# COMMENT

# A PROSECUTORIAL SOLUTION TO THE CRIMINALIZATION OF HOMELESSNESS

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## INTRODUCTION

More than one-third of the 580,000 homeless people in the United States are unsheltered.[1] This population includes those who sleep on the street, in cars, in abandoned buildings, and in other places not intended for human housing.[2] Some unsheltered homeless individuals choose to forego sleeping in a shelter, perhaps out of concern for their safety or because their work prevents them from abiding by a shelter's curfew. Others, meanwhile, are forced to sleep in public spaces because of insufficient shelter capacity.

The number of unsheltered homeless individuals has soared during the COVID-19 pandemic. Homeless shelters across the country have closed due to the pandemic, and those that remained open saw an exodus of residents who feared exposure to the virus in close quarters.[3] Given that the virus ultimately proved to be much less transmissible outdoors,[4] this mass dislocation of homeless people may very well have saved lives.

But living in public spaces risks devastating consequences. In cities across the United States, laws target basic human conduct that unsheltered homeless people perform in public, such as sleeping, camping, sitting, lying down, and loitering.[5] These antihomeless laws impose a range of civil and criminal penalties on the conduct they prohibit; this Comment focuses on criminal laws, because prosecuting homeless individuals—a common occurrence[6]—poses

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1 *See* MEGHAN HENRY, TANYA DE SOUSA, CAROLINE RODDEY, SWATI GAYEN & THOMAS JOE BEDNAR, U.S. DEP'T OF HOUS. & URB. DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2021), https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf [https://perma.cc/54V3-F9GS].

2 *Homeless in America: Examining the Crisis and Solutions to End Homelessness: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. app. at 76 (2019) (prepared statement of Nan Roman, President and Chief Executive Officer, National Alliance to End Homelessness).

3 *See, e.g.*, *Shelter Closings*, NAT'L LOW INCOME HOUS. COAL. (May 3, 2020), https://www.nlihc.org/coronavirus-and-housing-homelessness/shelter-closings [https://perma.cc/J7D3-6GRL]; Stephanie Yang, *Population in New York City Homeless Shelters Drops in Pandemic*, WALL ST. J. (Sept. 9, 2020, 9:50 AM), https://www.wsj.com/articles/population-in-new-york-city-homeless-shelters-drops-in-pandemic-11599652800 [https://perma.cc/H2Y7-B9GF] (reporting that homeless individuals in New York City "left the shelters in droves").

4 *See Participate in Outdoor and Indoor Activities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 19, 2021), https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/outdoor-activities.html [https://perma.cc/P6C6-MBFK].

5 *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 12-13 (2019), http://www.nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/J6QC-6SGH].

6 *See* Bidish Sarma & Jessica Brand, *The Criminalization of Homelessness: Explained*, APPEAL (June 29, 2018), http://www.theappeal.org/the-criminalization-of-homelessness-an-explaineraa074d25688d [https://perma.cc/5QSJ-YC7C] (explaining that prosecutors "frequently charge" homeless individuals for violating antihomeless laws).

a particular risk: it undermines their ability to gain and maintain employment, the surest way out of poverty.[7]

The perception that all homeless individuals are unemployed and uninterested in working is false. Nearly half of single homeless adults work,[8] and about ninety percent of those who do not have a job want one.[9] Given these numbers, many homeless individuals would benefit if legal burdens, such as the antihomeless laws this Comment discusses, did not compound the challenges they face while working or looking for work.[10]

Rendered politically powerless by their lack of resources,[11] homeless individuals have turned to the courts to try to enjoin enforcement of these laws.[12] Courts deciding these cases have looked to two Supreme Court decisions, *Robinson v. California*[13] and *Powell v. Texas*,[14] which limit the kinds of behavior that governments can criminally punish under the Eighth Amendment. Some courts have read *Robinson* and *Powell* as drawing a distinction between an act and a status, holding that the Constitution permits punishing a person for the former but not the latter. Relying on this distinction, these courts have upheld antihomeless laws that punish *acts* that further basic human needs rather than the *status* of being homeless.[15]

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7 *See* Gary Shaheen & John Rio, *Recognizing Work as a Priority in Preventing or Ending Homelessness*, 28 J. PRIMARY PREVENTION 341, 344 (2007) ("Helping people get a job at a living wage is essential to end their homelessness."); *Employment and Homelessness*, NAT'L COAL. FOR HOMELESS (July 2009), http://www.nationalhomeless.org/factsheets/employment.html [https://perma.cc/8QU5-PXME] ("[C]limbing out of homelessness is virtually impossible for those without a job.").

8 Stephen Metraux, Jamison D. Fargo, Nicholas Eng & Dennis P. Culhane, *Employment and Earnings Trajectories During Two Decades Among Adults in New York City Homeless Shelters*, 20 CITYSCAPE, no. 2, 2018, at 173, 190.

9 Julia Acuña & Bob Erlenbusch, *Homeless Employment Report: Findings and Recommendations*, NAT'L COAL. FOR HOMELESS (Aug. 2009), http://www.nationalhomeless.org/publications/homelessemploymentreport [https://perma.cc/6B24-ZKSL].

10 *See generally* Sarah Golabek-Goldman, Note, *Ban the Address: Combating Employment Discrimination Against the Homeless*, 126 YALE L.J. 1788, 1795 (2017) ("While homeless participants in this study described a number of challenges to obtaining employment, they frequently referred to discrimination based on homeless status as one of their most pressing problems.").

11 *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting) ("Though numerically significant, the homeless are politically powerless inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion.").

12 *See infra* Section II.B.

13 370 U.S. 660 (1962).

14 392 U.S. 514 (1968).

15 At least four lower federal courts have adopted this interpretation of *Robinson* and *Powell*. *See* Glover v. City of Laguna Beach, No. 15-1332, 2016 WL 11520619, at *4 (C.D. Cal. Feb. 10, 2016) ("Plaintiffs cite no authority that persuades the Court . . . that criminalizing the acts of sleeping or camping in public places unconstitutionally criminalizes the status of being homeless."); Ashbaucher v. City of Arcata, No. 08-02840, 2010 WL 11211481, at *6 (N.D. Cal. Aug. 19, 2010) ("Upon careful review of the holdings of *Robinson* and *Powell* . . . the Court concludes that the Eighth Amendment does not extend protection to involuntary conduct, such as camping overnight on public grounds,

Other courts, however, have read *Robinson* and *Powell* as creating a distinction between voluntary and involuntary acts, and as holding that the Eighth Amendment prohibits punishing an individual for performing the latter. These courts have reasoned that antihomeless laws impermissibly punish involuntary behavior, but only when a city has failed to provide enough shelter space to house its entire homeless population.[16] Most notably, in *Martin v. City of Boise*, the Ninth Circuit, the only court of appeals to have addressed the issue, held that the Eighth Amendment prohibited Boise, Idaho, from prosecuting homeless individuals for sleeping on public property, unless the city's shelter capacity exceeded its homeless population.[17] In December 2019, the Supreme Court denied Boise's petition for a writ of certiorari, leaving the issue unresolved on the national level.[18]

This Comment argues that given the lack of constitutional protections against antihomeless laws, prosecutors are better positioned than courts to mitigate the harm such laws inflict.[19] Prosecuting working or job-seeking

attributable to Plaintiffs' homeless status."), *report and recommendation adopted*, 2010 WL 11211527 (N.D. Cal. Dec. 1, 2010); Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009) ("A decision in Plaintiffs' favor would set precedent for an onslaught of challenges to criminal convictions by those who seek to rely on the involuntariness of their actions."); Joyce v. City & County of San Francisco, 846 F. Supp. 843, 858 (N.D. Cal. 1994) ("[H]omelessness does not analytically fit into a definition of a status."), *vacated as moot*, 87 F.3d 1320 (9th Cir. 1996).

16 At least five lower federal courts have adopted this interpretation of *Robinson* and *Powell*. *See* Martin v. City of Boise, 920 F.3d 584, 616 (9th Cir.) ("[T]he Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."), *cert. denied*, 140 S. Ct. 674 (2019); Jones v. City of Los Angeles, 444 F.3d 1118, 1136 (9th Cir. 2006) ("The *Robinson* and *Powell* decisions, read together, compel us to conclude that . . . [criminally punishing] homeless individuals who are sitting, lying, or sleeping in Los Angeles's Skid Row because they cannot obtain shelter violates the Cruel and Unusual Punishment Clause."), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007); Kohr v. City of Houston, No. 17-1473, 2017 WL 3605238, at *2 (S.D. Tex. Aug. 22, 2017) (enjoining the City of Houston from enforcing its ban on sheltering in public because the homeless plaintiffs "are involuntarily in public, harmlessly attempting to shelter themselves—an act they cannot realistically forgo"); Anderson v. City of Portland, No. 08-1447, 2009 WL 2386056, at *6 (D. Or. July 31, 2009) ("[I]t seems a reasonable proposition under the Eighth Amendment that homeless persons should not be subject to criminal prosecution for merely sleeping in public at any time of day."); Johnson v. City of Dallas, 860 F. Supp. 344, 350 (N.D. Tex. 1994) ("Because being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless."), *rev'd and vacated on other grounds*, 61 F.3d 442 (5th Cir. 1995); Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) ("[A]rresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless.").

17 *Martin*, 920 F.3d at 616.

18 *Martin*, 140 S. Ct. at 674.

19 This Comment also uses the term "prosecutor" to refer to police officers when they are responsible for prosecuting the government's case. *See generally* Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html [https://perma.cc/HP6F-NMAA] ("In hundreds of misdemeanor courts in at least 14 states, police officers can file criminal charges and handle court cases, acting as prosecutor as well as witness and negotiator.").

homeless individuals—those closest to escaping homelessness—creates significant barriers to their efforts to achieve sustainable independence.[20] Therefore, prosecutors should decline to file charges when they know that a homeless defendant is seeking to enter or is already in the workforce. If charges are filed, homeless defendants who can prove their employment or their job-seeking status should be diverted out of the criminal justice system and into homeless court programs.

Part I begins by introducing the two topics central to this Comment: antihomeless laws and criminal law. Section I.A surveys the devastating effects of antihomeless laws on homeless individuals. The criminalization of their conduct raises fundamental criminal law questions, which are explored in Section I.B. Next, Part II discusses *Robinson* and *Powell*, the pivotal Supreme Court cases that distinguish between laws that punish people for what they do (which are constitutional) and those that punish people for who they are (which are unconstitutional). Part II then dives into lower federal courts' misapplication of these two decisions to antihomeless laws, with a focus on the Ninth Circuit's ruling in *Martin*.

Part III argues that the constitutional remedy devised by the Ninth Circuit is misguided from a doctrinal and public policy perspective. To provide context for the alternative solution this Comment proposes to the dilemma antihomeless laws pose, Part IV explains the role prosecutorial discretion plays in the criminal justice system. Finally, the Comment concludes by proposing that prosecutors use their discretion to not prosecute working or job-seeking homeless individuals for violating antihomeless laws.

## I. THE CRIMINALIZATION OF HOMELESSNESS

Homelessness "is an exceptionally complex phenomenon even when it is not exacerbated by a global pandemic."[21] Many people experiencing homelessness face a Hobson's choice between living in a dangerous homeless shelter and living without shelter at all.[22] Others have no choice: they are

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20 In jurisdictions where police or prosecutorial discretion is already a defining feature of the enforcement of antihomeless laws, using a homeless offender's employment status as the touchstone for exercising that discretion serves important governmental benefits, discussed *infra* Section IV.B.

21 Frank v. City of St. Louis, 458 F. Supp. 3d 1090, 1092 (E.D. Mo. 2020).

22 Internal reports of life inside New York City's 30th Street Men's Shelter reveal some of the dangers that the sheltered homeless population faces:

> A client openly smokes crack in bed. Another runs from room to room, flicking light switches.
>
> One resident whacks another in the head with a lock stuffed inside a sock. A handgun is hidden in a construction barrier just outside the building's entrance.

forced to live in public spaces due to insufficient shelter capacity. The challenges that homeless individuals face are compounded by criminal laws that target people who live outdoors. Homeless individuals have successfully argued in court that when shelter space is unavailable, they should not be blamed or punished for sleeping in public. These arguments raise the question of which aspects, if any, of homeless individuals' life-sustaining conduct can be criminally punished. This Part begins to answer that question. It provides an overview of antihomeless ordinances in the United States, followed by a discussion of the criminal law elements that comprise these offenses.

### A. *An Overview of Antihomeless Laws*

Antihomeless laws, which criminalize conduct associated with being homeless—including camping,[23] sleeping,[24] sitting or lying down,[25] and loitering[26]—take inspiration from the "broken windows" approach to law enforcement. According to this theory, failing to control low-level crime causes the proliferation of more serious offenses.[27] In line with this view, proponents of antihomeless laws have argued that antihomeless laws are needed because the "mere presence of street homeless in the public sphere has the effect of unraveling the social order, leading to an increase in crime and thereby driving middle- and upper-class consumers out of downtown areas."[28]

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> Brass knuckles, stun guns, a hammer—all found inside lockers. An entire section of the shelter is known for "high drug activity."

Greg B. Smith, *How Shelter Chaos Drives Many Homeless to Live on Streets and in Subways*, CITY (Nov. 18, 2019, 4:15 AM), https://www.thecity.nyc/special-report/2019/11/18/21210717/how-shelter-chaos-drives-many-homeless-to-live-on-streets-and-in-subways [https://perma.cc/ZYS4-97AG].

23 Tulsa, Oklahoma, has a camping ban that makes it is unlawful to "take up one's abode" in public. TULSA, OKLA., TULSA CODE OF ORDINANCES tit. 27, ch. 18, § 1800(A)(2) (2020).

24 Atlanta, Georgia, has a sleeping ban that prohibits both "sleeping" and "making preparations to sleep" in public. ATLANTA, GA., ATLANTA CITY CODE pt. II, ch. 106, art. I, § 106-12(a) (2020).

25 Richmond, Virginia, has a law that makes it unlawful to "sit or lie" in any way that obstructs the "free normal flow" of pedestrian traffic. RICHMOND, VA., RICHMOND CODE ch. 19, art. V, div. 1, § 19-110 (b), (c)(1) (2020).

26 Toledo, Ohio, prohibits "hanging around" in a way that creates an "unreasonable annoyance to the comfort and repose of any person." TOLEDO, OHIO, MUNICIPAL CODE pt. 5, ch. 509, § 509.08(a), (b)(1) (2020).

27 James Wilson and George Kelling popularized this theory in their seminal 1982 article *Broken Windows: The Police and Neighborhood Safety*. They argued that "[at the community level, disorder and] crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is broken *and is left unrepaired*, all the rest of the windows will soon be broken." James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, at 29, 31.

28 Donald Saelinger, Note, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545, 553 (2006).

But the merits of this broken-windows approach to law enforcement are highly contested.[29] The New York Police Department, for example, has found "no empirical evidence demonstrating a clear and direct link between an increase in summons and misdemeanor arrest activity and a related drop in felony crime."[30] Research shows that broken-windows tactics are similarly ineffective in the homelessness context: rather than deterring crime, antihomeless laws force homeless individuals "into more secluded, less familiar locations where they are more vulnerable," increasing the risk of violent crime against them.[31]

Opponents of these laws argue that they entrench a cycle of homelessness and poverty. The cycle begins when an individual is cited or arrested for violating an ordinance, which requires the offender to appear in court to enter a plea.[32] For someone struggling to survive on the streets, the mere act of traveling to court, much less navigating the criminal justice system, is no easy task. And if past court orders and sentences have contributed to their plight, homeless individuals may fear returning to court. Not surprisingly, a research study found that nearly sixty percent of homeless offenders in Austin, Texas, failed to appear for their hearing, leading to the issuance of arrest warrants.[33] When a warrant is issued, the homeless individual's next offense then invariably leads to arrest and detention, the cost of which "far exceeds the amount of the original fine they would have had to pay."[34] These consequences can cause prolonged work interruptions, which may in turn lead to a reduction in shift hours or the loss of employment.[35] Because homeless offenders face great pressure to "plead guilty and end the ordeal of detention,"[36] offenders return to

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29 *See, e.g.*, Nick Malinowski, *Useful or Not, Broken Windows Policing Remains Morally Indefensible*, HUFFPOST (Dec. 6, 2017), https://www.huffingtonpost.com/nick-malinowski/useful-or-not-broken-wind_b_10742902.html [https://perma.cc/2VW6-ZF73].

30 MARK G. PETERS & PHILIP K. EURE, N.Y.C. DEP'T OF INVESTIGATION, AN ANALYSIS OF QUALITY-OF-LIFE SUMMONSES, QUALITY-OF-LIFE MISDEMEANOR ARRESTS, AND FELONY CRIME IN NEW YORK CITY, 2010-2015, at 3 (2016), https://www.nyc.gov/assets/oignypd/downloads/pdf/Quality-of-Life-Report-2010-2015.pdf [https://perma.cc/Z9H7-ZWJY].

31 NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 5, at 66.

32 *See* MADELINE BAILEY, ERICA CREW & MADZ REEVE, VERA INST. OF JUST., NO ACCESS TO JUSTICE: BREAKING THE CYCLE OF HOMELESSNESS AND JAIL 6 (2020), https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/08/homelessness-brief-web.pdf [https://perma.cc/GRN5-P3V8].

33 *See* Andrew Weber, *Most Tickets for Homelessness Result in Arrest Warrants. That Can Make Finding Housing Hard.*, KUT 90.5 (June 20, 2019, 5:00 PM), https://www.kut.org/austin/2019-06-20/most-tickets-for-homelessness-result-in-arrest-warrants-that-can-make-finding-housing-hard [https://perma.cc/Y3Q5-CRVA].

34 John J. Ammann, Essay, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion*, 44 ST. LOUIS U. L.J. 811, 819 (2000).

35 *Id.* at 28. Homeless individuals may also lose their personal belongings while incarcerated, which can make returning to work upon release more difficult. *Id.*

36 *See* BAILEY, CREW & REEVE, *supra* note 32, at 8.

the street not only homeless but criminally convicted—a status that makes finding work and achieving long-lasting independence all the more challenging.[37]

### B. *The Elements of Antihomeless Laws*

Antihomeless laws highlight a foundational criminal law question: What type of conduct may be punished by the state? The outer limits of what may constitute a crime are rooted in the Eighth Amendment's proscription against inflicting cruel and unusual punishment.[38] Within those boundaries, however, the particularities of criminal law are codified in federal, state, and local penal codes.

A criminal defendant may be found guilty of a crime if and only if the government proves all the elements of the offense beyond a reasonable doubt.[39] The mens rea element requires the state to show that the defendant had a guilty mind.[40] Strict liability crimes, which are more controversial,[41] have no mens rea requirement: defendants may be liable regardless of their mental state when committing the criminal act. Many antihomeless laws are strict liability offenses.[42] But even if these laws included a mens rea element, homeless individuals would satisfy it: they intentionally engage in the prohibited conduct to sustain their own survival and are aware when they do so in public.

The actus reus element, as defined by the Model Penal Code, requires a "voluntary act."[43] This requirement is best understood by separately analyzing each component of the term "voluntary act." First, the need for an "act" limits the behaviors appropriate for criminal punishment to conduct (or to

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37 *See* Jamie Michael Charles, Note, *"America's Lost Cause": The Unconstitutionality of Criminalizing Our Country's Homeless Population*, 18 PUB. INT. L.J. 315, 345 (2009) ("A criminal record makes their presence on the streets more certain because individuals with criminal records have a difficult time finding work.").

38 *See* Ingraham v. Wright, 430 U.S. 651, 667 (1977) (holding that the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such"). For a discussion of those limits, see *infra* Section II.A.

39 *In re* Winship, 397 U.S. 358, 364 (1970).

40 *See* MODEL PENAL CODE § 2.02 (AM. L. INST. 1985). The Model Penal Code defines four levels of culpability—purpose, knowledge, recklessness, and negligence—any of which may serve as the mens rea for an offense. *Id.*

41 Professor Stephen Morse, in a critique of strict liability crimes, well captured the desirability of the mens rea element in our criminal code: "As long as we continue to treat each other as persons and to value moral life, however, and do not simply treat each other as potentially dangerous machines, the harmdoer's attitude towards the victim, expressed by mental states, will be crucial to our emotional, moral and practical response." Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51, 63 (2003).

42 *See* David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487, 494 (1994) ("It is especially worth noting that homeless survival is often the intended target of some strict liability crimes that do not require any mens rea."); *see also, e.g.*, antihomeless ordinances cited *supra* notes 23–26.

43 MODEL PENAL CODE § 2.01(1) (AM. L. INST. 1985).

omissions, where one has a duty to act).[44] A thought or physical condition may not be criminalized. Second, the need for the criminal act to be "voluntary" requires the offender to purposely move his body.[45] As Oliver Wendell Holmes wrote, voluntariness requires more than a muscular contraction; the "contraction of the muscles must be willed."[46]

Antihomeless laws that criminalize camping, sitting or lying down, or loitering all target voluntary acts: homeless individuals intentionally engage in this conduct to survive. Sleeping bans also punish voluntary acts, but the voluntary act that these laws punish is not as apparent as other categories of antihomeless laws because sleeping is an unconscious state. But unless someone suddenly and unexpectedly falls asleep, the acts that precede sleep, which may include sitting or lying down, are voluntary, satisfying the actus reus requirement.[47]

## II. CRUEL AND UNUSUAL STATUS CRIMES

Those who challenge antihomeless laws in court often argue that they unconstitutionally inflict cruel and unusual punishment in violation of the Eighth Amendment. Two Supreme Court cases—*Robinson* and *Powell*—provide the fundamental principles that guide this analysis. Even though the Court did not hold in either case that anything more than a voluntary act is required to criminally punish a person, lower federal courts, including the Ninth Circuit, have relied on the Court's reasoning in those cases to strike down antihomeless laws.

### A. Robinson *and* Powell*: The Status-Act Distinction*

Walter Lawrence Robinson, a drug addict, was riding in a car that was pulled over by a police officer in February 1960 for having an unilluminated rear license plate.[48] During the traffic stop, the officer ordered Robinson to roll up his sleeves, which revealed "scar tissue and discoloration on the inside of his right arm, and numerous fresh needle marks on the inside of his left arm"—all of which are typical indicia of drug use.[49] Robinson was arrested and charged with violating a California statute that made it a crime to "be

44 *Id.*

45 *See* Michael S. Moore, Reply, *More on* Act and Crime, 142 U. PA. L. REV. 1749, 1827 (1994).

46 O.W. HOLMES, JR., THE COMMON LAW 54 (1881).

47 *See* MODEL PENAL CODE § 2.01 explanatory note (AM. L. INST. 1985) ("It is, however, required only that the actor's conduct include a voluntary act, and thus unconsciousness preceded by voluntary action may lead to liability based upon the earlier conduct.").

48 Appellant's Opening Brief at 4, Robinson v. California, 370 U.S. 660 (1962) (No. 554).

49 *Id.* at 5-6.

addicted to the use of narcotics."[50] He was found guilty and sentenced to ninety days in jail and two years' probation.[51]

On appeal to the Supreme Court, Robinson argued that criminalizing his drug addiction violated the Eighth Amendment.[52] The Court agreed, finding that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment."[53]

*Robinson*'s constitutional holding is clear: a person cannot be criminally punished for being an addict.[54] Less apparent, however, is the principle on which the Court relied to determine that punishing addiction is cruel and unusual.[55] Three plausible rationales, each of which is outlined below, have been offered.[56]

The simplest rationale is that criminal laws may punish people for their conduct (what they do), but not for their status (who they are). In *Robinson*, the Court recognized that because the California law punished addiction alone, it did not require the commission of any act.[57] Justice Potter Stewart, writing for the majority, found this impermissible. The law, he wrote, did not punish the "unauthorized manufacture, prescription, sale, purchase, or possession of narcotics."[58] A person could be "continuously guilty of this offense . . . whether or not he has been guilty of any antisocial behavior."[59] Because the California law punished Robinson for his status, rather than his conduct, it was unconstitutional.

The second rationale is less formalistic. It asks whether the individual is "free voluntarily to quit his condition."[60] Punishing people who cannot rid themselves of their illness or condition would serve no deterrent effect. Therefore, "in the light of contemporary human knowledge," the *Robinson* Court decided that punishing such people "would doubtless be universally thought to be an infliction of cruel and unusual punishment."[61] The Court

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50 *Robinson*, 370 U.S. at 660 (quoting CAL. HEALTH & SAFETY CODE § 11721 (West 1962)).

51 Brief of Appellee at 22, *Robinson*, 370 U.S. 660 (No. 554).

52 Appellant's Opening Brief, *supra* note 48, at 29-31.

53 *Robinson*, 370 U.S. at 667.

54 *Id.*

55 *See* Stephen J. Morse, *Addiction, Choice, and Criminal Law*, *in* ADDICTION & CHOICE: RETHINKING THE RELATIONSHIP 426, 433 (Nick Heather & Gabriel Segal eds., 2017) ("It is difficult to determine precisely what reasoning was the foundation for the Court's constitutional conclusion [in *Robinson*].").

56 These explanations were first offered in a *Harvard Law Review* note published shortly after the *Robinson* decision. Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 646-55 (1966).

57 *Robinson*, 370 U.S. at 666.

58 *Id.* at 664.

59 *Id.* at 666.

60 Note, *supra* note 56, at 648.

61 *Robinson*, 370 U.S. at 666.

compared the challenged California law to one that punished people for having a common cold, an illness that, like addiction, cannot be cured at will, and noted that neither law could be tolerated under the Eighth Amendment.[62]

A third rationale is that punishment for any disease acquired "innocently or involuntarily" is unconstitutional.[63] This principle paves the way for treating addiction, where the first use of drugs is often voluntary, differently than illnesses that are acquired without any meaningful choice, such as a common cold. Under this rationale, courts would not focus on whether a law punished a status or an act; they would instead decide only whether a defendant was ultimately responsible for his condition.

Six years after *Robinson* was decided, the Court offered guidance to those who sought clarification of its true rationale. Leroy Powell was a sixty-six-year-old chronic alcoholic who had been arrested for being drunk in public, by his estimation, approximately one hundred times.[64] In December 1966, Powell was arrested and charged under a Texas law that prohibited being "found in a state of intoxication in any public place."[65] Powell appealed his conviction directly to the Supreme Court and encouraged the Justices to hold that punishing him for his public intoxication, like punishing him for the disease itself, was unconstitutional, because he was incapable of complying with the law.[66]

Four Justices, in a plurality opinion written by Justice Thurgood Marshall, declined Powell's invitation. The plurality interpreted *Robinson* as holding that it is unconstitutional to punish mere status; any voluntary act, the plurality reasoned, may be punished under the Eighth Amendment.[67] According to Justice Marshall, "*Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*."[68] Justice Marshall then distinguished the law at issue in *Powell* from the one in *Robinson* by noting that Powell was convicted "not for being a chronic alcoholic, but for being in public while drunk on a particular occasion," a voluntary act.[69]

The dissent authored by Justice Abe Fortas, on the other hand, contended that *Robinson* prohibited punishing a defendant for "being in a condition he

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62 *Id.* at 667.

63 *Id.*

64 Brief for Appellee at 2, Powell v. Texas, 392 U.S. 514 (1968) (No. 405).

65 *Powell*, 392 U.S. at 517 (plurality opinion) (quoting TEX. PENAL CODE ANN. art. 477 (Vernon 1952)).

66 *See* Reply Brief for Appellant at 10, *Powell*, 392 U.S. 514 (No. 405) ("Nowhere is it explained why it is less cruel to punish a symptom of a disease than to punish the disease itself.").

67 *See Powell*, 392 U.S. at 532 (plurality opinion).

68 *Id.* at 533.

69 *Id.* at 532.

is powerless to change."[70] Although the Texas law covered "more than a mere status,"[71] distinguishing it from the one in *Robinson*, the dissent argued that both suffered from the same constitutional defect: each law allowed the government to punish a person for "being in a condition which he had no capacity to change or avoid."[72] According to the dissent, the Eighth Amendment prohibited punishing a person not only for having a disease but also for having "a compulsion symptomatic of the disease."[73] Thus, the Constitution prohibited the punishment of both Powell's "uncontrollable compulsion to drink" and, once intoxicated, his inability to "prevent himself from appearing in public places."[74]

Justice Byron White concurred in the judgment, providing the decisive fifth vote to uphold the Texas law. On the one hand, he seemed sympathetic to the dissent's disease rationale and surmised that if it "cannot be a crime to have an irresistible compulsion to use narcotics," then neither can it be a crime "to yield to such a compulsion."[75] On the other hand, he did not believe that Powell's chronic alcoholism compelled him to "frequent public places when intoxicated," the conduct for which Powell was prosecuted.[76] Justice White thought the attribution of this behavior to Powell's chronic alcoholism was "contrary to common sense and to common knowledge."[77] As a result, Justice White declined to prohibit the conviction of chronic alcoholics, like Powell, who "knowingly fail[] to take feasible precautions against committing a criminal act," such as staying home when drinking.[78] Because Justice White believed that Powell had been punished for a voluntary act, it was unnecessary for him to decide when, if ever, the Constitution prohibits states from punishing alcoholics who involuntarily yield to their compulsion to drink.[79]

### B. *Antihomeless Laws in Lower Federal Courts*

Lower federal courts have looked to the Supreme Court's holdings in *Robinson* and *Powell* as guideposts to resolve constitutional challenges to

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

71 *Id.*

72 *Id.* at 568.

73 *Id.* at 569. The Court in *Robinson* did not have reason to address the constitutionality of punishing individuals for conduct symptomatic of a disease because Robinson, unlike Powell, was punished for being an addict per se. *See* Robinson v. California, 370 U.S. 660, 667 (1962).

74 *Powell*, 392 U.S. at 568 (Fortas, J., dissenting).

75 *Id.* at 548 (White, J., concurring in the judgment).

76 *Id.* at 549.

77 *Id.*

78 *See id.* at 550 ("On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who could be punished for driving a car but not for his disease.").

79 *Id.* at 553-54.

antihomeless laws. Courts that have enjoined the enforcement of these laws under the Eighth Amendment have distinguished them from the Texas law in *Powell* on various grounds. Some courts have noted that unlike Powell, a chronic alcoholic who had a home in which he could have remained when drinking, homeless individuals without access to a shelter have nowhere but public spaces to live, forcing them to perform basic human conduct in public.[80] Other courts have interpreted *Powell* as defining the substantive limits of the Eighth Amendment based on more than the distinction between a status and an act. They have found relevant other factors, such as the involuntary and harmless nature of the criminalized conduct, and concluded based on those principles that antihomeless laws are unconstitutional.[81]

In the most prominent decision taking on the constitutionality of antihomeless laws, the Ninth Circuit, in *Martin v. City of Boise*, applied the former approach discussed above to hold that two antihomeless ordinances in Boise, Idaho, which punished camping and sleeping in public, respectively, both violated the Eighth Amendment.[82]

In October 2009, six homeless individuals from Boise sued the City to enjoin the enforcement of the laws, arguing that Boise's lack of available shelter beds gave them no choice but to sleep outside, requiring this conduct

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80 *See, e.g.*, Kohr v. City of Houston, No. 17-1473, 2017 WL 3605238, at *2 (S.D. Tex. Aug. 22, 2017) ("The evidence is conclusive that [homeless individuals] are involuntarily in public, harmlessly attempting to shelter themselves—an act they cannot realistically forgo . . . ."); Johnson v. City of Dallas, 860 F. Supp. 344, 351 (N.D. Tex. 1994) (finding that homeless individuals can be punished only if there would be "some place to be other than in public" for them to go, because only then would they be "in the position of a Mr. Powell, who could be punished for conduct not inextricably intertwined in a status"), *rev'd and vacated on other grounds*, 61 F.3d 442 (5th Cir. 1995); Pottinger v. City of Miami, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992) ("[T]he *Powell* plurality was not confronted with a critical distinguishing factor that is unique to the plight of the homeless plaintiffs in this case: that they have no realistic choice but to live in public places.").

81 *See, e.g.*, Jones v. City of Los Angeles, 444 F.3d 1118, 1136 (9th Cir. 2006) ("As homeless individuals, Appellants are in a chronic state that may have been acquired 'innocently or involuntarily.'" (quoting Robinson v. California, 370 U.S. 660, 667 (1962))), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007); Anderson v. City of Portland, No. 08-1447, 2009 WL 2386056, at *7 (D. Or. July 31, 2009) ("I find that plaintiffs adequately state a claim under the Eighth Amendment, in that they allege that the City's enforcement of the anti-camping and temporary structure ordinances criminalizes them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property.").

82 *See* Martin v. City of Boise, 920 F.3d 584, 604 (9th Cir.) ("[We] hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."), *cert. denied*, 140 S. Ct. 674 (2019). This opinion amended the original panel decision issued on September 4, 2018. *See* Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019).

to be protected under the Eighth Amendment.[83] Each plaintiff in *Martin* had been convicted and served time for violating one or both of these ordinances.[84]

The Ninth Circuit read *Powell* to mean that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[85] The court arrived at this conclusion by reasoning that five Justices in *Powell*—Justice White and the four dissenting Justices—"gleaned from *Robinson* the principle that 'that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'"[86] Based on that premise, the court reasoned that if a person does not have the option to sleep indoors, as was the case in Boise, criminalizing "sitting, sleeping, or lying outside on public property"[87] is the same as punishing that person for an "unavoidable consequence of being homeless."[88] From there, the Ninth Circuit had little difficulty holding that Boise's enforcement of the challenged ordinances was unconstitutional.[89]

The impact of this decision cannot be overstated: "The nine states in the Ninth Circuit hold almost two-thirds of the country's unsheltered homeless—California alone holds almost half—and many cities in those states don't have enough shelter beds for them."[90] *Martin* thus provides a significant share of the nation's homeless population with robust legal protections against laws that criminalize the "unavoidable consequences" of being homeless, such as sleeping on the street, in areas that lack adequate shelter space.[91]

## III. A MISTAKEN SOLUTION: THE EIGHTH AMENDMENT

According to the Supreme Court, the Eighth Amendment's limits on what a state may criminalize must be "applied sparingly."[92] The status-act distinction forged by the Court in *Robinson* and *Powell* represents the most expansive reading of these limits, beyond which the Court has never gone. The *Martin* court, in holding that no involuntary conduct may be punished, misread and overextended Supreme Court precedent. Furthermore, the Ninth Circuit's decision espouses bad public policy; although the outcome

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83 Brief of Plaintiffs-Appellants Robert Martin, et al. at 8, 23-25, *Martin*, 920 F.3d 584 (No. 15-35845).

84 *Martin*, 920 F.3d at 606.

85 *Id.* at 591 (quoting Powell v. Texas, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting)).

86 *Id.* at 616 (quoting *Jones*, 444 F.3d at 1135).

87 *Id.*

88 *Id.* at 617 (quoting *Jones*, 444 F.3d at 1137).

89 *Id.* at 618.

90 Scott Greenstone, *How a Federal Court Ruling on Boise's Homeless Camping Ban Has Rippled Across the West*, SEATTLE TIMES (Sept. 6, 2019, 6:00 AM), https://www.seattletimes.com/seattle-news/homeless/a-federal-ruling-limiting-cities-from-criminalizing-homeless-has-rippled-across-the-west [https://perma.cc/6BM6-A96L].

91 *Martin*, 920 F.3d at 617 (quoting *Jones*, 444 F.3d at 1136).

92 Ingraham v. Wright, 430 U.S. 651, 667 (1977).

may seem to help the homeless population, it will serve only to exacerbate the homelessness crisis.

### A. *The Doctrinal Shortcomings of Relying on the Eighth Amendment*

Despite its best intentions, the Ninth Circuit in *Martin* made several missteps in applying the doctrine laid out in *Robinson* and *Powell*. First, the court improperly included *Powell*'s four dissenting Justices in deriving what it deemed binding precedent from the case. Second, the court read far too much into Justice White's narrow concurring opinion.

As no single opinion in *Powell* was supported by a majority of the Court, courts and scholars face a challenge in identifying what precedent, if any, the case established. To resolve dilemmas such as this one, the Supreme Court has fashioned the *Marks* rule.[93] This rule, named after the Court's decision in *Marks v. United States*, requires lower courts applying Supreme Court plurality decisions to view the holding of the case as the "position taken by those Members who concurred in the judgments on the narrowest grounds."[94]

Despite this instruction from the Supreme Court, in applying *Powell*, the Ninth Circuit in *Martin* instead counted the four dissenting Justices and Justice White to conclude that *Powell* prevents Boise from punishing homeless individuals who have nowhere to sleep.[95] That analysis is inconsistent with the framework established in *Marks*. Under the *Marks* rule, dissenting Justices, unlike Justices who participate or concur in the judgment, cannot bind lower courts.[96] For the Court's opinion in *Powell*, the narrowest rationale shared by the plurality and concurrence is that Powell could be punished under the Texas law because his appearance in public while drunk was a voluntary act.[97] If five concurring Justices had held that a voluntary act was insufficient under the Eighth Amendment to punish a defendant, the Ninth Circuit's analysis of *Powell* would be compelling. However, because four out of the five Justices on whom the *Martin* panel relied had dissented, the Ninth Circuit's reasoning misses the mark.

Rather than applying the *Marks* rule, the *Martin* court read *Powell* as a dual-majority decision. This approach offers an alternative way to interpret fragmented Supreme Court opinions where no rationale was adopted by five

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93 *See* Marks v. United States, 430 U.S. 188, 193 (1977).

94 *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

95 *Martin*, 920 F.3d at 616-17.

96 *Marks*, 430 U.S. at 193.

97 Powell v. Texas, 392 U.S. 514, 532-33 (1968) (plurality opinion); *id.* at 549 n.1 (White, J., concurring in the judgment).

Justices.[98] In dual-majority cases, when five Justices across the dissenting and concurring opinions agree regarding the law, their rationale binds lower courts, despite their disagreement as to how that law applies to the facts of the case.[99] But relying on the dual-majority approach in fractured Supreme Court decisions squarely disregards the Court's mandate to apply the *Marks* rule to such cases.[100] *Marks* made clear that the technical alignment of the Justices matters, and its rule remains good law today.[101]

But even if the dual-majority approach did not contravene the Supreme Court's decision in *Marks*, its application to *Powell* would not necessarily dictate the outcome the Ninth Circuit reached in *Martin*. At best, the Ninth Circuit's preferred reading of *Powell* rests on the dicta of a Justice who avoided deciding the constitutional issue. As explained above, four Justices in *Powell* upheld the Texas statute because it punished conduct, not status.[102] Justice White concurred in this result because "Powell could have drunk at home and made plans while sober to prevent ending up in a public place."[103] Powell's conduct, according to Justice White, was voluntary; it was not a symptom of his chronic alcoholism.[104] This reading of the facts led Justice White to not adopt the dissent's rationale that conduct symptomatic of a condition is protected from punishment.[105] Thus, the Ninth Circuit read into Justice White's concurrence a rationale he never adopted.

### B. *Why Relying on Constitutional Doctrine Is Poor Public Policy*

"The Constitution," Justice Antonin Scalia once wrote, "is not an all-purpose tool for judicial construction of a perfect world."[106] Courts that use it as one, he warned, risk "swinging a sledge where a tack hammer is

98 *See* Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 289 (2019) ("In dual-majority cases, some legal test, rationale, justification, grounds, or line of reasoning is endorsed by a majority of judges, but that majority is split with respect to outcome."); *see also* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1943, 1945 (2019) ("[T]he *Marks* rule is wrong, root and stem, and should be abandoned. Instead of asking about the 'narrowest grounds,' courts should simply ask whether a single rule of decision has the express support of at least five Justices.").

99 Varsava, *supra* note 98, at 289.

100 *Marks*, 430 U.S. at 193.

101 Although the Supreme Court granted review in *Hughes v. United States*, 138 S. Ct. 1765 (2018), to review (and possibly overturn) the *Marks* rule, the Court ultimately "left the *Marks* rule intact." Ramos v. Louisiana, 140 S. Ct. 1390, 1430 (2020) (Alito, J., dissenting).

102 *Powell*, 392 U.S. at 532 (plurality opinion).

103 *Id.* at 553 (White, J., concurring in the judgment).

104 *Id.* at 549 n.1.

105 *See id.* at 553 ("It is unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place.").

106 Padilla v. Kentucky, 559 U.S. 356, 388 (2010) (Scalia, J., dissenting).

needed."[107] Although using the Eighth Amendment to enjoin the enforcement of antihomeless laws provides litigants with the semblance of relief, that constitutional remedy is both over- and underinclusive.

The Eighth Amendment approach is overinclusive because the doctrine imprudently protects all life-sustaining functions that homeless people perform in public. Although conduct not correlative of homelessness, such as trespassing or stealing food, remains punishable, the Ninth Circuit's reasoning puts much conduct beyond the reach of criminal law. Homeless people, for example, in addition to needing sleep, must urinate and defecate. Under the reasoning offered in *Martin*, a homeless person who does so in public, assuming no public restrooms are available nearby, cannot be criminally punished.[108]

The problematic implications of the Ninth Circuit's reasoning are even more striking in other contexts. Kleptomaniacs, arsonists, and other mentally ill individuals also have criminal compulsions that are symptomatic of their conditions. Punishing members of these subsets of the population for their conduct—like punishing the homeless for sleeping in public when shelter space is unavailable—can be viewed as punishing an involuntary act, which is unconstitutional under *Martin*'s reasoning. Indeed, a few years after *Powell* was decided, the D.C. Circuit expressed "war[iness] of the multitude of acts which are now crimes and which might have to be excused if . . . 'the original boundaries of *Robinson* are to be discarded.'"[109] In contrast to the Ninth Circuit's approach, punishing criminals without regard for whether their conduct is a symptom of a condition promotes compliance with the law. After a series of voluntary decisions, a criminal defendant should not be able to prevail by claiming, "I couldn't help myself."[110]

The Ninth Circuit's holding in *Martin* is also underinclusive. As the decision acknowledges, the rule of *Martin* fails to protect many homeless individuals "who *do* have access to adequate temporary shelter" but, for any number of reasons, "choose not to use it."[111] Homeless individuals, especially those who work late into the night, may be unable to abide by a shelter's curfew.[112] The largest shelter in Houston, Texas, for example, has a 5:00 PM

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107 *Id.*

108 *See* Martin v. City of Boise, 920 F.3d 584, 590 (9th Cir.) (M. Smith, J., dissenting from the denial of rehearing en banc) ("[T]he panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination."), *cert. denied*, 140 S. Ct. 674 (2019).

109 United States v. Moore, 486 F.2d 1139, 1151 (D.C. Cir. 1973) (en banc) (plurality opinion) (quoting *Powell*, 392 U.S. at 544 (Black, J., concurring)).

110 Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1587 (1994).

111 *Martin*, 920 F.3d at 617 n.8.

112 *See* Rick Paulas, *This Is Why Homeless People Don't Go to Shelters*, VICE (Feb. 24, 2020, 11:48 AM), https://www.vice.com/en_us/article/v74y3j/this-is-why-homeless-people-dont-go-to-shelters

curfew, which is "totally unrealistic for getting a job in the real world."[113] Other homeless individuals may have safety concerns about sleeping in a shelter, which often provide them with little protection against other residents who are dangerous.[114] Even sheltered homeless individuals are eventually forced to sleep in public after they stay the maximum number of consecutive nights that the shelter permits.[115] Shelters, therefore, merely delay the unfortunate reality that many people without a home will one day be forced to sleep on the street.

The Ninth Circuit's attempt to ameliorate the homelessness crisis by constitutionalizing matters of criminal law is ultimately misguided. As explained in the previous Section, a majority of the Supreme Court has never held that involuntary conduct categorically cannot be punished. Although the "interpretation that *Robinson* held that it was not criminal to give in to the irresistible compulsions of a 'disease[]' weaves in and out of the *Powell* opinions, . . . there is definitely no Supreme Court holding to this effect."[116] Given the absence of such a holding, the Ninth Circuit's reading is mistaken. The Eighth Amendment also serves as a rather blunt instrument when used to address the ills that antihomeless laws present. Prosecutors, as explained in the next Part, are far better equipped than courts to mitigate the harms that these laws perpetrate.

## IV. A PROSECUTORIAL SOLUTION: DISCRETIONARY ENFORCEMENT OF ANTIHOMELESS LAWS

Prosecutorial discretion is foundational to the American criminal justice system. Rather than punishing every criminal offender, prosecutors are vested with discretion to decide who should—and should not—be prosecuted. Federal, state, and local prosecutors' offices regularly adopt policies that guide the exercise of this discretion.[117] To help those closest to escaping homelessness, this Comment argues that law enforcement officers should not

[https://perma.cc/TCB8-Y2C9] (explaining that many homeless individuals "have jobs that might keep them out past the shelter curfew").

113 Kayla Robbins, *What Is It Like to Stay in a Homeless Shelter?*, INVISIBLE PEOPLE (Oct. 7, 2019), https://www.invisiblepeople.tv/what-is-it-like-to-stay-in-a-homeless-shelter [https://perma.cc/4UPV-S2U2].

114 *See id.* ("When the stranger bunked next to you (and the staff) are high as a kite on every substance known to man, you risk being assaulted, raped, or killed.").

115 In Boise, Idaho, for instance, some shelters "limit the length of time any one person can stay to a maximum of seventeen or thirty days after which they may not return for a period of thirty days." Brief of Appellants at 33, Bell v. City of Boise, 709 F.3d 890 (9th Cir. 2013) (No. 11-35674).

116 United States v. Moore, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (en banc) (plurality opinion).

117 *See* Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 597 (2019).

prosecute homeless individuals for violating antihomeless laws if they are either working or seeking work.

### A. *The Benefits of Prosecutorial Discretion*

The discretionary enforcement of our criminal laws is not simply a regrettable byproduct of scarce criminal justice resources; it is essential to doing justice. The alternative, prosecuting every offender for every crime, would be an injustice.[118] Two components of a prosecutor's discretion, the power to forego charging offenders and the authority to divert defendants out of the criminal justice system, have the greatest potential to forestall the harms inflicted by antihomeless laws.

#### 1. Declination

"What every prosecutor is practically required to do," former Attorney General Robert Jackson explained, "is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain."[119] A prosecutor's discretion not to charge a criminal defendant is at its zenith for minor offenses. When the harm is slight and the offender is not dangerous, there is a "natural temptation to 'have it both ways' by not prosecuting misconduct that most people are usually willing to let go unpunished, while still defining the conduct as criminal in order not to appear to condone it."[120] Declining to charge homeless individuals for violating antihomeless laws saves them from the collateral consequences that follow criminal prosecution, which, among other hardships, may include loss of work and barriers to re-entering the workforce.[121]

#### 2. Diversion

Even when prosecutors bring criminal charges, they can use their discretion to redirect defendants out of the criminal justice system. Offenders may apply to their local prosecutor's office for their cases to be diverted, which would allow them to complete "an alternative program or sentence rather than

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118 *See* Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 928 (1960); *cf., e.g.*, Ian Urbina, *It's a Fork, It's a Spoon, It's a . . . Weapon?*, N.Y. TIMES (Oct. 11, 2009), https://www.nytimes.com/2009/10/12/education/12discipline.html [https://perma.cc/9T5U-VAAZ] (reporting the suspension of a six-year-old boy from first grade under a "zero-tolerance policy" that prohibited "the possession of weapons on school grounds" after he brought a three-in-one Cub Scout utensil that served as a fork, spoon, and knife to school).

119 Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

120 *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1531 (1981).

121 Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 672.

incarceration."[122] The criminal case against the defendant is then dismissed upon satisfaction of the diversion program's conditions.[123] Diversion programs are often used for drug offenses, but are now available for many other minor crimes.[124] Approximately seventy diversion programs have been set up across the country to divert homeless individuals out of the criminal justice system for nonviolent, low-level offenses, including violations of antihomeless laws.[125] These initiatives not only spare the state the cost—and the defendant the harm—that accompanies criminal prosecution, but also help rehabilitate rather than incarcerate offenders.

### B. *Protecting the Working and Job-Seeking Homeless from Prosecution*

The *Martin* panel and other federal courts that have struck down antihomeless laws may well have believed that it would be unjust to punish the homeless for their life-sustaining conduct. After all, many unsheltered homeless people have nowhere but public spaces to live, so it is difficult, if not impossible, for them to avoid breaking these laws. Striking down these laws, however, undermines the holding that *Marks* compels lower courts to glean from *Powell*—that any voluntary conduct, even if it is allegedly compelled, may be punished.

To address the homelessness crisis while still comporting with the Constitution and Supreme Court precedent, prosecutors should adopt policies that aim to apply antihomeless laws more fairly.

Namely, when prosecutors know that a homeless defendant is seeking to enter, or is already in, the workforce, they should decline to file charges against that person. In cases where charges are filed, homeless defendants who prove their employment or job-seeking status should be diverted out of the criminal justice system and into homeless court programs.

These policies would be easy to implement, as evidenced by the dozens of already successfully operating homeless diversion programs. Police officers interacting with homeless individuals who have violated antihomeless laws

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122 *See* ACLU OF KAN., CHOOSING INCARCERATION: KANSAS PROSECUTORS' REFUSAL TO USE DIVERSION AND THE COST TO COMMUNITIES 4 (2018), https://www.aclukansas.org/sites/default/files/field_documents/choosing_incarceration_-_aclu_report_on_diversion_in_kansas_-_updated_january_2018__0.pdf [https://perma.cc/PJU9-H36D].

123 *Id.*

124 *See, e.g.*, CTR. FOR PRISON REFORM, DIVERSION PROGRAMS IN AMERICA'S CRIMINAL JUSTICE SYSTEM 13-16 (2015), https://www.centerforprisonreform.org/wp-content/uploads/2015/09/Jail-Diversion-Programs-in-America.pdf [https://perma.cc/A49V-D3J4].

125 *See* Steve Binder & Matt Wechter, *Homeless Courts: Recognizing Progress and Resolving Legal Issues that Often Accompany Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (July 9, 2020), https://www.usich.gov/news/homeless-courts-recognizing-progress-and-resolving-legal-issues-that-often-accompany-homelessness [https://perma.cc/34YT-WZ3C].

should inquire into those individuals' employment status. If a homeless person claims to be working or seeking work, the officer can assess the assertion's reliability before documenting it in the police report. Supporting evidence, such as a pay stub or employee badge, can help verify employment. Even without these kinds of supporting materials, police officers may credit a homeless individual's claim about his employment status. Given their face-to-face contact with homeless individuals, officers are well suited to evaluate the homeless individual's credibility. The individual's employment status (employed, unemployed and seeking work, or unemployed and not seeking work) should then be recorded in the police report.

As is often the case, prosecutors would then rely on the information captured in the police report—here, the homeless offender's employment status—to make their charging decisions.[126] Prosecutors should decline charges when the police report includes a finding that the homeless person is working or seeking work. But even if a homeless offender refuses to speak to the police officer or is unemployed and not seeking work, prosecution should not be a foregone conclusion.

If charges are brought, homeless individuals should be diverted into a program that promises dismissal of the case against them if they prove that they are working or looking for a job within a predetermined period of time—say, sixty days from the date of arrest. As a first step toward accepting responsibility for their offense, homeless defendants should be required to enroll with a caseworker at a homeless shelter who handles the program's admission process.[127] Once enrolled, defendants would work with caseworkers to look for and obtain employment.[128] Caseworkers are in a position to both help homeless individuals look for work and verify that they have done so in satisfaction of the program's terms.[129] Defendants who begin to look for work or find a job would then be put on the calendar for the next homeless court hearing, a special court session held at a host homeless shelter.[130] These defendants would also be provided with an advocacy letter verifying their employment status.[131] At the subsequent homeless court hearing, the homeless defendant would present the letter to the prosecutor, who will then confirm the homeless individual's employment status and ask the court to

126 *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1361-62 (1997) ("Typically, the prosecutor will make the charging decision by consulting the report the police have provided.").

127 *See* Stephen R. Binder, *The Homeless Court Program: Taking the Court to the Streets*, FED. PROB., June 2001, at 14, 17.

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

dismiss the case.[132] Ultimately, homeless defendants could leave court without a criminal record and with the hope of becoming financially independent.

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This proposal not only avoids reinforcing the Ninth Circuit's misinterpretation of the Court's holdings in *Robinson* and *Powell* but also remedies the under- and overinclusive nature of the *Martin* rule.

First, it avoids the underinclusive nature of *Martin*'s reliance on the Eighth Amendment, which does not prevent states from punishing homeless people who can sleep elsewhere but nonetheless choose to sleep in public spaces.[133] Even those homeless individuals who can comply with shelter curfews may still prefer to sleep on the street for safety or health reasons or because it allows them to stay together with family members from whom they would be separated in the shelter system.[134] Under the proposal outlined above, working and job-seeking homeless individuals who sleep in public would not be prosecuted, regardless of whether a shelter bed is available.

Second, by linking prosecution with employment status rather than broad notions of involuntariness, this Comment's proposal bypasses the overinclusive aspect of the Ninth Circuit's holding as well. Although this proposal leaves homeless individuals who are neither working nor seeking work vulnerable to prosecution, that is a feature, not a bug.

The homeless population that remains subject to prosecution under the approach outlined above can be divided into two groups. First, there are unemployed homeless individuals who are physically and mentally able to work but are neither employed nor seeking employment. This Comment's proposal strives to motivate those individuals to seek work and obtain an income that will allow them to afford housing, ending the devastating cycle of homelessness.[135] Fear of losing Social Security income and Medicaid benefits "has proved to be the greatest deterrent to employment," making it difficult to put some homeless individuals on the path toward self-sufficiency.[136] This proposal helps offenders overcome this deterrent: if offenders can avoid prosecution, even after they are charged, by entering into a homeless court

132 *Id.*

133 *See* Martin v. City of Boise, 920 F.3d 584, 617 n.8 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019).

134 *See supra* Section III.B.

135 *See* Shaheen & Rio, *supra* note 7, at 349 (arguing that external factors can successfully motivate homeless job seekers to seek work).

136 MARTHA R. BURT, URB. INST., EVALUATION OF *LA'S HOPE*: ENDING CHRONIC HOMELESSNESS THROUGH EMPLOYMENT AND HOUSING 9 (2007), https://www.urban.org/sites/default/files/publication/31556/411631-Evaluation-of-LA-s-HOPE.PDF [https://perma.cc/MX2C-V86S].

program, they will connect with caseworkers who can help them find work and get back on their feet. Second, this proposal does not cover the subset of homeless individuals who are not able to maintain employment or seek work, perhaps due to mental illness. This group of people already has the least to lose from a criminal prosecution—they cannot be employed or seek employment. This group does, however, stand to benefit from this proposal. The decrease in the homeless population that will result from the employment and housing of those who can work will allow existing mental health services to more easily meet the needs of those that need them the most.

## CONCLUSION

Antihomeless laws "reflect the hope rather than the expectation" that homelessness can be solved by a stroke of a legislature's pen.[137] Indeed, cycling through the criminal justice system makes it significantly harder for homeless individuals to escape their plight. Working or job-seeking homeless persons—those closest to achieving sustainable independence—have the most to lose from criminal prosecution and conviction.

The doctrinal and policy shortcomings of the Ninth Circuit's holding in *Martin* underscore the need to rethink the role courts play in the homelessness crisis. The legal cure forged by the court—namely, striking down antihomeless laws for violating the Eighth Amendment—misreads Supreme Court precedent and fails to target the root cause of the homelessness crisis.

If prosecutors decline to prosecute, and offer a diversion program to, those who are in or looking to join the workforce, much of the harm antihomeless laws inflict would be alleviated. This use of prosecutorial discretion not only accords with communal notions of fairness, but also, especially during a pandemic, may save the lives of some of society's most vulnerable citizens.

137 Frank J. Remington & Victor J. Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481, 493.

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