constitutional jurisprudence the City is not required to provide shelter or housing to anyone, the City is required to enforce its ordinances constitutionally."), *rev'd*, 61 F.3d 442 (5th Cir. 1995).

170. *See Jones*, 444 F.3d at 1138.

on whether the conduct at issue—sleeping—was the necessary product of being human and was thus life sustaining.[171]

Tethering the Eighth Amendment's substantive protection to involuntary conduct is consistent with a central theory underlying our system of criminal punishment. It has long been considered fundamental that punishment be tied to moral blameworthiness: Writing before *Robinson*, influential legal scholar Henry Hart argued that "it is necessary to be able to say in good conscience in *each* instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community."[172] In addition, in "ordinary moral discourse, an act may be considered blameworthy only if it is the product of a 'free' will."[173] Accordingly, criminal punishment should generally be limited to those who are morally blameworthy or capable of being deterred because they have acted voluntarily.[174] A person who falls asleep naturally does so without free will and so is not morally blameworthy simply for falling asleep.[175]

171. *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) ("Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct *involuntary, life-sustaining* activities in public places." (emphasis added)); *id.* at 1565 ("For plaintiffs, resisting the need to eat, sleep or engage in other life-sustaining activities is impossible.").

172. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 412 (1958). Hart's reasoning is consistent with that later adopted by some Justices in *Robinson*. Hart explained, for instance, the "vital difference between the situation of a patient who has been committed to a mental hospital and the situation of an inmate of a state penitentiary. The core of the difference is precisely that the patient has not incurred the moral condemnation of his community, whereas the convict has." *Id.* at 405-06. Likewise, in *Robinson*, both the majority and Justice Douglas in concurrence noted that while the decision foreclosed criminal punishment targeted solely at the status of being an addict, it did not foreclose involuntary civil commitment. *See* Robinson v. California, 370 U.S. 660, 665 (1962); *id.* at 677 (Douglas, J., concurring).

173. Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 COLUM. L. REV. 927, 940 (1969).

174. *See* Hart, *supra* note 172, at 405 n.13 ("[A] sanction which ineradicably imports blame, both traditionally and in most of its current applications, is misused when it is thus applied to conduct which is not blameworthy.").

175. While falling asleep may itself be a morally blameless action, the context in which an individual falls asleep may also be relevant. For instance, an individual who chooses to drive a car after too little sleep probably cannot be said to be morally blameless if he then falls asleep at the wheel and causes a fatal accident. By contrast, a homeless person who falls asleep in the only location available to him (a sidewalk, perhaps) does not engage in the same morally condemnable action. While admittedly threading the needle, this Note considers the distinction between the two examples to be based on the proximate relationship between the preceding voluntary conduct and the blameless conduct of falling asleep. With respect to the sleepy driver, the voluntary decision to get behind the wheel while too tired to drive is more proximate to the involuntary behavior of falling asleep and to the harm caused. *Cf. Jones*, 444 F.3d at 1137 ("Even if Appellants' past volitional acts contributed to their current need to sit, lie, and sleep on

footnote continued on next page

Humans, whether "good" or "bad," must sleep. Filtering for biologically compelled behavior limits the reach of *Robinson* to blameless behavior like sleeping, eating, and resting.[176] And a person who falls asleep in public because she has nowhere else to go is not capable of being deterred: It would be "morally repugnant" to punish that person simply because she does not have the luxury of options. As Justice White suggested, just as we cannot blame someone for having a cold, we cannot blame that person for sneezing or coughing.[177] After a certain point, we also cannot deter that person from sneezing, no matter how high the penalty imposed.

A focus on voluntariness alone, however, would be mistaken.[178] The lack of a limiting principle to temper the broad sweep of voluntariness is what divided the Court in *Powell*. Further, the Ninth Circuit's decision in *Jones* has "long drawn criticism" by courts and scholars for its focus on voluntariness without a "satisfactory limiting principle."[179] The *Lehr* court, for example, feared that extending *Robinson* to cover the homeless plaintiffs' challenge in that case would "set precedent for an onslaught of challenges to criminal convictions by those who seek to rely on the involuntariness of their actions."[180] Even *Anderson*, which recognized the plaintiffs' Eighth Amendment claim, suggested that "disallowing criminal sanctions based on the involuntariness of such conduct creates a slippery slope that may not be contained."[181] These courts feared that criminal defendants who may not satisfy the

---

public sidewalks at night, those acts are not sufficiently proximate to the conduct at issue here for the imposition of penal sanctions to be permissible.").

176. The second factor in this Note's proposed test—the nature of the conduct—helps narrow further what conduct is protected. That is, some bodily functions like urinating or defecating might be biologically compelled and involuntarily performed in public without public restrooms. However, these behaviors can be harmful to public health such that cities have a greater interest in regulating them.

The third factor in this Note's proposed test—the definitional overlap between the proscribed conduct and the protected status—likewise narrows what is protected. This is because, as in the example set forth above, there will be some biologically compelled, involuntary conduct like falling asleep while driving that lacks definitional overlap with any protected status. Accordingly, there is no risk that by regulating the involuntary conduct, a locality is simply trying to criminalize by proxy a protected status.

177. *See* Powell v. Texas, 392 U.S. 514, 548-49 (1968) (White, J., concurring in the result) ("If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion." (citation omitted)).

178. *See* Recent Court Filing, *Statement of Interest of the United States,* Bell v. City of Boise*, No. 1:09-cv-540 (D. Idaho Aug. 6, 2016)*, 129 HARV. L. REV. 1476, 1482-83 (2016).

179. *See id.* at 1480-81.

180. *See* Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009).

181. *See* Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *6 (D. Or. July 31, 2009).

requirements of an insanity defense could nonetheless rely on *Robinson* to argue that their criminal conduct was involuntary and so subject to Eighth Amendment protection.[182] While limiting involuntary conduct to that which is biologically compelled will temper this risk somewhat, this Note proposes two additional factors in its test to further focus the Eighth Amendment's substantive protection.

The nature of the conduct: After determining that the proscribed conduct is involuntary, a court should next consider the nature of the conduct, balancing how harmful it is against how strong the government's interest in regulating it is.

The *Anderson* court rightly explained that "the nature of the prohibited conduct" is as "equally important [a] factor" as the "involuntariness" of that conduct.[183] This is because society has a lesser interest in criminalizing conduct that does not harm others. The *Powell* plurality recognized that only conduct "society has an interest in preventing" may be criminalized.[184] It would be morally repugnant to punish simply for the sake of punishment.

However, these anti-homeless laws are often purportedly enacted precisely to promote public safety and health.[185] Accordingly, it is not enough to simply dismiss the regulated conduct as harmless. Especially in the context of constitutional rights, courts are accustomed to weighing the individual interest at stake against even the most significant of governmental interests. Municipalities have a long-established police power to "enact regulations in the interest of the public safety, health, welfare or convenience."[186] This includes, of course, a municipality's power to control "the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety."[187] Yet those regulations "may not abridge the individual liberties secured by the Constitution."[188] The Supreme Court has repeatedly made clear that a rule must yield when it unjustifiably infringes on a constitutional protection.[189]

---

182. *See, e.g.*, *Lehr*, 624 F. Supp. 2d at 1234 (setting forth with approval Justice Black's concerns articulated in his *Powell* concurrence that the dissent's proposed rule would impose "a form of the insanity defense" as "a constitutional requirement" (quoting *Powell*, 392 U.S. at 545 (Black, J., concurring))).

183. *See* 2009 WL 2386056, at *7.

184. *See Powell*, 392 U.S. at 533 (plurality opinion) (concluding that society has an interest in preventing drug use or alcohol abuse).

185. *See infra* text accompanying notes 193-94.

186. *See* Schneider v. New Jersey, 308 U.S. 147, 160 (1939).

187. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969).

188. *See Schneider*, 308 U.S. at 160.

189. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 319 (1974). In *Davis*, the Court held that the state's "important interest" in a particular evidentiary rule barring inquiry into juvenile

footnote continued on next page

This balancing of harms and interests should apply when considering whether the public's interests in clear walkways and public health must yield to an individual's Eighth Amendment interest in not being criminalized for being homeless. This Note offers that in most cases, the locality's interests must yield. A distinction should clarify this point. On the one hand, a locality's interest in traffic safety would probably permit the police to punish an individual who has fallen asleep in the middle of the road. This individual threatens to cause serious harm to drivers who fail to see the sleeper until too late. On the other hand, a locality's interest in clear sidewalks may not be sufficiently robust so as to overcome an individual's interest in not being criminalized in violation of the Eighth Amendment. This is especially true if there are other mechanisms available to the locality to safeguard its interests without sacrificing the individual's interests. These mechanisms could include placing restrictions on the amount of space an individual may take up on the sidewalk or requiring individuals using public space to sleep to store their belongings in a designated area or in public lockers.

This inquiry will often be easily administrable. Courts can distinguish between harmless conduct and conduct society has an interest in preventing, or between an individual's interest in avoiding cruel and unusual punishment and a locality's interest in public health and safety. In *Johnson*, for instance, the court distinguished between the public sleeping ban—which was "susceptible of a colorable attack under the Eighth Amendment"—and the other challenged ordinances regulating "the removal of waste from receptacles, coercive solicitation, or trespassing."[190] The court concluded that sleeping in public does not harm others, but solicitation or trespassing have the potential to harass pedestrians and property owners.[191] So too with public urination and defecation, which may be biologically compelled and life sustaining but which raise serious public health concerns that likely outweigh an individual's interest in relieving herself in public.

The more challenging question, of course, is whether camping bans target harmful behavior beyond mere sleeping and so should be immune from Eighth Amendment challenges. The public debate surrounding camping bans has

convictions of witnesses—protecting the anonymity of juvenile offenders—did not outweigh the defendant's Confrontation Clause right to question a particular witness. *See id.*; *see also id.* at 320 ("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.").

190. *See* Johnson v. City of Dallas, 860 F. Supp. 344, 349-50 (N.D. Tex. 1994), *rev'd*, 61 F.3d 442 (5th Cir. 1995).

191. *See id.* ("If one's homeless status entitled one to evade prosecution for removing waste from trash receptacles in order to find something to eat or wear, it is not difficult to rationalize constitutional protection for stealing food or clothing.").

focused on tent encampments as magnets for drug use and unsanitary living conditions.[192] The preambles to or statements of purpose of many camping bans echo these concerns. For example, the Fresno camping ban ordinance described in Part I above labels tent encampments "a public health and safety hazard," in part based on the lack of "proper sanitary measures" available in encampments.[193] The Houston ordinance cites concerns that "structures have been used to shield criminal acts."[194]

These concerns, however, focus on behaviors critics believe are enabled or shielded by tent encampments, not the act of camping itself. Extending the *Robinson* doctrine to protect public camping where no shelter is available would not extend it so far as to prevent a locality from enforcing its drug laws.[195] In addition, it is possible for a city cleaning crew to ensure that the areas surrounding a tent encampment remain sanitary without also requiring

192. In an infamous open letter to the city, a San Francisco resident implored the city to "start making progress" on the homelessness crisis. *See Open Letter to SF Mayor Ed Lee and Greg Suhr (Police Chief)*, JUSTIN KELLER (Feb. 15, 2016), https://perma.cc/X6GV-R3KQ. In the letter, the resident complained that his daily commute exposes him to "people sprawled across the sidewalk, tent cities, human feces, and the faces of addiction." *Id.* This imagery was echoed in the campaign leading up to the passage of Proposition Q in November 2016. In an especially controversial commercial, a store owner explained that after stepping on a hypodermic needle in front of his store, he would now have to be tested for HIV and hepatitis B for a year. *See* Housing Not Tents, *Yes on Prop Q—Doug's Story* at 0:12, YOUTUBE (Oct. 3, 2016), https://perma.cc/S3C2-MV9M. Jennifer Friedenbach, Executive Director of the Coalition on Homelessness and a fierce opponent of the criminalization of homelessness, criticized the advertisement, which she thought was a misguided effort that would "only exacerbate anti homeless sentiment" rather than lead to "true solutions." *See* Joshua Sabatini, *Prop. Q Divides SF over How to Address Homelessness*, S.F. EXAMINER (Oct. 10, 2016, 1:00 AM), https://perma.cc/N78P-2F65.

193. FRESNO, CAL., CODE OF ORDINANCES § 10-1700 (2018).

194. *See* Ordinance of Apr. 12, 2017, No. 2017-261, pmbl. (Hous., Tex.), https://perma.cc/34SZ-7HL6.

195. However, beyond the scope of this Note is another critical and contentious development in the availability of constitutional protections to homeless people: the applicability of Fourth Amendment protections to those living on the street and, specifically, to those living in tent encampments. *Cf., e.g.*, Lavan v. City of Los Angeles, 693 F.3d 1022, 1029-30 (9th Cir. 2012) (holding that the defendant city violated the homeless plaintiffs' Fourth Amendment rights by seizing and destroying property in an encampment and emphasizing that "[v]iolation of a City ordinance does not vitiate the Fourth Amendment's protection of one's property"); United States v. Sandoval, 200 F.3d 659, 660-61 (9th Cir. 2000) (holding that the defendant had a reasonable expectation of privacy in his makeshift tent such that a warrantless search of the tent violated the Fourth Amendment); State v. Pippin, 403 P.3d 907, 909 (Wash. Ct. App. 2017) (holding that the defendant's tent-like structure and its contents were entitled to constitutional protection under the state's equivalent of the Fourth Amendment because the defendant had a privacy interest in the tent and therefore affirming the trial court's suppression of evidence found in a search of the tent).

that the encampment be dismantled.[196] Some cities have even begun offering city services like trash pickup and portable bathrooms for encampments to ensure that the encampments remain clean and sanitary until the occupants can find more permanent housing or shelter beds.[197] In addition, a city could reasonably require an encampment to stay out of the roadway to cut down on traffic safety concerns.

Requiring conduct to be both involuntary and harmless serves as a "more robust limiting principle"[198] to address fears such as that expressed in *Lehr*, namely that someone suffering a psychotic break would be protected from criminal culpability by the Eighth Amendment.[199] The criminal system has developed to accommodate someone incapable of understanding the nature of her actions, but it still operates to punish that person within appropriate bounds because her conduct harms others. Similarly, it makes sense that we would distinguish between harmless involuntary conduct, like that of a homeless person merely sleeping in public, and harmful involuntary conduct, like that of a person who feels compelled to hurt someone for complex psychological reasons.

Definitional overlap: As a final step, a court would look to the nexus between the protected status and the proscribed conduct to determine whether criminalizing the conduct necessarily criminalizes the status. This focus on the nexus between status and conduct ensures that localities do not simply circumvent *Robinson* by adding arbitrary conduct requirements to legislation targeting homeless people.[200] After all, the whole point of extending the status

196. *See* Laura Waxmann, *City Cleans Up SF Encampment, but Allows Tents to Stay*, MISSION LOC. (Mar. 8, 2017, 10:27 AM), https://perma.cc/Y54K-YZMW; Laura Waxmann, *In One Week, Public Works Picks Up 55,000 Lbs of Trash, 4,000 Needles from Encampments*, MISSION LOC. (Mar. 20, 2017, 7:28 AM), https://perma.cc/2G8P-LFA4 ("Routine cleanups by the department's hotspot crews are usually administered in the morning and include removing trash and hazardous materials, power washing sidewalks and forcing campers to downsize accumulated trash or debris if they are blocking pedestrian or vehicular pathways."). At the same time, cities must be careful when cleaning to ensure that they do not remove someone's temporary structure, which may violate the owner's constitutional rights and disrupt the delicate, slow work the city's homeless outreach teams do. *See* Kevin Fagan, *SF Clears Street Camp, Angering City's Homeless-Aid Officials*, SFGATE (Apr. 14, 2017, 4:22 PM), https://perma.cc/8S4N-NJL4.

197. *See* Alissa Walker, *Cities Are Taking a New Approach to Homelessness*, CURBED (Apr. 4, 2017, 10:53 AM EDT), https://perma.cc/FS9N-YN55.

198. Recent Court Filing, *supra* note 178, at 1482-83.

199. *See* Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009).

200. This is similar to Justices' recognition in other areas of the law that it can be unconstitutional to target "conduct that defines the class." *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment) (quoting Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting)) (arguing that an anti-sodomy law was unconstitutional on equal protection grounds because "[w]hile it is true that the

footnote continued on next page

crimes doctrine to some forms of conduct is to prevent the end run around that protection that would result if cities were allowed to regulate status by proxy. If, however, the conduct is not related to the status in question, the need to prevent regulation of status by proxy conduct does not apply, and the doctrine should not so extend. For example, a homeless person by definition does not have a place to sleep. Therefore, regulating public sleeping by proxy regulates homelessness. This is to be distinguished from other public conduct that people with homes would perform in private but homeless individuals cannot, such as having sex or using drugs.[201]

Of the three factors proposed by this Note, this factor is perhaps most vulnerable to criticism as being too indeterminate. How should a court determine whether a city is regulating conduct as a proxy for status? Perhaps by examining the "definitional association" between the two.[202] For example, statutory definitions "emphasize[] that the lack of a fixed, adequate place to sleep is central to defining one as being homeless. To punish a person for not having an adequate place to sleep, then, is equivalent to punishing that individual for being homeless."[203] By contrast, there is less definitional association between the definition of homelessness and behavior like public urination or defecation, largely because there may be public facilities for individuals to use. Coupled with the inquiry into the nature of the conduct, a public urination law would be more likely to pass constitutional muster because it is less likely to serve as a proxy for criminalizing homelessness.

Despite this indeterminacy, the importance of this final factor has been recognized since *Powell*. In his dissent in that case, Justice Fortas suggested that conduct "typically flow[ing] from" or "part of the syndrome" of an illness would be protected.[204] In his concurrence, Justice White took a similar,

law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual").

201. As discussed in the text accompanying note 170 above, the *Jones* court in considering voluntariness asked whether an act subject to punishment was an "unavoidable consequence of being human and homeless." Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007). The court distinguished between a homeless person sleeping on the sidewalk—unavoidable—and conduct that could be penalized because it was not an inevitable consequence of being homeless, such as drunk driving or harassing others. *See id.* at 1137. For candor's sake, this Note acknowledges that the *Jones* court also included in the list of conduct that could be penalized "camping or building shelters that interfere with pedestrian or automobile traffic." *See id.* However, for the reasons set forth in Part II.C.3 below, this Note instead suggests that camping should be categorized with public sleeping.

202. *See Smith*, *supra* note 153, at 328.

203. *See* Donald E. Baker, Comment, *"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417, 441-42 (1990-1991) (emphasis omitted).

204. *See* Powell v. Texas, 392 U.S. 514, 559 & n.2 (1968) (Fortas, J., dissenting).

"symptomatic" approach, suggesting that "[p]unishing an addict for using drugs convicts for addiction under a different name."[205] As the Ninth Circuit emphasized in *Jones* and as the DOJ emphasized in its statement of interest, punishing such inextricable conduct is the equivalent of punishing status.[206]

3. Testing the distinction between sleeping bans and camping bans

Applying these criteria to the potential distinction between sleeping and camping bans illustrates the strength of the criteria beyond pure status-conduct distinctions alone, an approach many courts have struggled to apply.

Some jurisdictions, including San Francisco, have separate regulations for sleeping in public ("sit-lie" laws) and camping in public. Under the *Jones* sliding scale between status and conduct, there is an argument that setting up a tarp or tent falls closer to conduct while merely sleeping outside without erecting any structures falls closer to status.[207] Indeed, the *Jones* decision itself distinguished between the extremely restrictive sleeping ban at issue in that case and Portland's camping ban, which prohibited camping on public property.[208] The court suggested that by adding a more explicit conduct ingredient—like using a tent—in addition to mere sitting, lying, or sleeping, cities can protect ordinances from Eighth Amendment attack.[209]

Not so. While camping might involve more active steps than sleeping alone because a person must physically erect a tent or fasten a tarp, this marginal increase in behavior should not be dispositive. Otherwise, homeless

205. *See id.* at 548 (White, J., concurring in the result).

206. *See supra* text accompanying notes 101-02.

207. I have been able to identify only one Eighth Amendment challenge to another kind of ordinance restricting where people may sleep: a ban on sleeping in vehicles in certain locations in Los Angeles. *See* Corona v. City of Los Angeles, No. CV 17-2913-VBF (KK), 2017 WL 3701225, at *6 (C.D. Cal. Aug. 10, 2017) (recognizing the viability of an Eighth Amendment challenge to some anti-homeless ordinances but concluding that the ordinance banning vehicle dwelling in particular areas did "not punish involuntary conduct" because the ordinance permitted "all people who dwell in their cars the option of parking on public roads"), *recommendation adopted by* 2017 WL 3671155 (C.D. Cal. Aug. 23, 2017), *appeal dismissed as untimely*, No. 17-5687, 2018 WL 1176572 (9th Cir. Jan. 31, 2018). Instead, these ordinances are often challenged on due process grounds for lack of notice and vagueness. *See, e.g.*, Desertrain v. City of Los Angeles, 754 F.3d 1147, 1155-57 (9th Cir. 2014) (holding that an ordinance prohibiting the use of a vehicle as living quarters was void for vagueness where the ordinance did not define "living quarters").

208. *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1123 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007).

209. *See id.* ("Other cities' ordinances similarly directed at the homeless provide ways to avoid criminalizing the status of homelessness by making an element of the crime *some conduct in combination with* sitting, lying, or sleeping in a state of homelessness." (emphasis added)).

individuals may be forced to risk the elements for fear of being fined or arrested for using a protective cover. That would mean a person experiencing homelessness during a hurricane or harsh winter could sleep outside on the bare ground but not under a tarp.

Other constitutional rights provide helpful analogies. In the First Amendment context, "freedom of speech does not exist in the abstract."[210] Rather, "in the absence of an effective means of communication, the right to speak would ring hollow indeed."[211] A similar argument has been advanced with respect to the fundamental right of access to the courts. Such a right "in its most formal manifestation protects a person's right to physically access the court system."[212] The right requires "more," however, because otherwise, "such an important right would ring hollow in the halls of justice."[213] Therefore, the right of access requires not just physical access but also access that is "adequate, effective and meaningful."[214]

So too with the Eighth Amendment. To what avail would the Eighth Amendment's substantive protection of involuntary, life-sustaining public conduct like sleeping be if individuals could not undertake "effective means" of engaging in that conduct, for instance by erecting a makeshift barrier against the elements? Running a tent ban through the three-part test proposed above demonstrates the advantage of that test over a pure status approach. The individual challenging the ban would have to show that he did not have access to a private place to sleep. Society has no more interest in prohibiting a tent than it does a person sleeping on the ground; if anything, society has an interest in allowing an individual exposed to the elements to take reasonable measures to protect himself and his belongings. And finally, there is a close nexus between the conduct in question—erecting a temporary shelter to sleep outside—and the status protected—being without a home.

* * *

Some courts considering constitutional challenges to anti-homeless ordinances do not actually reach the Eighth Amendment merits at all. This is because they hold either that the Eighth Amendment right has not attached or that homeless plaintiffs lack standing to seek prospective relief. Both procedural barriers are a product of the way most cities enforce anti-homeless ordinances.

---

210. *See* Columbia Broad. Sys., Inc. v. DNC, 412 U.S. 94, 193 (1973) (Brennan, J., dissenting).

211. *Id.*

212. *See* Swekel v. City of River Rouge, 119 F.3d 1259, 1262 (6th Cir. 1997).

213. *See id.*

214. *See id.* (quoting Bounds v. Smith, 430 U.S. 817, 822 (1977)).

It is beyond dispute that if a homeless person is convicted for violating an anti-homeless ordinance, the Eighth Amendment has attached such that the individual has standing to seek retrospective relief. This Part has addressed the next logical question—whether the plaintiff has a meritorious claim that the Eighth Amendment protects the proscribed conduct.

The next Part steps back in the process of litigation to consider the procedural obstacles facing homeless individuals.

III. Procedural Obstacles to Advancing Eighth Amendment Challenges to Anti-homeless Ordinances

Although there is no question that a homeless person who has been formally convicted for violating an anti-homeless ordinance has standing to challenge that ordinance, courts still debate whether an individual has standing after something less than conviction. Many cities enforce anti-homeless regulations through informal warnings or formal citations that are left unprosecuted.[215] This initial contact with law enforcement can lead to extreme collateral consequences for homeless individuals.

The first way ordinances can be "enforced" is through informal warnings. For instance, "[w]hile the number of tickets actually issued for illegal camping is low, the Denver Police Department makes thousands of 'street checks' related to violation of the law."[216] These street checks carry with them implied threats that if the homeless person does not "move along," she will be cited or arrested.[217] Warnings may be incredibly disruptive but do not necessarily bring a homeless person within the formal criminal process.

Next, formal citations can lead to crippling fines and even subsequent arrest and conviction for failure to pay or appear. As explained in Part I above, an initial citation often means more than just paying a fine that is likely out of reach for many homeless individuals. Failure to pay or appear may result in a bench warrant for arrest. If the person violates the anti-homeless ordinance again, he may be arrested or required to pay even more fines. Even though most charges are ultimately dropped, an arrest can further entrench an

215. For instance, from 2007 to 2013, San Francisco issued over 3000 citations per year for violations of police codes prohibiting sleeping, camping, standing, sitting, and begging in public. POLICY ADVOCACY CLINIC, *supra* note 2, at 20. Of these citations, over 1300 citations were issued since 2011 under section 168 of the city's Police Code, which prohibits people from sitting or lying on city sidewalks during daytime hours. *See id.* at 18; *see also* S.F., CAL., POLICE CODE § 168(b) (2017). For an example of a municipality issuing tickets but declining to prosecute, see text accompanying note 223 below.

216. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 11 (describing this practice as "amount[ing] to use of threats by police to ticket or arrest homeless people unless they dismantle their camps").

217. *See* ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, *supra* note 16, at 12.

individual in homelessness, disqualifying him from public services, housing, or employment. Spending time in jail or contesting an initial citation means leaving possessions unguarded and potentially losing a spot at an emergency shelter. Without a place to sleep or store one's possessions and without a job or social services, an individual is more likely to violate the same ordinance again. All of this happens without a formal conviction.

This Part addresses two procedural questions left unanswered by existing scholarship[218]: first, whether the Eighth Amendment right attaches to those individuals who have received warnings or citations, paid fines, or been arrested, but who have not been convicted; and second, what a plaintiff must show to have standing to seek prospective relief in her Eighth Amendment challenge. This Part concludes that limiting the substantive protection of the Eighth Amendment to plaintiffs who have been convicted is a crabbed reading of that protection. Rather, the *Robinson* protection governs the criminal process as a whole, affecting both when the individual's Eighth Amendment right attaches and what that individual must show in order to have standing for retrospective and prospective relief.

A. When Do Homeless Plaintiffs Have Standing to Seek Retrospective Relief Under the Eighth Amendment?

Courts are divided over whether the substantive limit of the Eighth Amendment attaches only after conviction or earlier in the criminal process. In addition, courts holding that preconviction plaintiffs can advance substantive Eighth Amendment challenges to anti-homeless ordinances fall along a spectrum in terms of when in the criminal process plaintiffs have standing.

1. When does the Eighth Amendment's substantive limit attach?

Courts holding that the Eighth Amendment does not attach until after conviction rely on language from the Supreme Court's decision in *Ingraham v. Wright*: "An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes."[219] The Fifth Circuit's decision in *Johnson v. City of Dallas*[220] is instructive. That court reversed the district court's preliminary injunction, holding that the homeless

218. The most comprehensive treatment of these procedural barriers to date has been Marc Roark's 2015 article. *See* Marc L. Roark, *Homelessness at the Cathedral*, 80 MO. L. REV. 53, 87-88, 91, 94 (2015). However, Roark's article mentions only that some courts impose procedural barriers without analyzing their bases or validity.

219. 430 U.S. 651, 664 (1977).

220. 61 F.3d 442 (5th Cir. 1995).

plaintiffs did not have standing to bring an Eighth Amendment challenge.[221] According to the Fifth Circuit, the "cruel and unusual punishment clause of the Eighth Amendment applies only in criminal actions, following a conviction."[222] Although "numerous tickets ha[d] been issued," none of the plaintiffs "ha[d] been *convicted* of violating the sleeping in public ordinance."[223] Therefore, according to the panel, the plaintiffs could not invoke the Eighth Amendment in their civil, as-applied challenge to the ordinance.[224] Other courts, including the Eleventh Circuit and multiple federal district courts, have held the same.[225]

Courts that have held that the Eighth Amendment attaches earlier in the criminal process, before formal conviction, accuse courts like the Fifth Circuit in *Johnson* of misinterpreting and "advanc[ing] out of context . . . dicta from *Ingraham*."[226] In *Ingraham*, the Supreme Court considered two schoolchildren's challenges to their public school's use of corporal punishment as a violation of the Eighth Amendment.[227] The school board and state legislature both authorized the use of paddling to discipline "recalcitrant student[s]."[228] Ultimately, the Court concluded that such punishment fell outside the ambit of

221. *See id.* at 443.

222. *Id.* at 444 (quoting Palermo v. Rorex, 806 F.2d 1266, 1271 (5th Cir. 1987)); *see also id.* ("[T]he Eighth Amendment 'was designed to protect those convicted of crimes.'" (quoting *Ingraham*, 430 U.S. at 664)).

223. *See id.* at 445.

224. *Id.*

225. *See, e.g.*, D'Aguanno v. Gallagher, 50 F.3d 877, 879 n.2 (11th Cir. 1995) (affirming the district court's entry of summary judgment "without further discussion" because the "cruel and unusual punishment clause only protects people who have been convicted of a crime"); Hester-Bey v. Ford, No. 13 CV 4656(CBA)(LB), 2015 WL 4910570, at *3 n.5 (E.D.N.Y. June 8, 2015) ("[P]laintiff's claim does not lie under the Cruel and Unusual Punishments Clause . . . , which only applies to those who have been convicted of a crime."); Veterans for Peace Greater Seattle, Chapter 92 v. City of Seattle, No. C09-1032 RSM, 2009 WL 2243796, at *6 (W.D. Wash. July 24, 2009) (holding that the Eighth Amendment's "cruel and unusual punishments clause very clearly does not apply"); Betancourt v. Giuliani, No. 97CIV6748 JSM, 2000 WL 1877071, at *5 (S.D.N.Y. Dec. 26, 2000) (holding that the plaintiff's claim "must fail because an Eighth Amendment violation can only occur where a convicted person is involved" and because the plaintiff had been arrested but not convicted for sleeping in public), *aff'd in other part sub nom.* Betancourt v. Bloomberg, 448 F.3d 547 (2d Cir. 2006); Davison v. City of Tucson, 924 F. Supp. 989, 992-93 (D. Ariz. 1996) (citing *Ingraham*, *Johnson*, and *D'Aguanno* in concluding that the "Eighth Amendment protection against cruel and unusual punishment can only be invoked by persons convicted of crimes").

226. *See, e.g.*, Jones v. City of Los Angeles, 444 F.3d 1118, 1128 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007).

227. 430 U.S. at 653-54.

228. *See id.* at 655-56.

the Eighth Amendment.[229] As the Ninth Circuit explained in *Jones*, however, "*Ingraham* rests on the distinction between state action inside and 'outside the criminal process,' not on any distinction between criminal convictions and preconviction law enforcement measures such as arrest, jailing, and prosecution."[230] The claim in *Ingraham* failed because the punishment was meted out apart from the criminal process altogether, not because of when in the criminal process the punishment was inflicted.

Furthermore, the *Ingraham* plaintiffs advanced a very different claim from that challenging an anti-homeless ordinance. As explained above, the Eighth Amendment "circumscribes the criminal process in three ways": It (1) "limits the kinds of punishment that can be imposed on those convicted of crimes," (2) "proscribes punishment grossly disproportionate to the severity of that crime," and (3) "imposes substantive limits on what can be made criminal and punished as such."[231] That is, the *Ingraham* students challenged the *kind* of punishment imposed upon them for being recalcitrant students—corporal punishment. This type of claim challenges not the underlying conviction but rather what follows. By definition, there must be conviction and punishment in order to challenge the punishment. As such, the language relied upon by courts like the Fifth Circuit in *Johnson* "is relevant only to the first two of the three circumscriptions on the criminal process."[232]

By contrast, that language is simply irrelevant where, as with challenges to anti-homeless ordinances, the claim is based on the third, "*substantive* limit[] on what can be made criminal and punished as such."[233] According to the Ninth Circuit in *Jones*, courts like the Fifth Circuit in *Johnson* "fail to recognize the distinction between . . . the first two protections and [the] third."[234] The Eighth Amendment attaches earlier with respect to the third protection, the *Jones* court continued, because its substantive protection "governs the criminal law process as a whole, not only the imposition of punishment postconviction."[235] According to the *Jones* court, then, "the state transgresses this limit" and "a person suffers constitutionally cognizable harm as soon as he is subjected to the criminal process."[236] Even courts that have rejected the merits of the Eighth

229. *See id.* at 664 ("We adhere to th[e] long-standing limitation [that the Eighth Amendment protects those convicted of crimes] and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools.").

230. *See Jones*, 444 F.3d at 1128 (citation omitted) (quoting *Ingraham*, 430 U.S. at 667).

231. *See Ingraham*, 430 U.S. at 667.

232. *See Jones*, 444 F.3d at 1128.

233. *See Ingraham*, 430 U.S. at 667 (emphasis added).

234. *See Jones*, 444 F.3d at 1130.

235. *See id.* at 1128.

236. *See id.* at 1129.

Amendment challenge to anti-homeless ordinances have agreed with the Ninth Circuit and concluded that the substantive limit of the Eighth Amendment established in *Robinson* attaches before conviction.[237]

This makes sense. If a status or behavior cannot be criminalized consistent with the Eighth Amendment, that protection would ring hollow if the state could drag an individual through nearly the entire criminal process but stop just short of conviction to avoid Eighth Amendment scrutiny. It would ring similarly hollow to make the individual endure the entire criminal process through conviction just so that he could object to being subjected to that process in the first place. So while the "primary purpose [of the Cruel and Unusual Punishments Clause] has always been considered . . . to be directed at the method or kind of punishment imposed for the violation of criminal statutes,"[238] that is not its only purpose. The substantive limit restrains what governments can criminalize at all. This is consistent with the *Ingraham* Court's admonishment that the third, substantive limit is "to be applied sparingly."[239] When it is applied, the right attaches at the front end, as soon as the individual is subject to the criminal process, not at the back end once the individual is convicted. Thus, just as an addict should not be subject to the criminal process merely for being an addict, a homeless person should not be subject to the criminal process merely for being homeless.

The Fifth Circuit in *Johnson* also rejected standing prior to conviction by pointing to *Robinson* itself. As the Fifth Circuit emphasized, "*Robinson* involved a *post conviction* challenge to the validity of a California law."[240] However, nothing in the Court's opinion suggested that the holding turned on the procedural posture of that case as a direct appeal of Robinson's state conviction.

Finally, although not raised in the case law, it is worth addressing an argument that the Fourteenth Amendment's Due Process Clause, rather than the Eighth Amendment's substantive limitation, should govern preconviction claims. Such an argument would run parallel to the line drawn by the Court between pre- and postconviction challenges to detention conditions. While

237. *See, e.g.*, Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1226-27 (E.D. Cal. 2009) ("[W]hile the Court agrees with the *Jones* conclusion that conviction is not a prerequisite to bringing the instant Eighth Amendment claim, the Court's analysis of the merits of this cause of action requires a fundamental departure from *Jones*."); Joyce v. City & County of San Francisco, 846 F. Supp. 843, 853 (N.D. Cal. 1994) (explaining that "the protections of the Eighth Amendment cannot be deemed wholly inapplicable to the controversy now before the Court" because "the express language of *Ingraham*" recognizes the "substantive limits on what can be made criminal" (quoting *Ingraham*, 430 U.S. at 667)), *vacated as moot*, No. 95-16940, 1996 WL 329317 (9th Cir. June 14, 1996).

238. *Ingraham*, 430 U.S. at 667 (first alteration in original) (quoting Powell v. Texas, 392 U.S. 514, 531-32 (1968) (plurality opinion)).

239. *See id.*

240. *See* Johnson v. City of Dallas, 61 F.3d 442, 445 (5th Cir. 1995).

pretrial detainees and convicted prisoners are both protected from unconstitutional conditions of confinement, the Court has held that these protections have distinct constitutional sources. Convicted prisoners benefit from Eighth Amendment protection against cruel and unusual methods of punishment,[241] while pretrial detainees rely on the substantive component of the Due Process Clause.[242]

This distinction makes sense for cases challenging the conditions of confinement in jail or prison. As explained above, the Court has clearly held that the Eighth Amendment does not attach until conviction for challenges to the method or proportionality of punishment. Conditions-of-confinement cases challenge the method of punishment. The Eighth Amendment limits the conditions of confinement for convicted inmates to those that are not cruel and unusual.[243] The theory behind a pretrial conditions claim is different. That is, pretrial detainees "may not be punished prior to an adjudication of guilt in accordance with due process of law."[244] Rather than limiting the kind or amount of punishment, pretrial detainees cannot be punished in the constitutional sense at all. In response, the Court draws a hard line at conviction.

This hard line does not translate to the Eighth Amendment's substantive limit on what can be punished because, as described above, that limit governs the *entire* criminal process. The very fact of being subject to the criminal process in the first place is what supports an Eighth Amendment claim. Courts suggesting otherwise mistakenly cite case law holding that the Eighth Amendment applies only after conviction without distinguishing between the three types of Eighth Amendment claims.[245] And even if courts were tempted

241. *See* Helling v. McKinney, 509 U.S. 25, 31 (1993) ("It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.").

242. *See* Bell v. Wolfish, 441 U.S. 520, 533, 535 (1979) (stating "that the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detainment" and concluding "that the proper inquiry is whether those conditions amount to punishment of the detainee").

243. *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

244. *See Bell*, 441 U.S. at 535.

245. For example, the district court in *Betancourt v. Giuliani* cited *Ingraham* for the proposition that "an Eighth Amendment violation can only occur where a convicted person is involved." *See* No. 97CIV6748 JSM, 2000 WL 1877071, at *5 (S.D.N.Y. Dec. 26, 2000), *aff'd in other part sub nom.* Betancourt v. Bloomberg, 448 F.3d 547 (2d Cir. 2006). But the *Ingraham* Court's conclusion that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions," *see* Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977), relates not to the Amendment's substantive restriction on *what* can be punished, as discussed in this Note, but to the Amendment's restriction on what *kinds* of punishment can be imposed. *Betancourt*'s reliance on a Second Circuit case regarding

footnote continued on next page

to import such a line for substantive limitations, the Supreme Court has cautioned against relying on the "generalized notion of 'substantive due process'" when there is "an explicit textual source of constitutional protection" against the particular "governmental conduct."[246] Here, the Eighth Amendment is the "primary source of substantive protection" against criminalizing status or derivative conduct.[247]

2. What must homeless plaintiffs show to have standing for retrospective relief?

Even those courts that recognize that the Eighth Amendment's substantive limitation "governs the criminal law process as a whole"[248] vary with respect to when exactly the criminal process begins. Because homeless individuals may have contact with law enforcement multiple times before conviction, it is helpful to think of potential starting points—when the Amendment would attach and when plaintiffs would then have standing to sue—along a timeline. First, police often begin with an informal warning, instructing homeless individuals to move along pursuant to some anti-homeless ordinance but not issuing any legal document.[249] Next, police may issue a citation or ticket, bringing with it possible fines or a requirement to appear. Then, police may arrest the individual for committing a second infraction or under a bench warrant for failure to pay or for failure to appear to contest the first citation. And finally, there is conviction. This Subpart catalogs where courts have fallen along this timeline and concludes that homeless plaintiffs should have standing to seek monetary relief when the criminal process has first been instigated against them.

---

kinds of punishment as an example of applying the proposition from *Ingraham* demonstrates the court's confusion regarding the distinction between the separate restrictions. *See* 2000 WL 1877071, at *5 (citing Weyant v. Okst, 101 F.3d 845, 856 (2d Cir. 1996)). *Weyant* is a case about the level of medical care owed to a pretrial detainee rather than a convicted prisoner, not the substantive limitations of the Eighth Amendment. *See* 101 F.3d at 856.

246. *See* Graham v. Connor, 490 U.S. 386, 394-95 (1989).

247. *See* Whitley v. Albers, 475 U.S. 312, 314, 327 (1986) (holding that the Eighth Amendment rather than the Fourteenth Amendment's Due Process Clause would govern a prisoner's claim that prison officials used excessive force when one shot him in the leg during a prison riot); *see also* Albright v. Oliver, 510 U.S. 266, 288 (1994) (Souter, J., concurring in the judgment) ("[T]he Court has resisted relying on the Due Process Clause when doing so would have duplicated protection that a more specific constitutional provision already bestowed.").

248. *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1128 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007).

249. *See supra* notes 216-17 and accompanying text.

Working backward, it is not surprising that in all but one case reviewed for this Note, a conviction under an anti-homeless ordinance was more than sufficient to confer standing.[250] In the outlier, *Spencer v. City of San Diego*, the district court dismissed the first complaint because the plaintiffs failed to plead that they had been convicted under the challenged ordinance.[251] After the plaintiffs amended their complaint, the court dismissed the second complaint, this time finding that the plaintiffs failed to plead that they had been *punished* under the challenged ordinance.[252] The court abandoned this formalist approach, however, after the Ninth Circuit issued its decision in *Jones* while the court was considering a third motion to dismiss.[253]

Consistent with the theory that the Eighth Amendment's substantive protection extends to "the criminal law process as a whole,"[254] some courts have suggested that a plaintiff should have standing as soon as "the criminal justice system [is] utilized or instigated" against them.[255] The instigation of the criminal process leads to "meaningful injuries under the challenged ordinances, such as arrest, jail time, [or] fines."[256] In *Lehr*, the plaintiffs had standing after being "cited or convicted," and the court made clear that "a conviction is not required to establish standing."[257] Citations constitute a meaningful injury because they come with burdensome fines.[258] Other examples can be found in *Joyce*, where the plaintiff who had "paid a fine imposed by citation" had standing,[259] and in *Jones*, where the plaintiffs had standing because they "ha[d]

250. *See, e.g.*, *Jones*, 444 F.3d at 1130 (noting that "[a]lthough a conviction is not required to establish standing," two of the six plaintiffs had in fact been convicted and sentenced for violating the sit-lie law).

251. *See* Spencer v. City of San Diego, No. 3:04-cv-02314-WVG, slip op. at 3, 5 (S.D. Cal. May 10, 2005) ("Although Plaintiffs allege that they have been issued citations, they do not allege that they have been convicted of crimes.").

252. *See* Spencer v. City of San Diego, No. 3:04-cv-02314-WVG, slip op. at 3 (S.D. Cal. Jan. 12, 2006).

253. *See* Spencer v. City of San Diego, No. 3:04-cv-02314-WVG, slip op. at 2 (S.D. Cal. May 5, 2006).

254. *See Jones*, 444 F.3d at 1128.

255. *Cf.* Smith v. City of Corvallis, No. 6:14-cv-01382-MC, 2016 WL 3193190, at *9 (D. Or. June 6, 2016).

256. *See* Porto v. City of Laguna Beach, No. SACV 12-00501-DOC (PLA), 2013 WL 2251004, at *4 (C.D. Cal. May 21, 2013).

257. *See* Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1226 (E.D. Cal. 2009) (quoting *Jones*, 444 F.3d at 1130).

258. *See supra* notes 16-26 and accompanying text.

259. *See* Joyce v. City & County of San Francisco, 846 F. Supp. 843, 854 (N.D. Cal. 1994) ("'[F]ines . . . traditionally have been associated with the criminal process' . . . ." (first and second alterations in original) (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977))), *vacated as moot*, No. 95-16940, 1996 WL 329317 (9th Cir. June 14, 1996).

been and [were] likely to be *fined*, arrested, incarcerated, prosecuted, and/*or* convicted for involuntarily violating" the sit-lie law.[260]

On the other hand, mere warnings or move-alongs probably do not constitute meaningful instigation of the criminal process sufficient to confer standing. For instance, the plaintiff in *Porto v. City of Laguna Beach* was warned twice that he would be cited if again found sleeping in his car or on a public bench.[261] The court distinguished this contact with law enforcement from prior cases and found that these warnings were insufficient: "Unlike the plaintiffs in *Jones*, *Lehr*, *Anderson*, and *Joyce*, Plaintiff has never been cited or arrested under the challenged ordinance. Nor has he suffered any injury akin to the property loss and other tangible harms suffered by these plaintiffs."[262] The same was true in *Wilson v. Neil*, where the plaintiffs alleged only that they were threatened with arrest, not that they were arrested or convicted.[263] However, advocates suggest that a plaintiff may be able to advance a compelling argument that a pervasive pattern of police threats or "street checks" may rise to the functional equivalent of citations given the devastating effects that relocations can have on homeless people.[264]

Both *Porto* and *Jones* allude to deprivations of property as potentially conferring standing to bring an as-applied challenge to a criminal statute under the substantive limits on criminalization.[265] However, these decisions do not clarify whether property loss alone would be sufficient. In addition, while police issue citations or arrests as part of the formal criminal process established in the anti-homeless ordinance, property loss is often a collateral result of enforcement. In *Smith v. City of Corvallis*, for example, the court dismissed the Eighth Amendment claim because "the criminal justice system was never utilized or instigated by the defendant against the plaintiffs."[266] Indeed, the plaintiffs did not allege that they had been cited, fined, or arrested. Instead, they claimed only to have sustained some property loss during interactions with police.[267] As such, property loss alone—an unhappy byproduct of enforcing anti-homeless ordinances—seems more akin to the use

260. *See* 444 F.3d at 1127 (emphasis added).

261. 2013 WL 2251004, at *3-4.

262. *See id.* at *4.

263. *See* No. 1:13CV745, 2013 WL 5675361, at *2 (S.D. Ohio Oct. 17, 2013).

264. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 11 (describing Denver's practice of making thousands of "street checks" instead of issuing tickets, which amounts to "use of threats by police to ticket or arrest homeless people unless they dismantle their camps").

265. *See Porto*, 2013 WL 2251004, at *4; *Jones*, 444 F.3d at 1127.

266. *See* No. 6:14-cv-01382-MC, 2016 WL 3193190, at *9 (D. Or. June 6, 2016).

267. *See id.* at *1, *4.

of corporal punishment found in *Ingraham* to be outside the criminal process and thus unprotected by the Eighth Amendment.[268]

B. When Do Homeless Plaintiffs Have Standing to Seek Prospective Relief?

Homeless plaintiffs who have had contact with an anti-homeless ordinance will often seek injunctive relief preventing future enforcement in addition to monetary relief.[269] To have standing to seek equitable relief, a plaintiff must demonstrate a "real and immediate threat" of future injury.[270] Courts have interpreted this requirement to mean a "credible threat of future injury."[271] And when a plaintiff "seeks to enjoin criminal law enforcement activities against him, standing depends on [his] ability to avoid engaging in the illegal conduct in the future."[272] Some courts have emphasized the difference between two Supreme Court cases, *City of Los Angeles v. Lyons*[273] and *Honig v. Doe*,[274] in order to explain why homeless individuals in cities without sufficient shelter should be able to demonstrate a credible threat of future injury.[275] That difference turns on plaintiffs' ability to avoid future conduct.

In *Lyons*, an individual sought damages and equitable relief barring the city's police from using chokeholds except when the suspect posed an immediate danger.[276] Lyons had been stopped by officers for a traffic violation

268. *See supra* text accompanying notes 227-30.

269. In an article "about the practical aspects of filing and litigating . . . an institutional anti-homeless lawsuit," one of the attorneys who represented the plaintiffs in *Pottinger* explained that a "specific objective of this type of litigation is to enjoin the law enforcement strategy a municipality or agency employs to criminalize homelessness." *See* Benjamin S. Waxman, *Fighting the Criminalization of Homelessness: Anatomy of an Institutional Anti-homeless Lawsuit*, 23 STETSON L. REV. 467, 468, 470 (1994); *see also id.* at 473 ("Another important objective is obtaining compensatory damages for the specific injuries individual homeless persons have suffered.").

270. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

271. *See, e.g.*, Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 992 (9th Cir. 2012) (citing *Lyons*, 461 U.S. at 106); *see also* Kolender v. Lawson, 461 U.S. 352, 355 n.3 (1983) (holding that the plaintiff had standing to challenge a vagrancy law and seek declaratory and injunctive relief after being stopped approximately fifteen times in a period of less than two years).

272. *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1126 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007); *see also* Spencer v. Kemna, 523 U.S. 1, 15 (1998) (characterizing the denial of Article III standing in *Lyons* as having been based on the plaintiff's ability to avoid engaging in illegal conduct in the future); Brief of Plaintiffs-Appellants Robert Martin et al., *supra* note 111, at 36 (citing *Jones*, 444 F.3d at 1126).

273. 461 U.S. 95.

274. 484 U.S. 305 (1988).

275. *See, e.g.*, Church v. City of Huntsville, 30 F.3d 1332, 1337-38 (11th Cir. 1994) (concluding that the plaintiffs' complaint presented a case "closer to *Honig* . . . than to *Lyons*").

276. *See* 461 U.S. at 98.

and subjected to a chokehold that rendered him unconscious and caused severe physical injury.[277] The Court held that while he had standing to seek damages for the past use of the chokehold, Lyons could not seek equitable relief because he could not show that "he was likely to suffer future injury from the use of the chokeholds by police officers."[278] To make this showing, he would have had to draw an attenuated causal chain from violating a traffic code, to being stopped for that violation, to the police using a chokehold unprovoked, and to being rendered unconscious or otherwise harmed.[279] His claims were "speculative" in part because Lyons had personal control over whether he violated the law again, triggering future contact with law enforcement.[280]

In the second case, *Honig*, public school officials removed an emotionally disturbed teen from his classroom in violation of the procedural requirements of the Education for All Handicapped Children Act (EHA).[281] Citing *Lyons*, the Court in *Honig* recognized that "we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury."[282] However, that reluctance did not apply where the plaintiff was unable to "conform his conduct" to regulations or expectations.[283] Unlike Lyons, who theoretically could have chosen whether to comply with the traffic code in the future, the student seemed "unable to govern his aggressive, impulsive behavior."[284] Indeed, that lack of control was the very basis for his "handicapped" status under the EHA.[285] As such, the Court concluded that given the student's "prior history of behavioral problems," it was "certainly reasonable" to believe that the student would "again engage in classroom misconduct."[286] It was "equally probable," concluded the Court, that the school officials would again respond by removing the adolescent from the classroom without following appropriate procedures.[287] Because the student was unable to avoid repeating the conduct

277. *See id.* at 97-98.

278. *See id.* at 105.

279. *See id.*

280. *See id.* at 111 ("Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles . . . .").

281. *See* Honig v. Doe, 484 U.S. 305, 313-14 (1988); *see also* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. § 1232 (2016)).

282. 484 U.S. at 320 (citing *Lyons*, 461 U.S. at 105-06).

283. *See id.*

284. *See id.*

285. *Id.*

286. *See id.*

287. *See id.* at 321.

that led to his original injury for reasons beyond his control, he had standing to seek an injunction against unilaterally removing students from classrooms.[288]

The distinction between *Lyons* and *Honig* explains why homeless individuals should have standing to seek equitable relief. Much like the student's inability to control his actions, a homeless person in a city without sufficient shelter has no choice but to perform biologically compelled, life-sustaining conduct, like sleeping, in public. Rather than being speculative, a claim for injunctive relief is based on a credible threat where there exists a gap between the homeless population and available shelter. So thought the Ninth Circuit in *Jones*.[289] And in their opening brief to the Ninth Circuit, the plaintiffs in *Martin v. City of Boise* emphasized that they could not conform their conduct to the requirements of the tent ban because they were "dependent on emergency shelter to avoid conduct made illegal by the City" and were unable to access such shelter due to overwhelming demand for beds.[290] In *Church v. City of Huntsville*, a case that included a claim that arresting the homeless plaintiffs for conduct in public violated the Eighth Amendment, the Eleventh Circuit held along the same lines as the Ninth Circuit.[291] The *Church* court held that the plaintiffs had standing because the case was "closer to *Honig* . . . than to

288. *See id.* at 322. Lower courts have applied similar reasoning. For example, Judge Gertner determined that female detainees had standing to challenge a county's policy of routinely subjecting women, but not men, to prearraignment strip searches and visual body cavity searches. *See* Mack v. Suffolk County, 191 F.R.D. 16, 20-21 (D. Mass. 2000). Judge Gertner explained that the county's "reliance on *Lyons* is misplaced" because, while "no one can predict future arrests," the women who brought the challenge were "more vulnerable than others" to being arrested and subjected to the search again. *See id.* at 20. The women challenging the search were more likely to be arrested than others for the very reason of their arrest: "Plaintiffs with a criminal record . . . are more likely to be arrested and detained than those with no criminal history" and, given the county's enforcement practices, the women were likely to be arrested again. *See id.* In addition, because they challenged not an informal practice of chokeholds, as in *Lyons*, but an "iron clad policy," the women were almost guaranteed to be strip searched again if arrested. *See id.* at 21. So too with the challenges at issue in this Note, which attack not informal policies but formal anti-homeless ordinances.

289. *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1127 (9th Cir. 2006) ("In the absence of any indication that the enormous gap between the number of available beds and the number of homeless individuals in Los Angeles . . . has closed, Appellants are certain to continue sitting, lying, and sleeping in public thoroughfares . . . ."), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007). Other courts have agreed. *See, e.g.*, Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *4 (D. Or. July 31, 2009) ("Plaintiffs allege that they are likely to violate the ordinances in the future by sleeping in public places, because they have no other place to sleep. Thus, plaintiffs have standing to assert an Eighth Amendment claim." (citation omitted) (citing *Jones*, 444 F.3d at 1127)).

290. *See* Brief of Plaintiffs-Appellants Robert Martin et al., *supra* note 111, at 35, 37-38.

291. *See* 30 F.3d 1332, 1339 (11th Cir. 1994).

Lyons."[292] "Because of the allegedly involuntary nature of their condition," the Eleventh Circuit explained, "the plaintiffs cannot avoid future 'exposure to the challenged course of conduct' in which the City allegedly engages."[293] Therefore, unlike the plaintiff in *Lyons* who could show no reason why he would be unable to avoid future violations of the traffic law, homeless plaintiffs have no choice but to continue breaking anti-homeless laws as long as they remain homeless and their cities continue to have insufficient shelter beds.

* * *

A crabbed reading of the Eighth Amendment that restricts the substantive protection set forth in *Robinson* to postconviction plaintiffs would bar the vast majority of homeless individuals from challenging anti-homeless ordinances while allowing cities to continue enforcement unchecked. As the Ninth Circuit emphasized in *Jones*, a "more restrictive approach to standing, one that made conviction a prerequisite for any type of Cruel and Unusual Punishments Clause challenge, would allow the state to criminalize a protected behavior or condition and cite, arrest, jail, and even prosecute individuals for violations, so long as no conviction resulted."[294]

Enforcing an anti-homeless law that a homeless person must violate in order to survive triggers a cycle of criminalization that can be devastating. Out-of-reach fees are imposed at multiple stages in the criminal process.[295] Citations can lead to arrest for failure to appear or pay, which can prevent homeless people from later qualifying for social services or employment.[296] Time spent in court or in jail may deprive homeless people of their few possessions or their precious spots on emergency waiting lists.[297] All of this

292. *See id.* at 1338.

293. *See id.* (quoting O'Shea v. Littleton, 414 U.S. 488, 497 (1974)); *see also* Cross v. City of Sarasota, No. 15-CV-02364-EAK-JSS, 2016 WL 3476421, at *3 (M.D. Fla. June 21, 2016) (distinguishing the plaintiffs' claims from those in *Lyons* and denying the city's motion to dismiss because, based on the "unpredictable nature of homelessness," there was a substantial likelihood that plaintiffs would be "subjected to the lodging ordinance in the future"). The parties ultimately settled the case on the condition that the ordinance in question would not be enforced when the city lacked sufficient emergency shelter beds. *See* Joint Stipulation at 1, *Cross*, No. 15-CV-02364-EAK-JSS (M.D. Fla. June 21, 2017).

294. 444 F.3d at 1129.

295. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 37; *see also* COAL. ON HOMELESSNESS, *supra* note 1, at 33 ("90% of respondents reported that they were unable to and did not pay their last citation.").

296. *See* COAL. ON HOMELESSNESS, *supra* note 1, at 33; NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 36-37.

297. *See* Baker, *supra* note 203, at 448; *see also* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 36-37 (describing the collateral consequences of contact with the

footnote continued on next page

makes it more challenging to break the cycle of homelessness. In light of this cycle, reading the Eighth Amendment's substantive protections to attach at first formal contact with the criminal process is consistent with the purpose of those protections.

Conclusion

Homelessness is a complex, controversial issue, and its potential remedies fall beyond the scope of this Note. City managers facing increasing constituent pressure to "do something" receive inconsistent guidance from courts on what they can actually do. In turn, lower and state courts have received little guidance from the Supreme Court on how to handle challenges to what cities have done to address homelessness. Homeless plaintiffs must prevail on both procedural and substantive grounds, and so this Note attempts to address the divisions among courts plaguing both sets of questions. By addressing the variety of potential questions that could come up in the course of this kind of litigation, this Note seeks to assist litigants considering challenging an anti-homeless ordinance and to serve as a bench guide for courts considering such challenges.

Although this Note aims to present a compelling argument in favor of its own analysis, the doctrine is anything but settled. This is especially true because the Supreme Court has not weighed in on the *Robinson* doctrine in decades, even as anti-homeless legislation has become more common and more controversial. In the face of such doctrinal ambiguity, "legislators are obligated to determine, as best they can, the constitutionality of proposed legislation."[298] Therefore, this Note also seeks to provide some final drafting points to legislators considering anti-homeless regulations. Particularly because, as explained in Part III above, judicial review of anti-homeless ordinances will not always be available, it is imperative that cities independently evaluate the constitutionality of their legislative responses to homelessness. Insulation from judicial review should not spur cities to enforce ordinances up to the point before conviction simply because they can; instead, it should motivate cities to be vigilant in policing their own legislative practices.

Should cities pursue regulatory responses to homelessness, they would be wise to include a provision suspending enforcement when there are insufficient shelter beds. Otherwise, homeless individuals will have no choice but to perform proscribed conduct in public. For example, section 169 of San Francisco's Police Code, the product of Proposition Q discussed in Part I above,

---

criminal justice system, including unpaid tickets building on preexisting poverty or restricting employment and housing options).

298. *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975).

mandates that the prohibition on public camping not be enforced "unless there is available Housing or Shelter for the person or persons residing in the Encampment."[299] As of the time this Note went to print, the waiting list for emergency shelter was over 1000 individuals.[300]

By contrast, the Fresno and Houston ordinances discussed in Part I above do not include nonenforcement provisions triggered by lack of available shelter. Fresno's ordinance vests discretion with enforcing police officers to take an individual found camping in violation of the act to supportive services in lieu of arrest.[301] However, it does not *require* an individual to be taken to a facility providing social services rather than be arrested, and it does not specify what is to be done in the absence of available services. It is no wonder that the Fresno Madera Continuum of Care, a collaborative of service providers dedicated to serving local homeless populations, brought the constitutional infirmities of the proposed ordinance to the city council's attention prior to its adoption. It wrote: "We do not believe this [ordinance] will be just a 'tool in the toolbox' and fear the discretionary enforcement will result in unequal treatment of the homeless . . . and could end with unwanted litigation."[302] Given the increasing number of constitutional challenges to anti-homeless ordinances across the country, this letter could prove prescient.

Houston's ordinance fares no better. Again, as explained in Part I above, Houston's camping ban authorizes a police officer to arrest an individual so long as the officer makes "reasonable efforts" to obtain social services.[303] However, the "reasonable efforts" provision does not require placement in a homeless shelter or with other supportive services. In addition, in an interview in the *Houston Chronicle*, the captain of the Houston Police Department explained, "Right now the shelters are working with us and saying that if somebody tells us they want shelter, we're going to get them shelter that night."[304] He conceded, however, that this plan "might not work for 100 percent of the people," though he also claimed that "it will work for almost all of them."[305] For those who don't get shelter—and from the anecdotal

299. *See* S.F., CAL., POLICE CODE § 169(d) (2017).

300. *See Shelter Reservation Waitlist*, *supra* note 32.

301. *See* FRESNO, CAL., CODE OF ORDINANCES § 10-1703(b) (2018).

302. *See* Letter from Shawn Jenkins, Chairman, Fresno Madera Continuum of Care, to Yvonne Spence, City Clerk, Fresno City Council (Aug. 17, 2017) (on file with author).

303. HOUS., TEX., CODE OF ORDINANCES §§ 21-61 to -64 (2018).

304. *See* Andrew Kragie, *Houston's Homeless Adapt to City's Ban on Camping, Which Took Effect Friday*, HOUS. CHRON. (May 12, 2017, 9:22 AM), https://perma.cc/CHX9-QQ8T (quoting William Staney, captain of the Houston Police Department).

305. *Id.* (quoting William Staney, captain of the Houston Police Department).

evidence presented in *Kohr*, that seems like the majority of homeless individuals[306]—the ordinance should not be enforced.

Section 168 of San Francisco's Police Code provides another helpful example of what cities may do should they be unwilling to suspend enforcement when there are not sufficient shelter beds available. It prohibits sitting or lying on public sidewalks only between 7:00 AM and 11:00 PM.[307] Overnight, homeless individuals may sit or lie. These provisions demonstrate that as long as homeless people have some alternative to sleeping or camping in public—either because there are shelter beds or because there are limited hours when or locations where they may engage in such activity—that prohibited conduct is not involuntary and can be criminalized consistent with the Eighth Amendment.[308]

The arguments presented in this Note, when combined with the injury inflicted on homeless people by the cycle of criminalization, suggest that there are both constitutional and policy reasons not to criminalize sleeping while homeless in areas without sufficient shelter. Until enough shelters are built or people have access to other options, cities should suspend enforcement of anti-homeless ordinances and resist enacting new regulations. If they decline to do so, these ordinances will remain vulnerable to constitutional attack.

306. *See Kohr* Corrected Memorandum, *supra* note 45, at 5.

307. S.F., CAL., POLICE CODE § 168(b) (2017).

308. *See, e.g.*, Benson v. City of Chicago, No. 06 C 1123, 2006 WL 2949521, at *3 (N.D. Ill. Oct. 12, 2006) (distinguishing a challenged ordinance from that in *Jones* and rejecting the plaintiff's Eighth Amendment challenge because "Chicago does not prohibit sitting, lying or sleeping in any public place at any time and in any circumstance[]").