CAMPING AND THE CONSTITUTION

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INTRODUCTION: THE RISE OF A CONSTITUTIONAL RIGHT TO "SLEEP" ON PUBLIC PROPERTY

Legal protection for private property owners against trespass has an ancient lineage in Anglo-American common law,[1] a principle that retains its vitality today.[2] Indeed, a property owner's right to exclude anyone deemed unwelcome has been characterized as a "fundamental aspect of property ownership," if not "the "*sine qua non*" feature of property.[3] Governments, whether local, state, or federal, may also regulate the use of property that they hold in trust for the public,[4] which can include making trespass a criminal offense, in order to protect and promote the public safety, health, and welfare.[5]

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[1] *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 71 (1972) (noting that at common law a property owner may "expel" an unlawful occupant "by force, without being liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary, and does no wanton damage."); WAYNE R. LAFAVE, CRIMINAL LAW § 21.2, at 1081-89 (5th ed. 2010); PROSSER & KEETON ON THE LAW OF TORTS § 13, at 67-84 (W. Page Keeton Gen'l Ed., 5th ed. 1984); Page Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457 (1959).

[2] *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 350, 361 (2015) ("[P]eople still do not expect their property, real or personal, to be actually occupied or taken away."); RESTATEMENT (SECOND) OF TORTS § 50 (2012) (defining a trespasser as "a person who enters or remains on land in the possession of another without the possessor's consent or other legal privilege."); *id*. §§ 77-83 (identifying when a party may use reasonable, non-deadly force to prevent or terminate another's intrusion upon that party's land).

[3] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (noting that the "right to exclude" others is "universally held to be a fundamental element of the property right"); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (2021) (calling the right to exclude the "*sine qua non*" of property) (quoting Thomas W. Merrill, Essay, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998)).

[4] *See, e.g.*, U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]"); Berman v. Parker, 348 U.S. 26, 32–33 (1954) (citation omitted) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . . Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.").

[5] *See, e.g.*, Clark v. Community for Creative Nonviolence, 468 U.S. 288, 297 (1984) (quoted *infra* note 8); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions."). It should make no difference that a city uses the

For some time now, advocates for the homeless have sought to find a place in the Constitution guaranteeing their clients a right to live somewhere, at least on public land.[6] To date, the Supreme Court of the United States has turned aside such claims. In *Lindsey v. Normet*, the Court held that, because there is no constitutional right to occupy a home owned by someone else, the government may grant landowners civil remedies for trespass.[7] In *Clark v. Community for Creative Nonviolence*, the Court held that the Free Speech Clause does not prohibit the National Park Service from barring sleeping and camping in national parks even when it is done as a form of symbolic speech protesting the inadequacy of homeless shelters.[8] And on numerous occasions, the Court has expressly rejected the argument that the Constitution

criminal law to enforce such prohibitions. It certainly makes no difference to the Ninth Circuit, which has struck down both criminal laws (*Martin*) and civil sanctions (*Grants Pass*).

[6] Sleeping on public property is merely the beachhead; the end game is a right to government-provided housing. *See* ALICE S. BAUM & DONALD W. BURNES, A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS 137 ("[S]imply providing housing is *not* the primary solution to the problem of homelessness because the lack of affordable housing is *not* the primary cause. Without help for their many disabling conditions, most of the homeless will continue to be unable to maintain themselves in permanent housing.") (emphasis in original), 138 ("the absence of affordable housing as a primary cause of homelessness is advanced by advocates mainly for political reasons—to promote consideration of systemic macroeconomic problems that they believe need to be addressed. . . . By first mobilizing for the right to shelter for the homeless advocates were actually pushing for a national entitlement to housing, an entitlement that extends well beyond helping the homeless.") (1993); MICHAEL SHELLENBERGER, SAN FRANSICKO: WHY PROGRESSIVES RUIN CITIES 17 (2021) ("Progressives have long defended the right of the homeless to camp in public places. . . . By the early 1990s, advocates for the homeless were hosting seminars where they taught people how to camp out in the city." (footnote omitted)); *id.* at 113–14 ("In his memoir, former San Francisco mayor Willie Brown writes, 'I discovered factors—some bureaucratic, some political—working in a kind of evil synthesis with each other that really prevented the long-term homeless from entering the system. Backing this up was a collection of so-called activists with heavy political clout who absolutely believed (and still believe) that homeless people should have a right to live on the street. They believed that homeless people had an absolute right to do everything they were doing, no matter how harmful to themselves or to the rest of the citizenry.'" (quoting WILLIE L. BROWN, JR., BASIC BROWN: MY LIFE AND OUR TIMES 272–73 (2011))). Even the term "homeless" was created for political purposes. SHELLENBERGER, *supra*, at 135–36 ("'It was advocates who coined the phrase, "homeless,"' said the University of Pennsylvania's Dennis Culhane. 'They're the ones who thought "homeless" would be a soft, fluffy term for the public to be sympathetic to.' The term was used as a way to advocate for public subsidies for housing. 'The anti-homelessness movement chose the term "homelessness,"' wrote Gowan, 'as opposed to "transient," "indigent," etc., for its implication that the biggest difference between the homeless and the housed was their lack of shelter.' Words are powerful. The word 'homeless' not only makes us think of housing, it also makes us *not* think of mental illness, drugs, and disaffiliation. . . . The poor farming families like the Okies who fled to the Bay Area in 1933 were utterly unlike the crack-, heroin-, and alcohol-abusing single homeless men of San Francisco in 1983. The two groups were homeless for completely different reasons and needed completely different things to improve their lives." (footnotes omitted)). The Constitution does not run against private parties, *see* United States v. Morrison, 529 U.S. 598, 621–24 (2000); Civil Rights Cases, 109 U.S. 3 (1883), and the Takings Clause bars the government, including the courts, from physically occupying private land, even if only for a brief period, *see Cedar Point Nursery*, 141 S. Ct. at 2071–78. The result is constitutional litigation over the issue whether the government must house the homeless.

[7] 405 U.S. 56, 74 (1972) ("We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.").

[8] 468 U.S. 288, 297 (1984) ("If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.").

requires the government to dispense one or another type of affirmative financial or in-kind benefit.[9] Until recently, the belief that the Constitution guarantees shelter for the homeless should have been seen as a pipe dream.

Nonetheless, in two cases decided in the past five years—*Martin v. City of Boise*[10] and *Johnson v. City of Grants Pass*[11]—the U.S. Court of Appeals for the Ninth Circuit gave every homeless person a right to sleep or camp on government property if there is no indoor shelter for them. The Ninth Circuit read two decisions by the Supreme Court of the United States—*Robinson v. California*[12] and *Powell v. Texas*[13]—as forbidding the government from punishing anyone for an involuntary act. Given the biological necessity to sleep, sleeping, with some (unspecified) accoutrements, is an involuntary condition that cannot be punished.[14]

The Ninth Circuit held in *Martin* and *Grants Pass* that the Eighth Amendment Cruel and Unusual Punishments Clause bars imposing criminal or civil sanctions against the homeless for sleeping on government-owned property if there is no "secular shelter bed" for them to occupy.[15] As authority for that ruling, *Martin*

[9] *See, e.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457–58 (1988) (declining to rule that there is a constitutional right to public education); Harris v. McRae, 448 U.S. 297, 312–18 (1980) (same, government funding of abortion); Jefferson v. Hackney, 406 U.S. 535, 551 (1972) (ruling that states may make nondiscriminatory choices about how to allocate welfare funds). *See generally* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border.").

[10] 902 F.3d 1031 (9th Cir. 2018), *amended and reissued on denial of reh'g and reh'g en banc*, 920 F.3d 584 (2019). *Martin* relied on an earlier Ninth Circuit decision—*Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)—that was later vacated when the case settled.

[11] 50 F.4th 787 (9th Cir. 2022), *amended and reissued on denial of reh'g and reh'g en banc*, 72 F.4th 868, 896 (2023) ("We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go."), *cert. granted*, No. 23-175, 2024 WL 133820 (U.S. Jan. 12, 2024); *see also* Coalition on Homelessness v. San Francisco, 90 F.4th 975 (9th Cir. 2024) (relying on *Martin* and *Grants Pass*).

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

[13] 392 U.S. 514, 548–54 (1968) (White, J., concurring in the result).

[14] *Martin*, 920 F.3d at 615–18. The Ninth Circuit left uncertain just what the additional equipment may include. *See id.* at 618 ("The Camping Ordinance therefore can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements. We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter."); *Grants Pass*, 72 F.4th at 874–75 ("City ordinances preclude homeless persons from using a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within the City's limits."); *id.* at 895 ("Beyond prohibiting bedding, the ordinances also prohibit the use of stoves or fires, as well as the erection of any structures. The record has not established the fire, stove, and structure prohibitions deprive homeless persons of sleep or 'the most rudimentary precautions' against the elements. Moreover, the record does not explain the City's interest in these prohibitions. Consistent with *Martin*, these prohibitions may or may not be permissible. On remand, the district court will be required to craft a narrower injunction recognizing Plaintiffs' limited right to protection against the elements, as well as limitations when a shelter bed is available." (footnotes omitted)); *id.* at 896 ("We hold, where *Martin* did not . . . that 'sleeping' in the context of *Martin* includes sleeping with rudimentary forms of protection from the elements, and that *Martin* applies to civil citations where, as here, the civil and criminal punishments are closely intertwined."); *id.* ("We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go.").

[15] *Martin*, 920 F.3d at 617 ("We hold only that so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless

concluded, first, that the Supreme Court's *Robinson* and *Powell* decisions prohibit the state from criminally punishing someone for conduct over which he or she has no voluntary control, and, second, that sleep is a "biologically essential" function to which everyone must succumb at some point.[16] Those decisions create a right to occupy property out of phrases torn from their context. They are new examples of that court's willingness to legislate solutions to highly disputed social policy problems under the aegis of constitutional provisions not remotely pertinent.[17]

The Ninth Circuit's decisions made a hash out of the law developed under the Cruel and Unusual Punishments Clause for the past 50-plus years. What is worse, the rulings constitutionalize a serious social policy issue that no honest party could plausibly say the Framers remotely sought to address through the Cruel and Unusual Punishments Clause. Homelessness is a difficult enough problem to manage when it is short-term or episodic and occurs due to temporary economic misfortune (being let go from work) or the cyclical nature of the work some individuals pursue (resort-area occupations). The problem becomes horribly complicated when, as often arises in the case of the chronically homeless, drug use and mental illness consign their victims to a life of penury and misery. Those factors cannot be ignored, as the Ninth Circuit did. Long-term use of opioids (e.g., fentanyl) or stimulants (e.g., "crack" cocaine or methamphetamine) corrodes a user's soul, dissolves whatever bonds exist with one's family, and can lead a user to violently lash out at anyone nearby.

Homelessness can elicit pathos, empathy, and compassion in the hearts of observers. So moved, commentators have discussed this problem and offered various proposals to address it.[18] The Constitution, however, does not demand any particular response. We soon will know what the Supreme Court thinks because on January 12, 2024, it decided to review the Ninth Circuit's ruling in *Grants Pass*.[19] This Article will explain, in Part I, why the Ninth Circuit's decisions cannot be reconciled with the text and history of the Cruel and Unusual Punishments Clause. Part II will then discuss why the Supreme Court's opinions do not demand the result dictated by the Ninth Circuit. Part III will also explain why there is no good reason to create

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individuals for involuntarily sitting, lying, and sleeping in public. That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." (footnote and punctuation omitted)). The Ninth Circuit's *Grants Pass* ruling added the "secular shelter bed" requirement, perhaps to prevent a municipality from counting the beds available at sectarian organizations that offer shelter for the homeless. Churches have traditionally provided the homeless with shelter, so excluding them discriminates against religious organizations by discounting their ability to fulfill their charitable missions, and loads the dice against municipalities. *Cf.* Carson v. Makin, 142 S. Ct. 1987, 1996–2002 (2022) (sectarian schools may not be excluded from a state tuition program because of their religious exercise). Besides, *beds* aren't "secular" or "sectarian"; only people or organizations can be because they may choose their orientation towards religion. So, if the point of the exercise is to guarantee the homeless a place to *sleep*—an activity that, by definition, is unconscious—it makes no sense to fret whether the environment contains a Star of David, a crucifix, a crescent, a statue of Buddha, or a frame of Robin Williams from *The Fisher King*.

[16] *Martin*, 920 F.3d at 588 (Berzon, J., concurring in the denial of rehearing en banc) (Judge Berzon also authored the majority opinion).

[17] *See* Hon. Diarmuid F. O'Scannlain, *A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Through October Term 2010*, 87 NOTRE DAME L. REV. 2165 (2012).

[18] *See, e.g.*, MARYBETH SHINN & JILL KHADDURI, IN THE MIDST OF PLENTY: HOMELESSNESS AND WHAT TO DO ABOUT IT (2020).

[19] Grants Pass v. Johnson, No. 23-175, 2024 WL 133820 (U.S. Jan. 12, 2024).

an entirely new rule of constitutional law to address this sad and vexing societal quandary.

I. THE TEXT AND HISTORY OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

The Cruel and Unusual Punishments Clause is a bizarre place to look for a restraint on what conduct the government may outlaw. Its text focuses on "punishment,"[20] not on "trials," which is the province of the Sixth Amendment,[21] let alone "crimes" or "offenses," concepts with deep common-law roots that would have been well known to the Founding Generation.[22] The Constitution expressly addresses Congress's criminal-law making authority only twice: once in Article I, when it empowers Congress to "define and punish" the crime of "Piracy," as well as "Offences against the Law of Nations,"[23] and again in Article III, when it defines the offense of "Treason" to "consist only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."[24] The Framers defined that crime in the Constitution's text because "they did not trust elected officials to protect political dissent,"[25] and the Supreme Court has held that Congress may prohibit camping on federal property notwithstanding the restraint that such an action might have on symbolic political speech.[26] Those provisions should tell the honest reader that Congress may otherwise define federal crimes.

Additional support for that conclusion can be seen in the fact that several other constitutional provisions expressly authorize Congress to define offenses and affix punishments. The Coinage Clause empowers Congress to establish a national currency and fix its value,[27] while the Counterfeiting Clause allows Congress (not surprisingly) to punish counterfeiting.[28] The Define and Punish Clause authorizes Congress to define the crime of "Piracy," as well as "Offences against the Law of

[20] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[21] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

[22] English criminal law predates the Norman Conquest. *See* Paul J. Larkin, Jr. *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 329 (2016). Each colony had a criminal code. *See, e.g.*, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 20–27 (1993); DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776 (1974); RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA (2000); HUGH F. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA (1965).

[23] U.S. CONST. art. I, § 8, cl. 10 ("[The Congress shall have Power] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . .").

[24] U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").

[25] Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and* Kahler v. Kansas, 43 HARV. J.L. & PUB. POL'Y 85, 97 (2020). *See generally* Cramer v. United States, 325 U.S. 1, 8–15 (1945); Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 226 (1944) (Part I); Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395 (1945) (Part II); Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 806 (1945) (Part III); Charles Warren, *What Is Giving Aid and Comfort to the Enemy?*, 27 YALE L.J. 331 (1918); Sanford Jay Rosen, *The Law of Treason*, 51 TEX. L. REV. 817 (1973).

[26] *See* Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 297 (1984) (discussed *supra* note 8 and accompanying text).

[27] U.S. CONST. art. I, § 8, cl. 5 ("[The Congress shall have Power] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures . . . .").

[28] U.S. CONST. art. I, § 8, cl. 6 ("[The Congress shall have Power] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . . .").

Nations."[29] The Military Regulation Clause vests Congress with the power to establish a separate criminal code and criminal justice system for the military.[30] Finally, several later amendments empower Congress to adopt legislation to enforce various constitutional guarantees,[31] and that enforcement can come in the form of a criminal prosecution.[32] Those clauses rely on the political process to fill out the remainder of the federal criminal code other than treason,[33] and they do not limit Congress's ability to define the elements of those offenses.

Moreover, the term "punishment" in the Cruel and Unusual Punishments Clause presumes that whoever once was just the "accused" for Fifth and Sixth Amendment purposes[34] has now been found guilty. As such, the text of that clause alone proves that it has no bearing on the antecedent issue of how a legislature may define offenses. Having been convicted, the government may sanction him as the law authorizes, as long as that "punishment" is not "cruel and unusual."[35] Said differently, "by the time of sentencing, the government's power to define crimes has dropped out of the picture; what matters is its power to punish."[36] That conclusion should end any discussion of the use of that clause to define a punishable offense.

Interestingly, the constitutional text does create certain *defenses* to crimes. The Bill of Attainder Clauses[37] bar the federal or state legislatures from enacting a law that names and convicts someone of a crime without a trial.[38] The *Ex Post Facto*

[29] U.S. CONST. art. I, § 8, cl. 10 ("[The Congress shall have Power] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ."); *see* United States v. Smith, 18 U.S. (5 Wheat.) 153, 157–62 (1820) (defining "piracy" as robbery and murder on the high seas).

[30] U.S. CONST. art. I, § 8, cl. 14 ("[The Congress shall have Power] To make Rules for the Government and Regulation of the land and naval Forces . . . ."); *see also* 10 U.S.C. §§ 801–946 (2018) (the Uniform Code of Military Justice).

[31] *See* U.S. CONST. amends. XIII, § 2; XIV, § 5, XV, § 2; XVIII, § 2 (repealed); XIX, cl. 2; XXI, § 2; XXIV, § 2; XXVI, § 2.

[32] *See, e.g.*, 18 U.S.C. §§ 1581–1597 (2018) (prohibiting slavery, peonage, and trafficking in humans).

[33] Other clauses implicitly authorize Congress to define crimes. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13–15 (1969) (arguing that Congress has the inherent authority to protect the federal interests embodied in the substantive guarantees of federal lawmaking power in Article I, § 8). The Excise Tax Clause enables Congress to raise revenue via "Taxes, Duties, Imposts and Excises," U.S. CONST. art. I, § 8, cl. 1, and Congress has made smuggling a federal offense, 18 U.S.C. § 545 (2012). The Commerce Clause enables Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. It permits Congress to punish criminally anyone who violates an act of Congress. *Id.* The Seat of Government Clause permits the federal government to use land ceded by Virginia and Maryland as the nation's capital, U.S. CONST. art. I, § 8, cl. 17, which implicitly empowers Congress to create a criminal code for what we now know as the District of Columbia. *See, e.g.*, 18 U.S.C. § 7(3) (2012); D.C. CODE §§ 22-101 to -5215 (2013 & Supp. 2019). Finally, even if those provisions did not implicitly enable Congress to use the criminal law for enforcement, the Article I Necessary and Proper Clause would grant Congress that power. U.S. CONST. art. I, § 8, cl. 18.

[34] The Fifth Amendment is twice relevant. The Indictment Clause demands that no one be brought to trial "for a capital, or otherwise infamous crime," until a grand jury has indicted him, and the Due Process Clauses prohibit the government from depriving anyone of "life, liberty or property" without first affording him "due process of law," which requires proof of guilt at a trial (or upon a guilty plea). U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law."); Chapman v. United States, 500 U.S. 453, 465 (1991). The Sixth Amendment establishes requirements for such a "trial."

[35] *See supra* note 20.

[36] Larkin & Canaparo, *supra* note 25, at 132–33.

[37] U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed."); *id.* § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder . . . .").

[38] *See, e.g.*, Nixon v. Adm'r Gen. Servs., 433 U.S. 425, 468–84 (1977); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323–25 (1866); 2 WILLIAM BLACKSTONE, COMMENTARIES *388.

Clauses[39] keep legislatures from retroactively applying a statute defining a new crime or enhancing the penalty for an old one.[40] Several Bill of Rights provisions also serve as defenses. The First Amendment takes away from Congress the authority to "make . . . [any] law" trespassing on certain civil liberties, such as freedom of speech or the press, the right peaceably to assemble or to petition the government for redress of grievances, and the right to adopt whatever religious beliefs a person finds most attractive.[41] Nowhere does the Constitution allow one to defend against a public trespass offense on the ground that he or she has nowhere else to sleep.

The case of *United States v. Marion* is instructive in this regard.[42] The defendants argued that the government violated their Sixth Amendment Speedy Trial Clause by waiting three years after the crime allegedly occurred before charging them. Justice Byron White made short work of that argument. He explained that the Speedy Trial Clause "has no application" until an offender "in some way becomes an '*accused*,'" which did not happen in *Marion* until the grand jury returned its indictment.[43] "On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution."[44] The logic of *Marion*'s approach to constitutional interpretation applies here. Just as the term "accused" limits the reach of the Speedy Trial Clause to individuals charged with a crime, so too the term "punishments" limits the reach of the Cruel and Unusual Punishments Clause by excluding the logically and legally antecedent issue of how a punishable crime can be defined.

What the text shows is that—but for treason, bills of attainder, and *ex post facto* laws—the Constitution trusts the public and their elected representatives to decide what conduct should be made a crime and what defenses should be available to someone formally charged with an offense. The Constitution does not bar the federal, state, or municipal governments from providing shelter for the homeless, but it also does not require those governments to provide that service. The Constitution leaves the acquisition and use of sleeping quarters to each individual, family, church, or private organization.

The history of the Cruel and Unusual Punishments Clause confirms what its text illuminates.[45] The clause is the child of the English Bill of Rights of 1689 and section 9 of the 1776 Virginia Declaration of Rights, which prohibited "cruel and

[39] U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."); *id.* § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . .").

[40] *See, e.g.*, Collins v. Youngblood, 497 U.S. 37, 41–44 (1990); Weaver v. Graham, 450 U.S. 24, 28–31 (1981).

[41] U.S. CONST. amend. I; *see, e.g.*, United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 420 (1989).

[42] 404 U.S. 307 (1971).

[43] *Id.* at 313 (emphasis added).

[44] *Id.*

[45] For the history of that clause, see, for example, Harmelin v. Michigan, 501 U.S. 957, 966–75 (1991) (opinion of Scalia, J.); Johnson v. City of Grants Pass, 72 F.4th 868, 927–28 (9th Cir. 2023) (O'Scannlain, J., respecting the denial of rehearing en banc), *cert. granted*, No. 23-175, 2024 WL 133820 (U.S. Jan. 12, 2024); 4 BLACKSTONE, *supra* note 38, *369–72; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 750–51 (Boston, Hilliard, Gray & Co. 1833); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839 (1969); Larkin & Canaparo, *supra* note 25, at 134–36.

unusual punishments."[46] Historians generally agree that Parliament adopted the English Bill of Rights in response to the grotesque and unlawful sentences imposed by the King's Bench Lord Chief Justice Jeffreys during the reign of King James II.[47] Regardless of which of those punishments outraged Parliament, its members sought only to outlaw physically and hideously cruel penalties imposed by the state, not to tie its own hands as to what could be made a crime. (And, of course, any claim that Parliament sought to guarantee the homeless shelter on the Crown's land or within its own walls would have qualified the claimant for a trip to Bedlam.) In this country, the Framers' generation and its successors had the same goal in mind: merely to prohibit hideously painful or unauthorized sentences.[48]

Interestingly, the Ninth Circuit ignored the text and history of the Cruel and Unusual Punishments Clause, even though the Supreme Court had made it clear that both are critically important to a proper understanding of that provision.[49] Instead, the Ninth Circuit relied entirely on Supreme Court decisions—in fact, on just one majority opinion, *Robinson v. California*,[50] and on Justice Byron White's concurring opinion in another case, *Powell v. Texas*.[51] Accordingly, to the Court's decisions, particularly those two, we now turn.

II. THE SUPREME COURT'S PRECEDENTS

Nearly all of the Court's Eighth Amendment decisions focus on one aspect or another of the punishment of convicted offenders and address issues such as whether some punishments are ever permissible (such as the death penalty) and whether some offenders can be sanctioned more harshly than others (such as recidivists versus first-time offenders).[52] Those decisions—likely 99 percent of the Court's Eighth Amendment case law—have this in common: they address the permissible sanctions for an offense and don't tell legislatures what conduct may be deemed a crime. Only two cases cited by the Ninth Circuit even purport to do so.

Robinson v. California held unconstitutional a California law making mere addiction to narcotics a crime, with a punishment of at least 90 days' incarceration upon conviction.[53] The likely rationale for the statute was to simplify narcotics

[46] An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M. c. 2, § 10 (Eng.); Va. Const. of 1776 (Bill of Rights), § 9; *see Harmelin*, 501 U.S. at 966–74 (opinion of Scalia, J.).

[47] *Harmelin*, 501 U.S. at 967–74 (opinion of Scalia, J.). Historians differ only over what precise atrocities outraged Parliament. One theory focuses on the vicious sentences—which included disemboweling, beheading, and drawing and quartering—that Jeffreys handed down during the "Bloody Assizes" following an unsuccessful 1685 rebellion. The other theory posits that parliament responded to the extraordinary and legally unauthorized sentence—which included two floggings and life imprisonment accompanied by five exposures on pillory a year—that Jeffries imposed on Titus Oates; a Protestant cleric convicted of committing perjury for making false accusations against fifteen Catholics who were executed for organizing the 1679 "Popish Plot" to overthrow King Charles II. *Id.*

[48] *See, e.g.*, *Harmelin*, 501 U.S. at 975–85 (opinion of Scalia, J.) (discussing the interpretations of the clause from the First Congress to the late nineteenth century); Granucci, *supra* note 45, at 842 (noting that the floor debates in the First Congress, which proposed the Clause, "confirm the view that the cruel and unusual punishments clause was directed at prohibiting certain methods of punishment").

[49] *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112, 1122–23 (2019).

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

[51] 392 U.S. 514, 548–54 (1968) (White, J., concurring in the result).

[52] Larkin & Canaparo, *supra* note 25, at 136–38 & nn.265–75.

[53] 370 U.S. 660, 660 n.1, 667 (1960).

prosecutions by eliminating the need to establish the facts underlying possession and to use the fact of addiction as a proxy for the likelihood that addicts would commit street crimes (such as theft) to obtain the money necessary to purchase drugs.[54] Moreover, *Robinson* arbitrarily narrowed the relevant time period to a snapshot—the status of addiction—thereby excluding all anterior-in-time conduct—such as acquiring and possessing narcotics—that lead to that condition, along with follow-up conduct—such as petty theft—that drug abusers commit to purchase additional quantities of drugs.[55] The Supreme Court was troubled by what it saw as an effort to punish criminally an affliction that "may be contracted innocently or involuntarily."[56] As Justice Potter Stewart memorably put it, 90-days confinement is not inherently cruel or unusual—in fact, a state may involuntarily confine a narcotics addict for treatment[57]—but "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[58] Accordingly, the Court held the California law unconstitutional.

Robinson sent shock waves throughout the legal and academic communities because it suggested that the Cruel and Unusual Punishments Clause barred criminal liability for involuntary conduct. Judges and commentators sought to divine whether the Supreme Court had effectively constitutionalized the right to possess and use alcohol and illicit drugs because alcoholics and addicts cannot withstand their overwhelming internal desire to obtain and use them.[59] That interpretation

[54] *See* Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 70 (1968) ("California, surely, sought to punish 'being an addict' not from any abhorrence for the status but because addicts *act*, that is, they use drugs, and some are tempted to commit crimes to obtain money to buy drugs."); Note, *Public Intoxication Convictions and the Chronic Alcoholic*, 82 HARV. L. REV. 103, 107 n.19 (1968) ("A state may well have valid reasons for punishing the status of being an addict, since it simplifies the problem of enforcement by making proof of actual use of drugs unnecessary and at the same time anticipates future antisocial acts almost certain to occur.").

[55] *See* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 601–02 (1981) ("Even if we should not blame people for *being* sick, we may well blame them for *becoming* sick. The addict may seem blameless in the narrow time frame, but in a broader time frame he may well be blameworthy. Certainly, it is not at all uncommon or bizarre for a parent to blame (and punish) a child who goes out of the house in a storm without adequate raingear for *getting* a cold, even though the same parent would not punish the child for the "status" of *being* ill. Venereal disease is another clear case: That VD is generally considered a disease hardly precludes us from blaming its victims, because they *contracted* it through *earlier* voluntary acts.").

[56] *Robinson*, 370 U.S. at 667.

[57] *Id.* at 664–65.

[58] *Id.* at 677.

[59] *See*, *e.g.*, Sweeney v. United States, 353 F.2d 10, 11 & n.2 (7th Cir. 1965) (questioning whether, in light of *Robinson*, it is permissible to revoke an alcoholic's probation for violating a condition of his probation that he refrain from alcohol use); United States *ex rel.* Swanson v. Reincke, 344 F.2d 260, 260–63 (2d Cir. 1965) (holding that *Robinson* did not immunize an alleged narcotics addict from the crime of unlawfully possessing narcotics); State *ex rel.* Blouin v. Walker, 154 So. 2d 368, 371–72 (La. 1963) (same, for the crime of habitually using narcotics); People v. Hoy, 143 N.W.2d 577, 578 (Mich. Ct. App. 1966) (ruling that it is not a cruel and unusual punishment to imprison an alcoholic for the crime of being drunk and disorderly); City of Seattle v. Hill, 435 P.2d 692, 698–99 (Wash. 1967) (en banc) (holding that *Robinson* did not immunize an alcoholic from the crime of public intoxication); Browne v. State, 129 N.W.2d 175, 179 (Wis. 1964) (ruling that *Robinson* did not immunize an alleged narcotics addict from the crime of using narcotics); Peter Barton Hutt, *Recent Forensic Developments in the Field of Alcoholism*, 8 WM. & MARY L. REV. 343 (1967); Fred L. Lieb, *Cruel and Unusual Punishment and the Durham Rule*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 227 (1968); John M. Murtagh, *Arrests for Public Intoxication*, 35 FORDHAM L. REV. 1 (1966); John B. Neibel, *Implications of* Robinson v. California, 1 HOUS. L. REV. 1 (1963); John A. Lowe, Note, *The Criminal Responsibility of Chronic Alcoholics*, 52 CORNELL L. REV. 470 (1967); James P. Manak, Recent Decision, *The Narcotics Problem: Outlook For*

might even have immunized offenders suffering from drug addiction from crimes, such as theft and other property crimes, that were necessary to obtain funds to purchase drugs. Beyond that, there was a question whether the Supreme Court had federalized the insanity defense.[60] Two federal courts of appeals ruled that the government could not punish an alcoholic for the crime of *public* intoxication because alcoholism is a disease beyond a person's voluntary control.[61] To resolve that confusion, the Supreme Court granted review in the other Eighth Amendment case on which the Ninth Circuit relied, *Powell v. Texas*.[62]

Convicted in a Texas state court of being intoxicated in public, in violation of state law, Powell argued that, under *Robinson*, he could not be held criminally responsible for the crime of public intoxication because he was an alcoholic and could not prevent himself from drinking.[63] In an opinion by Justice Thurgood Marshall, a plurality of the Court clearly rejected any suggestion that the Cruel and Unusual Punishments Clause constitutionalizes an involuntariness defense or creates a mental illness-based defense in one form or another. The plurality refused to use "the aegis of the Cruel and Unusual Punishment Clause" to become "the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."[64] Accordingly, nothing in the plurality opinion supports the Ninth Circuit's rule.

Justice Byron White, however, concurred only in the judgment. He agreed with the plurality that the statute in *Powell* was materially different from the one in *Robinson* because Texas did not make it a crime simply to be an alcoholic; *public* intoxication was the offense.[65] That difference was crucial. He reasoned that an alcoholic lawfully can be held responsible for "knowingly fail[ing] to take reasonable precautions against committing a criminal act."[66] As he explained, "the alcoholic is like a person with smallpox, who could be convicted for being on the street but not

Reform, 12 BUFF. L. REV. 605 (1963); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

[60] Larkin & Canaparo, *supra* note 25, at 141 & nn.293–95.

[61] Easter v. District of Columbia, 361 F.2d 50, 55 (D.C. Cir. 1966) (en banc) (ruling that Cruel and Unusual Punishments Clause forbids punishing an alcoholic for the crime of public drunkenness), and Driver v. Hinnant, 356 F.2d 761, 765 (4th Cir. 1966) (same).

[62] 392 U.S. 514 (1968).

[63] *Id.* at 517, 532.

[64] *Id.* at 533.

[65] *Id.* at 549 (White, J., concurring in the result) ("Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, and so could not constitutionally be convicted for drinking, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk.").

[66] *Id.* at 549–50 (White, J., concurring in the result) ("The trial court said that Powell was a chronic alcoholic with a compulsion not only to drink to excess but also to frequent public places when intoxicated. Nothing in the record before the trial court supports the latter conclusion, which is contrary to common sense and to common knowledge. The sober chronic alcoholic has no compulsion to be on the public streets; many chronic alcoholics drink at home and are never seen drunk in public. Before and after taking the first drink, and until he becomes so drunk that he loses the power to know where he is or to direct his movements, the chronic alcoholic with a home or financial resources is as capable as the nonchronic drinker of doing his drinking in private, of removing himself from public places and, since he knows or ought to know that he will become intoxicated, of making plans to avoid his being found drunk in public. For these reasons, I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place." (footnote omitted)).

for being ill, or, like the epileptic, who would be punished for driving a car but not for his disease."[67]

Properly read, *Robinson* and *Powell* offer homeless advocates no support for their Eighth Amendment claim. As the *Powell* plurality explained, *Robinson* only requires some act—known in common law as the *actus reus* of an offense—before the government may punish someone.[68] Justice White agreed. Texas law required that proof; only being drunk *in public* was an offense, not merely being drunk. The Ninth Circuit mistakenly read snippets from *Robinson* and *Powell* as prohibiting the government from criminalizing involuntary conduct, rather than merely requiring someone to commit a forbidden act. In effect, the Ninth Circuit's reading of *Robinson* and *Powell* resembles what has been said about how courts use legislative history of a statute: They look out over a crowd and pick out their friends.[69] Here, the "crowd" consists of *Robinson* and *Powell*, and the "friends" are whatever passages offered even a whisper of support for what the Ninth Circuit held,[70] which seems to have been a predetermined result.[71] Supreme Court decisions are not statutes, however, and should not be read as such.[72] That interpretation of the Supreme Court's precedents would turn the Supreme Court into the role of "the ultimate arbiter of the standards of criminal responsibility" that the Marshall plurality clearly eschewed, in *Powell*, and the White concurrence did not embrace.

Robinson and *Powell* do not undermine the ordinances in *Martin* or *Grants Pass*. Those cities have not made it a crime to be homeless or to fall asleep. Trespassing and anti-camping ordinances make it an offense to sleep or camp *on public property*. That distinction is an important one. The homeless are not punished for a physical compulsion; only when they choose to sleep on public property. The ordinances do no more than declare off limits for camping or sleeping property that governments hold in trust for all their residents to use for commerce, pleasure, exercise, or any other lawful pursuit. The cities' actions also further their interest in public health and safety, given that homeless encampments are seedbeds for activities such

[67] *Id.* at 550 (White, J., concurring in the result).

[68] 4 BLACKSTONE, *supra* note 38, *21 (noting that an offense consists of "a vicious will" and "an unlawful act consequent upon such vicious will").

[69] Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (attributing the remark to Judge Harold Leventhal).

[70] That's not an overstatement. For support, *Martin* quoted a passage from the Supreme Court's opinion in *Ingraham v. Wright*, 430 U.S. 651, 667 (1977), stating that "the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways," one of which was that "it imposes substantive limits on what can be made criminal and punished as such." Martin v. City of Boise, 920 F.3d 584, 615 (9th Cir. 2019). As authority for that proposition, *Ingraham* simply cited *Robinson* without elaboration. The issue in *Ingraham* was "whether the paddling of students as a means of maintaining school discipline constitutes cruel and unusual punishment in violation of the Eighth Amendment." 430 U.S. 651 at 653. After canvassing the Court's precedents, the Eighth Amendment's history, and the rather common-sense proposition that a schoolchild is not a convicted offender, the Court answered, "No." *Id.* at 664–71. Perhaps, the Ninth Circuit forgot that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute," Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979), because it did not explain why the passage in *Ingraham* could be torn asunder from the rest of the opinion. *Ingraham* added nothing to *Robinson*, and it is a fantasy to believe that *Ingraham*'s "paddling is not a criminal punishment" holding renders trespass and anti-camping ordinances unconstitutional to anyone, even the homeless.

[71] The Anatole France quote at the outset of the *Martin* opinion pretty much signals what is to follow. 920 F.3d at 603 ("'The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, to steal their bread.'")

[72] *See Reiter*, 442 U.S. at 341 (quoted *supra* note 70).

as illegal drug use, prostitution, public urination and defecation, and other activities that a city may outlaw. Those are entirely legitimate goals for any government.[73]

The response to that argument would be the following: By definition, the people at issue have nowhere else to go; that is what it means to be "homeless." Alcoholics can drink at home; the homeless cannot sleep at home because they have none. The only two options available to them are to sleep on private or public property. The former would run afoul of state trespass laws and the Fifth Amendment Takings Clause. Accordingly, unless the state can identify a third category of property that the homeless can use to sleep, public land is the only available alternative for someone with the inevitable biological need to sleep.

The problem with that response is that it assumes the government is the default party responsible to rectify hardships that it did not cause. The government is not responsible for a homeless individual's drug use or mental illness. The former is the fault of anyone who uses illicit drugs, and the latter is an unfortunate accident of nature. Homelessness is a tragic condition for numerous people. But so too is suffering from cancer, Lou Gehrig's Disease, or other maladies that shorten or trouble one's life. The Supreme Court has repeatedly held that the Constitution creates "no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[74] To be sure, the government has certain obligations where it deprives someone of the opportunity to care for himself or herself, as occurs in the case of prisoners.[75] But the government has no duty to ameliorate harms it did not cause, and neither the substance use, nor the mental illness, nor the poor economic straits that leave someone homeless can by placed at the government's door.

III. THE HUBRIS OF A JUDICIALLY INVENTED SOLUTION TO THE PROBLEM OF HOMELESSNESS

There is no good reason to look past the text and history of the Cruel and Unusual Punishments Clause to create a rationale that could justify the Ninth Circuit's rulings. The Ninth Circuit certainly offered none. In the Supreme Court, however, numerous organizations and academics will proffer different non-textual and non-historical justifications for the Ninth Circuit's bottom line. As explained below, it is difficult to find one that would justify what that court has ordered cities to do.

A. The Ninth Circuit's Rule Cannot Logically Be Cabined to a Right to "Sleep"

Ordinarily, enforcing a ban on a specific punishment—say, drawing and quartering—is a straightforward matter. Before trial or sentencing, a defendant can move for the court to hold that punishment unconstitutional. If the judge agrees, the case

[73] *See* Cox v. New Hampshire 312 U.S. 569, 574 (1941) (quoted *supra* note 5). Moreover, some of the homeless are better "identified as hustlers" than "victims," while "[o]thers evince a discernment bordering on entitlement." SHELLENBERGER, *supra* note 6, at 134, 135.

[74] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989); *accord* Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005); *supra* note 9.

[75] See Estelle v. Gamble, 429 U.S. 97, 103–04 (1976) (ruling that a state must provide medical care to prisoners because they cannot obtain it for themselves while incarcerated).

can move forward.[76] If the judge denies that motion, the defendant can raise the issue on appeal (and, if necessary, seek a stay of his sentence). Ultimately, enforcement is merely a matter of entering a judgment holding the challenged punishment forbidden and, if necessary, enjoining the government from refusing to respect the integrity of that judgment by trying to impose a forbidden punishment.

Not so, however, in the case of a constitutional right to sleep. Different people sleep at different times of the day (some are night owls and sleep late, others are early risers), for different periods (meth users will be up for days at a time, and then sleep for a comparable period), and perhaps more than once each day (some people might take a series of "cat naps"). How are municipalities to know when, and for how long, a person needs to sleep? Can they require the homeless to check in with a municipal official—a "sleeping attendant," who must be available, of course, on a 24/7/365 basis—to start the clock running? Or must a municipality trust a homeless party to use a yet-to-be-invented "sleeping meter" to record how long he or she may doze in any one location? That the Ninth Circuit did not even bother to address these simple permutations of its right to "sleep" shows that its right is hardly an administrable rule.

There is more.

Martin and *Grants Pass* sought to limit those rulings to a right to "sleep" on public property, because sleep is a biological necessity that no one can avoid. Sleep, however, is not the only biological necessity humans have. There are other ones (to keep this article at a "G" rating, let's just say that what goes in eventually must come out) that the Ninth Circuit studiously ignored even after they were brought to the majority's attention.[77] After all, if biological necessity is the lodestar for defining the reach of this new constitutional right, nothing in the logic of *Martin* and *Grants Pass* limits their rule to merely sleeping. The result would be that the homeless now have a constitutional right to fertilize public grass or concrete.[78]

It gets worse.

A court that reads the Cruel and Unusual Punishments Clause to grant the homeless a right to live on public property certainly won't stop there.[79] After all, the homeless also need drug treatment and medical care.[80] Under the Ninth Circuit's rationale, a municipality must provide these as well, or else no one would get a

[76] Put aside the complication that would arise if the government can immediately appeal a trial judge's ruling. That adds delay to the litigation process but does not change its nature.

[77] *See* Johnson v. City of Grants Pass, 72 F.4th 868, 935 (2023) (Milan Smith, J., dissenting from the denial of rehearing en banc).

[78] *See* Kerry Jackson, *Postcards from the Epicenter*, *in* KERRY JACKSON ET AL., NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND COMPASSION 5–6 (2021) ("Homelessness . . . puts the public at risk. This is particularly true in San Francisco, where the streets are so filthy, reports National Public Radio, 'that at least one infectious disease expert has compared the city to some of the dirtiest slums in the world.' . . . Complaints made to the city about the volumes of human waste in the streets have increased as the homeless population has risen. There were 1,748 complaints made in 2008. . . . Through October 2018, there were 20,400. Complaints of discarded needles have grown sharply as well." (footnote and punctuation omitted)).

[79] *See* Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 615 (2007) (noting the tendency of courts and litigants to seek to expand a principle to "the limit of its logic").

[80] *See* BAUM & BURNES, *supra* note 6, at 3 ("There is compelling evidence that the primary issue is not the lack of homes for the homeless; the homeless need access to treatment and medical help for the conditions that prevent them from being able to maintain themselves independently in jobs and housing.").

"good night's sleep." Of course, a blanket, a tent, some food, and drinking water are of little use if someone is seriously ill, which could lead to a constitutional right to free medical care, a right that the Supreme Court has expressly rejected under the Due Process Clause.[81] But the Supreme Court had also rejected a constitutional right to live on public property,[82] so ignoring two lines of precedent rather than just one does not require any additional heavy lifting.

Sleeping is also next to impossible if it is raining, snowing (as it will during winter in some western areas in the Ninth Circuit, like parts of Washington, Idaho, and Montana) or severely cold (ditto). Logically, that would require the municipality to allow the homeless an ancillary right, as *Grants Pass* noted, to have a blanket, or perhaps even a tent, for protection against adverse elements.[83] The latter, however, turns the right to "sleep" into a right to "camp," despite what the Ninth Circuit wrote. The result is that inch by inch, a right to *sleep* on government property effectively would become a right to *live* there—which is likely the end game that the Ninth Circuit had in mind from the get-go. After all, anti-camping ordinances are not designed to trip up the commuter who dozes off while sitting on a park bench; they are designed to keep people from using park benches as open-air motels by preventing individuals from living on public property.[84] Like a drowning person's effort to grab something—anything—to stay afloat, the reference in *Martin* and *Grants Pass* to "sleep," which everyone must do at some point, was necessary to invoke the passages in *Robinson* and *Powell* referring to "involuntary" conduct. That outcome transforms the geographic area at issue—an area of wholly indeterminate size and boundaries, because the number of homeless people and available shelter space can vary from season to season or even day to day—from land held in trust for the entire public's use to land that now has been judicially transferred from the government to a select subset of that public.

Yes, it would be possible—grammatically, at least—to craft an opinion limiting this new right only to "sleep." It would even be linguistically possible to limit that right to only one eight-hour period each day between the hours of 9 pm and 5 am the following morning. But limiting the right in that way, to quote Justice Marshall in *Powell*, "is limitation by fiat."[85] Devising such a schedule is legislation, plain and simple, as any honest jurist would concede.[86]

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[81] *See* Harris v. McRae, 448 U.S. 297, 312–18 (1980); *supra* note 8.

[82] *See supra* notes 6, 7.

[83] Johnson v. City of Grants Pass, 72 F.4th 868, 896 (2023) ("We hold . . . that 'sleeping' in the context of *Martin* includes sleeping with rudimentary forms of protection from the elements.").

[84] Joseph Tartakovsky, *Judicial Interventionism*, *in* JACKSON ET AL., *supra* note 78, at 63 ("Why ban sleeping anyway? Is sleeping antisocial? Alone, no. But such laws are essentially prophylactic: a person who sleeps in public, as a biological need, also will perform other biological or basic human needs in public. That person will store his essential property in public. That person may erect a sidewalk-obstructing shelter in public. Or use the potent drugs on which he depends there. The point of anti-camping laws was to clarify that habitation in public is simply disallowed—a clear enforceable rule—instead of resorting to the old methods of harassing the homeless by enforcing trifles like littering or destroying vegetation or loitering."); *cf.* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 (1958) (arguing that an ordinance prohibiting sleeping in a railway station is not aimed at a commuter who dozes off while waiting for a train, but at the person who chooses to sleep there overnight).

[85] *Powell*, 392 U.S. at 534.

[86] Yes, the Supreme Court has done that before. No one could seriously argue that the Self-Incrimination Clause, like the Faber College constitution, has "a little-known codicil," ANIMAL HOUSE (Universal Pictures 1987), https://www.youtube.com/watch?v=1tfK_3XK4CI [https://perma.cc/Q6MB-VWAW], that requires

To be sure, the Ninth Circuit did say that a municipality is not obliged to allow the homeless to sleep on government property if there are beds available in publicly operated shelters that could house everyone who needs and wants one. But the task imposed on municipalities likely is a Sisyphean one. Evidence shows that creation of new bedspace does not guarantee the elimination of homeless encampments. On the contrary, through what is known as the Magnet Effect, new bedspaces can attract additional, new homeless parties to the neighborhood, increasing the homeless population beyond whatever new capacity a city has created.[87] That happened in San Francisco and Seattle.[88] The Constitution should not be read to order the government to engage in such futility.

B. The States' Application of Their Trespass and Anti-Camping Laws Is Not Arbitrary

Nor can it be argued that application of the trespass laws to the homeless is an arbitrary and purposeless application of the criminal law. "People are not dying from drug overdose deaths in San Francisco because they're being arrested. They're dying because they *aren't* being arrested."[89] The criminal law is not disrupting their otherwise normal lives. It might be saving some of them.

Homelessness is not simply a matter of lacking a permanent dwelling. Some people wind up in a shelter because of short-term economic misfortune (e.g., being laid off) or seasonal unemployment (e.g., hunting, fishing, or agricultural work). The chronically homeless are another matter. As one commentator noted, "Most of the homeless are *not* simply people without homes, as many of their advocates would have us believe."[90] On the contrary, "[t]he majority suffer from severe problems

police officers to administer *Miranda* warnings before questioning a suspect. *See* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966). But the Court recently signaled that it no longer would create constitutional rights that are not firmly grounded in the text of the Constitution or the history and traditions of our nation. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43, 2248–56, 2259–60 (2022) (ruling that there is no support in the constitutional text or its history for a right to abortion, and therefore overturning Roe v. Wade, 410 U.S. 113 (1973)). If the Court maintains that course, it is not likely to read the words "cruel and unusual punishment" to force the government to allow the homeless to occupy government property regardless of how short that adverse possession might be or why it is necessary.

[87] *See* SHELLENBERGER, *supra* note 6, at 21–22.

[88] According to Chris Herring, a sociologist, researcher, and consultant for the San Francisco Coalition on Homelessness, "'[u]nfortunately, after the first few months'" that a new homeless shelter had been open, "'it became clear that the navigation center [the new facility] . . . was not resulting in fewer encampments . . . Instead, the number of camps increased, as did complaints and policing. This was not due to the shelter's failure of meeting the needs of the unhoused, but rather to its success in doing so.'" *Id.* at 20–21; *see also id.* at 21 ("'I do think we have a magnet effect,' said Seattle's former homelessness chief. Nearly one quarter of the homeless in King County, in which Seattle is the biggest city, said they became homeless outside of Washington State."); *id.* at 21 ("[San Francisco] Mayor [London] Breed said she opposed Proposition C [a state measure to help the homeless] because she feared that spending yet more on homelessness services, without any requirement that people get off the street, would backfire. 'We are a magnet for people who are looking for help,' she said."); *id.* at 22 ("A Los Angeles homelessness service provider emphasizes the extent to which the homeless shop around from city to city seeking the best housing and benefits and avoiding the law.").

[89] *See id.* at 49.

[90] Robert B. Hawkins, Jr., *Foreword*, in RICHARD W. WHITE, JR., RUDE AWAKENINGS: WHAT THE HOMELESS CRISIS TELLS US ix (1992). What Hawkins wrote in 1992 remains true today. *See generally* SAM QUINONES, THE LEAST OF US: TRUE TALES OF AMERICA AND HOPE IN THE TIME OF FENTANYL AND METH (2021); SHELLENBERGER, *supra* note 6. In fact, according to Hawkins and White, homeless advocates knew of those problems as early as the 1980s but kept their mouths shut to avoid losing the public's sympathy for people whose plight advocates could attribute to macroeconomic policies that then-President Ronald Reagan had endorsed. WHITE,

that are difficult to treat under optimal conditions—problems such as substance abuse, serious mental illness, and family breakdowns."[91]

supra, at 11 ("During most of the 1980s, advocates led us to believe that the primary cause of homelessness was a lack of housing. But in a May 1989 interview I did with [Robert] Hayes—next to the late Mitch Snyder, the nation's most prominent homeless advocate—he told me the time was right to acknowledge the problems of alcohol and drug addiction."). White described that practice as "lying for justice." *Id.*; *see also* BAUM & BURNES, *supra* note 6, at 132 ("By refusing to acknowledge alcoholism, drug addiction and mental illness as major characteristics of the homeless population, the homelessness movement has failed to grasp the opportunity to educate the public about these disorders and about the nation's failure to help those impaired by them."). For present purposes, what matters is *not* whether White has accurately characterized the motivations of homeless advocates. What matters is that deciding whether his description is accurate is *not* a matter that the courts can easily resolve, and, even more importantly, is *not* an issue that the Ninth Circuit even recognized would affect the debate.

[91] Hawkins, *supra* note 90, at ix; *see also* Elizabeth Ondens & Hunter L. McQuistion, *Single Adults in Shelters*, *in* CLINICAL GUIDE TO THE TREATMENT OF THE MENTALLY ILL HOMELESS PERSON 29 (Paulette Marie Gillig & Hunter L. McQuistion eds., 2006) ("Multiple prevalence studies reveal that substance abuse or dependence is a factor for a large percentage of homeless individuals, including those with a chronic mental illness."); COMM. ON HEALTH CARE FOR HOMELESS PEOPLE, INST. OF MEDICINE, HOMELESSNESS, HEALTH, AND HUMAN NEEDS 50–51 (1988) [hereinafter HOMELESS PEOPLE] ("Many homeless adults suffer from chronic and severe mental illness. . . . The major mental illnesses, principally schizophrenia and the affective disorders (bipolar and major depressive disorders), are unlikely to result from the trauma of homelessness. Rather, they cause a level of disability and impaired social functioning in some people that, in the absence of adequate treatment and support, may lead to homelessness, which will then exacerbate these conditions."), 51 ("Personality disorders are not considered 'major' mental illnesses because reality awareness is maintained; nevertheless, these disorders are manifested by a person's long-standing inability to deal with the routine demands of living (e.g., as a parent, worker, or independent citizen). Deeply ingrained maladaptive behavior patterns, which usually begin during childhood or adolescence, interfere with a person's capacity to relate to others, limit a person's potential, and often provoke counterreactions from the environment. Personality disorders should not be seen primarily as a consequence of homelessness. Rather, because they impair a person's ability to cope with the demands of life and the expectations of society, they may contribute to the factors that cause certain people to become homeless."), 53–56 ("Several studies have sought to clinically examine homeless individual adults in shelters . . . Two recent studies reported a high prevalence of substance abuse (alcohol and other drugs) and major psychiatric disorders among this population. Arce et al. (1983) examined homeless people in Philadelphia and diagnosed major mental illness in 40 percent of those studied. When substance abuse, personality disorders, and organic disorders were included among the diagnoses, the figure rose to 78 percent of those studied. Bassuk et al. (1984), in a similar study in Boston, reported major mental illnesses (mania, depression, schizophrenia) among 39 percent of those studied; when substance abuse and personality disorders were included among the diagnoses, the figure rose to 90 percent. . . . One study . . . interviewed a sample of homeless men from various settings in the skid row area of Los Angeles. Trained interviewers . . . determined that at the time of the examination, 60 percent of the homeless men met the criteria for one or more current (within the past 6 months) mental disorders or substance abuse disorders. . . . Many respondents met the criteria for the diagnosis of more than one type of serious disorder. When added together, the total percentage of homeless people who apparently suffer from any mental illness or substance abuse problem was 83 percent, a figure similar to those found in the studies by Arce et al. (1983) and Bassuk et al. (1984)."), 60 ("Severe and intractable alcohol disorders have historically been thought to be especially prevalent among homeless people."), 63-64 ("Estimates of homeless individual adults with drug problems range from a low of 10 percent reported by users of Johnson-Pew clinics nationwide to 33.5 percent for individuals living in shelters and on the streets in Boston.") (citations omitted), 65 ("[A] point must be made about the comorbidity caused by mental illness, alcoholism and alcohol abuse, and illicit drug abuse. There is a growing concern among those who work with homeless people about clients with dual and multiple diagnoses (further exacerbated by a higher prevalence of many acute and chronic physical illnesses)."), 212 App. C (note regarding the rural homeless) ("The major health care problems among the adult population are malnutrition, alcoholism and substance abuse, dental care, respiratory illness, stress, depression, mental illness, and environmental health problems such as those related to impure drinking water."); WHITE, *supra* note 90, at 11–12 ("It is important to understand that these are not simply people who are 'out of step' with the rest of society; they have profound diseases that, like other serious physiological conditions, require treatment. . . . Recently, advocates have invested great efforts in 'shattering this myth' that the homeless are all mentally ill. But shattering this myth does nothing to change the fact that one in three homeless *do* suffer from mental illness—second only to substance abuse.").

Precise numbers about the characteristics of the homeless are hard to come by, and estimates do vary.[92] For example, the total number of the homeless is a subject of dispute. In 2022 the U.S. Department of Housing and Urban Development estimated that, on any one night, 582,500 people were homeless, with 60 percent in shelters and 40 percent living on the street, in abandoned buildings, or comparable locations.[93] Perhaps 121,000 of the severely mentally ill homeless live on the streets, with the remainder in state hospitals, prisons, or jails.[94] The three most common mental illnesses among the homeless, in increasing order of prevalence, are major depression, bipolar disorder, and schizophrenia, with the last one afflicting the majority of the seriously mentally ill and standing as the worst of the three.[95]

The combination of homelessness, alcoholism or drug use, and mental illness—a status that goes by the term "dual," "multiple," or "concurrent diagnosis,"[96] and also is known as the "perilous trifecta"[97]—has been found common among the homeless.[98] In 2019, Kenneth Rosenberg, a psychiatrist, estimated that "[a]t least one quarter of people struggling with homelessness also have" a serious mental illness, and "as many as two thirds" of that subset also have a substance use disorder or other chronic health condition.[99] Other commentators have made similar estimates of the relationship between homelessness, serious mental illness, and

[92] *See* SHINN & KHADDURI, *supra* note 18, at 28 ("Studies of mental health and substance abuse problems among people experiencing homelessness find wildly different rates."); HOMELESS PEOPLE, *supra* note 91, at 56 ("There is an impression, however, supported by nonspecific indicators of mental health status, that larger proportions of individual homeless women than homeless men are mentally disturbed."); STEPHEN B. SEAGER, STREET CRAZY: AMERICA'S MENTAL HEALTH TRAGEDY xii (2000) ("According to different sources, one-third to one-half of the homeless population is chronically mentally ill.").

[93] *See, e.g.*, TANYA DE SOUSA ET AL., OFF. OF POL'Y DEVELOP. & RESEARCH, U.S. DEP'T OF HOUSING & URB. DEVELOP., THE 2022 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PT. 1—POINT-IN-TIME ESTIMATES OF HOMELESSNESS 2 (Dec. 2022).

[94] *See* SHELLENBERGER, *supra* note 6, at 89; SHINN & KHADDURI, *supra* note 18, at 22 ("By the late 1970s . . . [t]he decriminalization of vagrancy and public drunkenness meant that people who might once have sobered up in jail were now on the streets.").

[95] SEAGER, *supra* note 92, at xi, xiii, 33 ("Severe, chronic schizophrenia . . . is the most devastating illness a person can contract that doesn't have the decency to kill you. . . . It tortures you instead."); *see* SHELLENBERGER, *supra* note 6, at 44 ("Drug overdose is the leading cause of death among the homeless."), 90.

[96] *See, e.g.*, BAUM & BURNES, *supra* note 6, at 41 ("Alcohol and drug abuse combined with mental illness creates a matrix of problems that often include homelessness . . . . Described by clinicians as being in constant crisis, the dually diagnosed are extremely disorganized. They experience difficulty maintaining simple daily living routines, including maintaining regular meals, managing money, sustaining regular activities, keeping appointments, managing personal hygiene, and maintaining social supports.") (footnote omitted); WHITE, *supra* note 90, at 21 ("Although fewer than half of the U.S. homeless are seriously mentally ill, they are the most visible homeless."), 58 ("High proportions of U.S. homeless—both men and women—have a serious problem with alcohol or drug abuse."), 59 ("Substance abuse is arguably America's number-one problem, and it is the number-one factor in homelessness. Mental illness is number two."); Joanne Neal, *Illicit Drug Use and Homelessness*, INT'L ENCYCLOPEDIA OF HOUSING & HOME 714 (2012).

[97] Christopher F. Rufo, *Homeless, Addicted, and Insane*, in JACKSON ET AL., *supra* note 78, at 35-37 (noting that, out of "a recurring homeless population of 18,000," two-thirds of which are unsheltered, there are "4,000 men and women in San Francisco who are simultaneously homeless, psychotic, and addicted to alcohol, meth, and heroin; 70 percent have been on the streets for more than 5 years; 40 percent . . . for more than 13 years.") (footnote omitted).

[98] *See* Elizabeth Bowen et al., *Homelessness and Health Disparities: A Health Equity Lens*, *in* HOMELESSNESS PREVENTION AND INTERVENTION IN SOCIAL WORK 62 (Heather Larkin et al. eds., 2019) ("Although only 3% of Americans were dually diagnosed in 2014 . . . rates of dual diagnosis in homeless populations may be more than 50%.") (citations omitted.).

[99] KENNETH PAUL ROSENBERG & JESSICA DELONG, BEDLAM: AN INTIMATE JOURNEY INTO AMERICA'S MENTAL HEALTH CRISIS 82 (2019).

substance abuse.[100] The lives of some mentally ill homeless parties "revolve around addictions"[101]—in part because they use alcohol or drugs as a form of self-

[100] *See, e.g.*, BAUM & BURNES, *supra* note 90, at 3 (noting "emerging research" that "documented that up to 85 percent of all homeless adults suffer from chronic alcoholism, drug addiction, mental illness, or some combination of the three"), 15 ("Once on the streets, homeless youths turn to prostitution and crime to support themselves, and the vast majority abuse drugs and alcohol.") (footnote omitted), 21 ("Drug abuse has now become almost as much a feature of the homeless population as alcohol was on the old skid rows . . . .") (footnote omitted), 22 (noting, in 1993, that homeless people over age 40 tend to use alcohol, while the homeless under age 40 use drugs), 23 ("Most researchers . . . agree that at least one-third of the homeless suffer from severe and persistent chronic psychiatric disorders such as schizophrenia and manic-depression; the proportion may be as might as one half.") (footnote omitted); 25 ("[A]s many as 40 to 50 percent of the homeless mentally ill also suffer from alcoholism or drug addiction or both or use alcohol or drugs to self-medicate their psychiatric symptoms."); 25 ("Although not strictly a problem of mental illness, mental retardation is also found among many of the homeless. According to one study, the rate of adult mental retardation among the homeless may be as much as two to three times greater than that of the general population."), 38; HOMELESS PEOPLE, *supra* note 91, at 39 ("Certain illnesses and health problems are frequent antecedents of homelessness. The most common of these are the major mental illnesses, especially chronic schizophrenia."); SHELLENBERGER, *supra* note 6, at 90 ("Seventy-eight percent of the homeless inmates of the San Francisco County jail system who suffered serious mental illnesses also suffered from addiction to alcohol or drugs, according to a study in 2000.") (footnote omitted); Bernardo Carpiniello et al., *Violence as a Social, Clinical, and Forensic Problem*, *in* VIOLENCE AND MENTAL DISORDERS 3, 4 (Bernardo Carpiniello et al. eds. 2020) (noting that "[d]ata from literature independent of the studies sampled . . . indicate a major risk of violence among people affected by a mental disorder," with "studies based on both outpatients and inpatients report[ing] that 12-22% had perpetrated violence") (endnote omitted); *id*. at 5-6 (also noting that the mentally ill were at "risk of becoming victims of violence" and that one study found that "20-34% of outpatients had been violently victimized in their lifetime"); Joao Manricio Castadelli-Maia et al., *Introduction*, *in* HOMELESSNESS AND MENTAL HEALTH 3, 4 (Joao Manricio Castadelli-Maia et al. eds., 2022) (relying on a 2018 survey by the U.S. Department of Housing and Urban Development to note that 17.3 percent of the homeless had a serious mental illness and almost 75 percent had some form of mental illness, and that the homeless have higher rates of substance (drug and alcohol) abuse, schizophrenia, bipolar disorder and major depression that the general population); CHRISTOPHER JENCKS, THE HOMELESS 24 (1994) ("Clinicians who examine the homeless today usually conclude that about a third have 'severe mental illness.'"); *id*. at 46 ("[M]ental illness and substance abuse play a big role in homelessness."); Hunter L. McQuistion & Paulette Marie Gillig, *Mental Illness and Homelessness: An Introduction*, *in* GILLIG & MCQUISTION, *supra* note 91, at 2 ("Studies show reasonably consistent rates among homeless people of one-third to one-half with severe psychiatric disorders, whether major mood disorders (20%-30%) or schizophrenia (10%-15%). Rates of substance and alcohol abuse were reported as 20%-30% and 57%-63%, respectively.") (citations omitted); David Nardarci, *Psychiatric Impatient Settings*, in GILLIG & MCQUISTION, *supra* note 91, at 93 ("There is a substantially increased incidence of alcohol and substance abuse among mentally ill homeless people, and substance abuse is clearly one of the biggest risk factors associated with repeat homelessness.. . . . Alcohol or substance abuse is often the critical factor precipitating the homelessness of an otherwise marginally compensated individual.") (citations omitted); Cara A. Struble et al., *Research on Homelessness and Mental Health: What Have We Learned from the United States and Nations in Europe*, *in* Castadelli-Maia et al, *supra*, at 45, 49 (noting that studies in American cities found that 15-20 percent of the homeless had a serious mental illness and 74-78 percent had some form of mental illness), 52-53 (stating that substance use disorders (alcohol or drugs) are "prevalent" among the homelessness in the United States, with 60-75 percent of the homeless having a history of some substance use disorder); D.J. JAFFE, INSANE CONSEQUENCES: HOW THE MENTAL HEALTH INDUSTRY FAILS THE MENTALLY ILL 34 (2011) (noting that out of roughly 564,000 homeless people in America on a given night in 2015 (depending on the definition of homeless and the age group at issue), "the consensus estimate" for 2014 was that, at a minimum, "25 percent of the American homeless—140,000 individuals—were *seriously* mentally ill" and that 45 percent—250,000 individuals—had some mental illness) (emphasis in original); *id*. at 71 ("Some people who have untreated serious mental illness may lose cognitive abilities they once had. . . . [They] can't think straight, or organize, connect with or gain control of their thoughts. Thoughts come so fast and furious and disconnected that they spew a flood of impossible-to-understand gibberish, what psychiatrists call word salad . . . . Loss of cognition affects over 70 percent of the homeless who have serious mental illness.") (footnotes omitted); *id*. at 168 ("Persons with serious mental illnesses are more likely to be homeless, live in shelters, and interact with drug dealers and therefore more likely to be raped, beaten, victimized, and experience other very real traumas than the general public."); QUINONES, *supra* note 90 (quoted *infra* at note 157 and text accompanying note 158); SHINN & KHADDURI, *supra* note 18, at 61 ("Alcohol and drug dependence, which often co-occur with other forms of mental illness, were the most common mental disorders, experienced by almost two fifths (alcohol) and one quarter (drugs)."); WHITE, *supra*

medication "to help them cope with the hallucinations and alleviate the anxiety and stress associated with their mental illness."[102] In cities, like San Francisco, with permissive attitudes toward drug use,[103] many homeless people stay in encampments to use illegal substances more freely and easily than they could in shelters.[104] The organization Mothers Against Drug Deaths has launched a billboard campaign with an image of the Golden Gate Bridge with the message, "Famous the World Over for Our Brains, Beauty and, Now, Dirt-Cheap Fentanyl."[105] Unfortunately, in contemporary America, the wages of drug use can often be death. "Methamphetamine deaths increased 500 percent from 2008 to 2018" in San Francisco, while "[f]entanyl overdoses doubled in 2019 over the year before."[106] According to Brian Clark, Drug Enforcement Administration (DEA) Special Agent-in-Charge (SAC) for San Francisco, "[o]n average we lose three lives a day to drug poisoning from sales connected to this area."[107]

Then, there is the crime that is inevitably associated with homelessness and homeless encampments—what one commentator described as having been "the

note 90, at 9 ("Recent [circa 1992] comprehensive studies show that the rate of alcoholism among the homeless is much higher than this [one-third], and that drug abuse has risen sharply with the advent of crack cocaine. The mentally ill homeless frequently abuse alcohol or drugs; some reports say that most of them do. Drug abusers often abuse alcohol."); Vicky Stergiopoulos et al., *Neurocognitive Impairment in. a Large Sample of Homeless Adults with Mental Illness*, 131 ACTA PSYCHIATRICA SCANDINAVICA 238 (2015) (noting that, from a study of 1,500 homeless adults, approximately half met criteria for psychosis, major depressive disorder, and alcohol or substance use disorder; nearly half had experienced severe traumatic brain injury; and 72 percent demonstrated cognitive impairment and deficits in several areas, such as processing speed (48 percent), verbal learning (71 percent), recall (67 percent), and executive functioning (38 percent)); Vicky Stergiopoulos et al., *Collaborative Mental Health Care for the Homeless: The Role of Psychiatry in Positive Housing and Mental Health Outcomes*, 53 CANADIAN J. PSYCHIATRY 61 (2008) (noting that the prevalence of severe and persistent mental illness and substance use disorder among homeless men referred to a shelter-based treatment was 76.5 and 48.5 percent, respectively); *cf.* Fred E. Markowitz, *Psychiatric Hospital Capacity, Homelessness, and Crime and Arrest Rates*, 44 CRIMINOLOGY 45, 47-48 (2006) ("An important consequence of reduced hospital capacity is that a large portion of persons with severe mental illness now live in urban areas with less supervision and support. Although many do well, others lack 'insight' into their disorders, go untreated, or have difficulty complying with medication regimens, and are unable to support themselves. This presents considerable difficulties for families and others who are often unable or unwilling to deal with persons whose behavior may at times be unmanageable or threatening.") (citations and punctuation omitted).

[101] SHELLENBERGER, *supra* note 6, at 44; *see also* JENCKS, *supra* note 100, at 9 ("a large fraction of the homeless use drugs"), 119 ("Many [of the mentally ill] are substance abusers.").

[102] BAUM & BURNES, *supra* note 6, at 41; ROSENBERG & DELONG, *supra* note 99, at 95-96. According to two commentators, "somewhere between 65 and 85 percent of the homeless population suffer from serious chronic alcoholism, addiction to drugs, severe chronic psychiatric disorders, or some combination of the three." BAUM & BURNES, *supra* note 6, at 29 (footnote omitted).

[103] *See* SHELLENBERGER, *supra* note 6, at 43 ("San Francisco gives away more needles to drug users, six million per year, than New York City, despite having one-tenth the population.") (footnote omitted).

[104] *See, e.g.,* SHELLENBERGER, *supra* note 6, at 23 ("[M]any policymakers understand this. 'I went out with a team twice to have conversations with people to get an understanding of what they're dealing with,' said [San Francisco] Mayor Breed in 2020. 'It was absolutely insane. Most of the people did not take us up on the offer [of shelter and services]. . . . Even people who would prefer to live in sober environments say they do not want to quit their addictions. 'When we surveyed people in supportive housing in New York,' said University of Pennsylvania homelessness researcher Dennis Culhane, 'almost everybody wanted their neighbors to be clean and sober, but they didn't want rules for themselves about being clean.'") (footnote omitted).

[105] Travis Gilmore, *Federal Authorities Announce Crackdown Targeting Fentanyl Dealers in San Francisco*, EPOCH TIMES, Nov. 4, 2023, https://www.theepochtimes.com/us/federal-authorities-announce-crackdown-targeting-fentanyl-dealers-in-san-francisco-5522911 [https://perma.cc/RAY6-32EK].

[106] Rufo, *supra* note 97, at 41 (footnotes omitted).

[107] Gilmore, *supra* note 105.

advocates best-kept secret."[108] Start with the fact that open-air drug sales and use flourish in some neighborhoods.[109] That alone is a serious problem. For instance, what has happened in the Kensington neighborhood of Philadelphia in 2023 is a tragedy visually displayed in real time by some of the media.[110] Plus, drug use in areas like the Tenderloin in San Francisco is not limited to long-term residents. Those neighborhoods attract users from elsewhere. In the words of DEA SAC Clark, "[t]he Tenderloin has become ground zero for drug tourism."[111]

But crime goes beyond the sale, possession, and use of illicit drugs. "[P]rostitution and violence are ever-present in the open-air drug scenes in San Francisco, Los Angeles, and Seattle."[112] In San Francisco, for example, "[t]he hard reality is that the perilous trifecta has fueled a boom in property crime, public disorder, and

[108] WHITE, *supra* note 90, at 12 ("Crime among the homeless has been the advocates' best-kept secret. 'One of the most striking characteristics of the homeless population,' according to the [National Bureau of Economic Research] study, 'neglected in much popular discussion, is the frequency of criminal activity. Almost four in ten homeless individuals admit having spent time in jail with the average among these two years.' . . .[According to] a comprehensive survey of the literature, . . . more than. 50 percent have spent some time in jail, 24 percent in prison."); *see also, e.g.*, TERESA GOWAN, HOBOS, HUSTLERS, AND BACKSLIDERS 70-71 (2010) ("Most of the local street addicts seemed to have lost the capacity to maintain relationships of trust with each other. They shared a common sense that the central Tenderloin was a jungle, a place where the strong abused the weak and the week in turn exploited each other. . . . [T]hese crack-addicted hustlers paid lip service to brotherhood and often stole from each other when they were asleep.") (footnote omitted); Gabriel Hays, *Progressive Commentator Calls Out San Francisco as "Terrifying" "Nightmare": "You're Going to Get Robbed*," FOX NEWS, Oct. 23, 2023, https://www.foxnews.com/media/progressive-commentator-calls-san-francisco-terrifying-nightmare-youre-going-get-robbed [https://perma.cc/S9PM-AGNC] ("Progressive political commentator Ana Kasparian pulled no punches in her assessment of how bad liberal mecca San Francisco has become thanks to rising crime, homelessness, and Democrat policies. . . . [T]he 'Young Turks' co-host called the California city a 'nightmare' and warned visitors, 'Your car's going to get broken into, okay? You're going to get robbed.'. . . 'No one is safe, everyone's angry, and you see all sorts of terrible stuff happening right there in broad daylight in the middle of the street.' . . . 'San Francisco is terrifying.' . . . '[Y]ou know what else isn't effective? Using taxpayer money, funneling it to non-profits so they can literally buy crack pipes and hand them out at skid row.'").

[109] *See, e.g.*, SHELLENBERGER, *supra* note 6, at 42-43 ("When you walk through the open-air drug scenes in the Tenderloin in San Francisco, Skid Row in Los Angeles, and the Blade in Seattle, you see people of all races and ages injecting and smoking fentanyl, heroin, meth, and other hard drugs right there on the sidewalk near where they bought them.").

[110] *See, e.g.*, Jon Michael Raasch, *CRISIS IN KENSINGTON: Former Addict Warns Epicenter of US Drug Crisis "Descended Deeper Into Despair" in 2023*, FOX NEWS, Dec. 30, 2023, https://www.foxnews.com/us/crisis-kensington-former-addict-warns-epicenter-us-drug-crisis-descended-deeper-despair-2023 [https://perma.cc/PC7R-5EBY]; Ethan Barton, *CRISIS IN KENSINGTON: Where Children Regularly Step Over Bodies to Get to School*, FOX NEWS, Apr 15, 2023, https://www.foxnews.com/us/crisis-kensington-children-regularly-step-over-bodies-get-school [https://perma.cc/WEQ9-Z29V] ("[Frank] Rodriguez, also wants to remind America that addiction affects non-users as well. . . . 'There's children that live there that have to walk over bodies to go catch the bus, to go to school, to go to the library,' he said. 'There's people that are hostage in their own homes in that community.'"); Ethan Barton, *Philadelphia's Open-Air Drug Market Is "a Third-World Country," Former Resident and Addict Says*, FOX NEWS, Feb. 13, 2023, https://www.foxnews.com/media/philadelphias-open-air-drug-market-third-world-country-former-resident-addict-says [https://perma.cc/CWJ4-PXUA]; Megan Myers & Jon Michael Raasch, *CRISIS IN KENSINGTON: 'Chemical Warfare' in Philadelphia Drug Market 'Is Getting Worse,' Former Dealer Says*, FOX NEWS, Feb. 13, 2023, https://www.foxnews.com/us/crisis-kensington-chemical-warfare-philadelphia-drug-market-getting-worse-former-dealer-says [https://perma.cc/N9N7-FZE6].

[111] Gilmore, *supra* note 105.

[112] SHELLENBERGER, *supra* note 6, at 49; *see also, e.g.*, GREGG BARAK, GIMME SHELTER, A SOCIAL HISTORY OF HOMELESSNESS IN CONTEMPORARY AMERICA 75 (1992) ("Adolescent prostitutes, male and female, who number in the tens of thousands in this country, live with a constant fear of violence, as do other homeless people. This is especially true for women of all ages who either live on or work on the streets.").

violence."[113] Whether due to alcohol or drugs, substance abuse itself is associated with violence.[114] As Doctor Rosenberg put it, "Mental illness and substance abuse feed each other until you have a conflagration that is much more toxic than the sum of its parts."[115] Whether before or after people become homeless,[116] there is a troubling (even if not causal) association of illicit substance abuse, untreated mental illness, and violence.[117] Homelessness might worsen matters; it certainly can't help.

[113] Rufo, *supra* note 97, at 40. "The city currently has the highest property crime rate in the nation and . . . has enabled massive open-air drug markets in neighborhoods such as the tenderloin, which is a central hub for the homeless population." *Id.* (footnote omitted).

[114] *See, e.g.,* HENRY H. BROWNSTEIN ET AL., THE METHAMPHETAMINE INDUSTRY IN AMERICA 92 (2014) (quoting a New Mexico detective: "It's the most violent drug because they have paranoia."); PERRY N. HALKITIS, METHAMPHETAMINE ADDICTION: BIOLOGICAL FOUNDATIONS, PSYCHOLOGICAL FACTORS, AND SOCIAL CONSEQUENCES 60 (2009); LESLIE IVERSEN, SPEED, ECSTASY, RITALIN: THE SCIENCE OF AMPHETAMINES 143 ("There is a considerable literature relating amphetamines to violence and crime.") (citation and punctuation omitted), 144 ("The assaults were particularly frightening because of their unprovoked, grossly psychotic quality. . . . Apart from the random violence induced by intoxication with amphetamines, the need for an ongoing supply of the drug can also lead to crime.") (punctuation omitted), 145 (noting a report that "44 percent of a group of moderate to heavy crystal meth users in the USA reported violent behaviour as a result of using the drug, and methamphetamine-related violence occurs commonly in domestic disputes.") (2006); SHELLENBERGER, *supra* note 6, at 49 (quoting Reverend Andy Bales, who runs Los Angeles' largest homeless shelter: "'We are seeing behaviors . . . that I've never seen in thirty-three years.. . . It's extreme violence of an extreme sexual nature.'") (footnote omitted), 52 (quoting a former emergency room physician: "'Being high on meth looks just like bipolar mania. . . . [I]t's indistinguishable.'"); RALPH WEISHEIT & WILLIAM L. WHITE, METHAMPHETAMINE: ITS HISTORY, PHARMACOLOGY, AND TREATMENT 61-62 (prolonged, heavy use of methamphetamine can lead to psychotic episodes, particularly "crank bugs"—the hallucination that bugs are crawling under one's skin), 84 (noting that possible ties between methamphetamine and violence could be psychopharmacological (the effect of the drug on the brain), systemic (consuming the drug in a culture of meth users), and economic-compulsion (to obtain money to buy meth)), 87 (noting that some researchers have found that one-quarter to one-third of methamphetamine users have had violent episodes while under the influence of the drug), 92 (daily users have a greater likelihood of committing violent crimes), 95 (noting "the frequent finding that the association between methamphetamine use and violence is particularly strong for domestic or partner violence") (2009); Ulrika Haggard-Grann et al., *The Role of Alcohol and Drugs in Triggering Criminal Violence—A Case-Crossover Study*, 101 ADDICTION 100, 105 (2006) ("We found a large increase in the risk of criminal violence among individuals who had been exposed to the short-term effects of alcohol (hazard period of 24 hours before violent act). This corresponds with a strong positive correlation found previously between alcohol and violence in various clinical and laboratory studies.") (footnotes omitted); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 422 (2006) (finding that 38 percent of parties serving a jail sentence for violent crime were under the influence of alcohol); Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT 101, 113 (noting that "substance abuse itself was associated with a very high relative risk for assaulting behavior, whether or not it occurred in the presence of other psychopathology), 118 ("Violence was more prevalent among alcohol and drug users (as high as 20%, and there were more people with substance abuse problems in the community than there were with major mental illness only.") (John Monahan & Henry J. Steadman eds., 1994).

[115] ROSENBERG & DELONG, *supra* note 99, at 8 ("If having a mental illness is like living in a house with a smoldering fire in the basement, substance abuse is like hurling in live grenades from the second floor. It makes everything worse.").

[116] Some argue that homelessness drives people to use illicit drugs or alcohol. *See*, *e.g.*, BARAK, *supra* note 112, at 89 (noting that homeless prostitutes might turn to drugs or alcohol to escape from their feelings of misery and self-loathing). Others believe that drug and alcohol use runs in the other direction. *See*, *e.g.*, WHITE, *supra* note 90, at 59 ("Alcohol or drug abuse generally precedes and contributes to job loss, spouse abuse, child abuse, family breakup, crime, prison, and then continues afterward. These other alcohol-related problems often contribute to homelessness.").

[117] *See, e.g.,* BAUM & BURNES, *supra* note 6, at 41 ("'Dually diagnosed' individuals—those who are mentally ill and abuse alcohol and drugs—have more family conflicts, are more socially isolated and less trusting, and have higher rates of arrest and incarceration than those homeless people who suffer from mental illness but do not use alcohol or drugs.") (footnote omitted); SHELLENBERGER, *supra* note 6, at 90 ("There is frequent violence within the [San Francisco] psychiatric emergency department. 'One day someone was swinging a pipe, someone was swinging a bat, and someone was swinging a bicycle,' said Psychiatrist Paul Linde to the San Francisco

Chronicle. 'These are often people who are intoxicated on intravenous methamphetamine and/or psychotic from either untreated bipolar, untreated schizophrenia, and oftentimes both. Maybe a third of the patients brought in immediately need to be medicated and sometimes even placed in four-point restraints.'"); Seena Fazel et al., *Schizophrenia, Substance Abuse, and Violent Crime*, 301 JAMA 2016, 2016-2021 (2009) (although noting that "[m]ore than 20 epidemiological studies . . . typically find that schizophrenia is related to a 4- to 6-fold increased risk of violent behavior," the authors found that "the association between schizophrenia and violent crime is minimal unless the patient is also diagnosed as having substance abuse comorbidity," and that "the risk of violent crime in individuals with schizophrenia and substance abuse comorbidity was increased 4-fold"); Markowitz, *supra* note 87, at 50 (noting "the direct relationship between mental disorder and the likelihood of violent and criminal behavior . . . . In many cases, those experiencing certain psychotic symptoms may misperceive the actions of others (including police officers) as threatening and respond aggressively.") (citation and punctuation omitted); *id*. at 51 ("[M]any mentally ill homeless persons are at increased risk of police encounters and arrest for not only 'public order' types of offenses, such as vagrancy, intoxication, or disorderly conduct, but also for more serious types of crimes, such as assault.") (citations and punctuation omitted); Sean N. Fischer et al., *Homeless, Mental Illness, and Criminal Activity: Examining Patterns Across Time*, 42 AM. J. CMTY. PSYCHOLOGY 251, 261 (2008) ("Findings suggest that the likelihood of an individual committing a crime increased as homelessness and severity of mental illness symptoms increased across observation period."); Rebecca J. Mitchell et al., *Homelessness and Predictors of Criminal Reoffending: A Retrospective Cohort Study*, 33 CRIM. BEHAV. & MENTAL HEALTH 261, 267 (2023) ("This study confirmed the very high rate of criminal justice contact among people attending psychiatric clinics in the homeless sector. Nearly two-thirds of homeless clinic attendees had an index court appearance for an offence during the 12.5 years of the study. . . . The most likely principal offences were assault, illicit drug offences or theft."); Robert Keers et al., *Association of Violence with Emergence of Persecutory Delusions in Untreated Schizophrenia*, 171 AM. J. PSYCHIATRY 332, 335-36 (2014) ("Persons with schizophrenia who did not receive treatment were more than three times as likely to be violent than their treated counterparts. . . . . There has been considerable debate over the causal pathways between schizophrenia and violence. Some investigators have argued that the association is driven entirely by comorbid conditions, such as drug and alcohol dependence. However, others have suggested that active symptoms, in particular delusions, play a significant causal role in violent behavior. Our results support this latter hypothesis, suggesting that, if left untreated, schizophrenia is associated with the emergence of persecutory delusions, which in turn increase the likelihood of violence.") (endnotes omitted); Colman O'Driscoll et al., *The Impact of Personality Disorders, Substance Use and Other Mental Illness on Re-Offending*, 23 J. FORENSIC PSYCHIATRY & PSYCHOLOGY 382 (2012); Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCH. GEN'L PSYCHIATRY 393, 399-400 (1998) ("[W]e found the presence of a co-occurring substance abuse disorder to be a key factor in violence: the 1-year prevalence was 17.9% for patients with a major mental disorder and without a substance abuse diagnosis, 31.1% for patients with a major mental disorder and a substance abuse diagnosis, and 43.0% for patients with some other form of mental disorder and a substance abuse diagnosis. . . . Substance abuse significantly raised the prevalence of violence in both patient and community samples" (*but see id*. at 400 (noting that stranger-violence is less of a risk than violence against family members and friends)); Swanson, *supra* note 88, at 119 ("Mentally disordered individuals with substance abuse comorbidity are significantly more likely to be violent than those with mental disorder alone—as shown by the odds ratios ranging from about 3.1 to 4.3."); Jeffrey Swanson et al., *Violence and Severe Mental Disorder in Clinical and Community Populations: The Effects of Psychotic Symptoms, Comorbidity, and Lack of Treatment*, 60 PSYCHIATRY 1, 18 (1997) ("[M]entally ill individuals with no treatment contact in the past 6 months had significantly higher odds of violence in the long term (albeit measured retrospectively)."); *id*. at 19-20 ("One key factor may be substance abuse comorbidity. As other studies have suggested, those with co-occurring alcohol and drug problems tend to be less compliant with treatment, are more symptomatic, present more complications, and have poorer outcomes in standard community mental health programs. . . . [P]atients with comorbid substance abuse combined with hostile suspiciousness are difficult to engage in treatment, . . . they present complicated clinical and social problems which often prove relatively intractable, and . . . they are more likely to be violent than patients with single diagnoses and nonparanoid symptomatology. And to reiterate, these results may also reflect the fact that persons with severe mental illness and substance abuse disorder—when they are also suspicious, hostile, feel threatened, and socially disconnected—tend not to remain in community treatment. Some of the same personal characteristics that are associated with treatment noncompliance may indeed lead to violence. . . . [I]t may be the case that those who are disengaged from treatment pose a significantly greater risk for violence when they experience paranoid symptoms, perceive threats or cognitive control from others.") (citations and punctuation omitted); *id*. at 21 ("As Mulvey . . . and Hiday . . . have recently argued, mental illness and substance abuse comorbidity appear to be statistically significant risk factors for violence, but the causal pathways producing these associations have not been adequately specified.") (citations omitted); Pamela J. Taylor, *Psychosis and Violence: Stories, Fears, and Reality*, 53 CANADIAN J. PSYCHIATRY 647, 650, 656 (2008) (noting that "[s]ince 1990, sound epidemiologic research has left no doubt about a significant

Of course, not all homeless individuals commit violent crimes, and not all mentally ill individuals are violent.[118] Some are, however, and "[t]he "dually diagnosed are more likely to engage in violent and criminal activity than other homeless people."[119] When that occurs, it is often difficult to obtain the long-term commitment of mentally ill and dangerous parties even if they are highly likely to repeat their violent conduct.[120] It also is difficult to persuade some mentally ill homeless people suffering from delusions and paranoia to take medication that could alleviate their symptoms, prevent violent outbursts, and improve their life.[121] Given the inability to confine such people under the law today, along with the dearth of available treatment beds for the ones who could be confined, no one is better off.[122]

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relation between psychosis and violence" and that "[a]mong the most seriously violent people with psychosis, psychotic symptoms tend to drive that violence," but adding that a study of American data "demonstrated a very significantly increased risk of violence among individuals with psychosis who also abused substances, compared with those who did not, a frequently replicated finding").

[118] Crimes committed by the homeless often are minor offenses, such as purse snatching, luggage theft, and minor property crimes (e.g., shoplifting), although a nontrivial number of the homeless engage in prostitution. BARAK, *supra* note 112, at 75, 77. Sadly, some of those people are minors. *Id*. at 88 ("Without adequate financial resources to meet their basic needs, homeless youth become prime targets for recruitment into the illicit or underground economy of drug dealing, hustling, and prostitution/pornography.").

[119] BAUM & BURNES, *supra* note 6, at 42. "Moreover, the suicide rate for this group is more than three times higher than that of the general population." *Id*. (footnote omitted).

[120] JENCKS, *supra* note 100, at 31 ("In theory, psychiatrists can still lock up people who pose a danger to themselves or others. In practice, legal and budgetary changes have made this less common than it used to be. The fact that people with histories of schizophrenia and violence tend to have relapses, when they once again lash out at others, does not have a comfortable place in American legal thinking. . . . Even when a legal case can be made for long-term confinement, fiscal austerity makes it rare except in the most extreme cases. If mental hospitals are trying to close wards, they have a strong incentive to decide that asymptomatic patients have recovered, no matter what the patient's past history suggests about the likelihood of recurrence. Discharging such patients might not pose a great danger to others if they could be monitored closely after leaving the hospital. But monitoring out-patients is difficult even when they have stable housing, and it is impossible when they have no fixed address."), 32 (noting a 300 percent increase in the risk of being pushed onto the subway tracks in New York City from the late 1970s to the 1980s); ROSENBERG & DELONG, *supra* note 99, at 2-3 ("[T]he commitment laws . . . dictate that you can't involuntarily hospitalize someone unless they declare themselves to be immediately suicidal or homicidal to an impartial evaluating psychiatrist."); Michael Ruiz, *New York Man Who Saved Woman from Subway Mugging by Scaring Off Would-Be Robber with Warning Shot Arrested*, FOX NEWS, Nov. 9, 2023, https://www.foxnews.com/us/new-york-man-saved-woman-subway-mugging-scaring-off-would-be-robber-warning-shot-arrested [https://perma.cc/8Q5X-GYW3] (noting that, in New York City, "[o]ver the last two years, 37 people have been shoved onto the subway tracks"). For examples of the difficulty, see SHELLENBERGER, *supra* note 6, at 87-89, 92-94; SEAGER, *supra* note 92, at ix-xi, 34-36, 57-65.

[121] *See* HOMELESS PEOPLE, *supra* note 91, at 59 ("Another problem confronting clinicians is a person who is neither offensive nor dangerous but who is resistant to treatment because of delusions arising from the mental illness itself. Mental health workers may believe that medication and supportive care could substantially help a mentally ill person cope, but the patient is legally entitled to refuse treatment."), 66 ("During the site visits, it was repeatedly emphasized to the committee members by those who work with the homeless that homeless people with dual and multiple diagnoses are among the most difficult to entice into treatment.").

[122] *See* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) ("[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."); HOMELESS PEOPLE, *supra* note 91, at 57-58 ("The central problem for homeless people with mental illnesses is the lack of community-based treatment facilities and adequate housing. In addition, the special characteristics of this patient group present particular challenges for treatment. These patients often have already had negative experiences with mental health care, often in understaffed, underfunded institutions, and are determined not to accept further treatment. Some have had unpleasant adverse reactions to antipsychotic medications or remember having been abused in the mental health care system; some homeless people lack insight into the reality of their illness and their need for ongoing treatment, but others who are aware of their problems simply do not believe that they will receive appropriate treatment if they accept an offer of care. In most cases, they lack the support of friends or family, are suspicious of authority figures (including providers of treatment), and are slow to develop a trusting therapeutic

It is not an arbitrary or cruel use of government power to prevent such circumstances from developing. Doing so protects not only nearby law-abiding residents, but also anyone living in homeless encampments themselves. As Michael Shellenberger has noted, "the main perpetrators of violence against the homeless tend to be other homeless people, or drug dealers."[123] Or, as Gregg Barak put it, "the proverbial 'shopping bag ladies' . . . come to experience personal violence as a normative arrangement of their day-to-day existence."[124] In sum, municipalities have a legitimate interest in preventing neighborhoods from becoming modern-day mini-versions of the infamous eighteenth-century town of Deadwood, South Dakota, where lawlessness was the order of the day.[125]

A municipality also may legitimately resort to the criminal law, even early in the process of a developing homeless encampment, for the purpose of furthering several entirely legitimate goals: to protect the physical safety of the people living near encampments and the people living in them, to maintain a decent quality of neighborhood life, to keep minor disturbances from becoming serious violent crimes, and to prevent the ready availability of drugs in open-air markets from enticing former

relationship."). The Supreme Court bears only part of the blame for homelessness; local politics often deserves the lion's share. *See* Rufo, *supra* note 97, at 39 ("At bottom, San Francisco's mental health policy is constrained by its own ideological preferences. . . . No matter how much it spends on treatment programs, the city must ultimately resolve the paradox of the perilous trifecta. Will the addicts brazenly shooting up in the subway station seek treatment on their own? Will the woman eating rats in the alleyway voluntarily accept help? We already know the answer to these questions., but the political class's conception of freedom, drenched in the Molotov rags of Berkeley 1968, cannot admit that a successful policy will require force. Until it does, however, the perilous trifecta will continue to dominate life on the streets.").

[123] SHELLENBERGER, *supra* note 6, at 25.

[124] BARAK, *supra* note 112, at 84; *id*. (noting that one study of the "bag lady" homeless in Manhattan found that "94 percent of the women interviewed admitted to being criminally victimized" and that 82 percent of those woman suffered two or more offenses such as rape, attempted rape, robbery, and theft "in one criminal incident'") (citation omitted); *see also*, *e.g*., BAUM & BURNES, *supra* note 6, at 19; HOMELESS PEOPLE, *supra* note 91, at 44 ("Homeless people are at high risk for traumatic injuries for a number of reasons. They are frequently victims of violent crimes such as rape, assault, and attempted robbery. In addition, primitive living conditions result in unusual risks; for example, the use of open fires for warmth predisposes them to potential burns."); JENCKS, *supra* note 100, at 33 ("The homeless mentally ill are probably a bit more violent than the average American, but . . . I suspect that when the homeless mentally ill are involved in violence they are as likely to be victims as aggressors."), 89 ("People with serious mental disorders are more likely to be homeless, interact with drug dealers, and be raped, beaten, or otherwise victimized than the general public.") (footnote omitted); ROSENBERG & DELONG, *supra* note 99, at 118 (noting that mentally ill women are twice as likely as mentally ill men to be victimized and five times as likely as women in the general population for be the victim of sexual assault); Amy M. Donley et al., *Violence, Criminalization, and the Homeless*, *in* 25 INT'L ENCYCLOPEDIA SOC. & BEHAVIORAL SCIS. 111, 113 (2d ed. 2015) ("It is nearly axiomatic that life on the streets or in the shelters exposes homeless people to high crime risks, and while the reward for victimizing a homeless person may be small, they are exceedingly easy targets, especially if they are also substance abusive, mentally ill, or both."); Markowitz, *supra* note 87, at 51 ("The vulnerability of the homeless mentally ill also increases their risk of being the victims of crime. They are easier targets for offenders.") (citations and punctuation omitted); Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934-2001*, 40 J. LEGAL STUD. 39, 44 (2011) ("Research has consistently shown that persons suffering from mental illness are far more likely to be victims of violent crime than the general population.") (citations and punctuation omitted); Laurence Roy et al., *Criminal Behavior and Victimization Among Homeless Individuals With Severe Mental Illness: A Systematic Review*, 65 PSYCHIATRIC SERVS. 739, 747-48 (2014).

[125] *See* Seth Bullock, Deadwood, South Dakota (2023), https://www.deadwood.com/history/infamous-deadwood/seth-bullock/ [https://perma.cc/A8QL-BSPZ] (describing Deadwood as "the wildest town in the West," and noting that "[i]n its early days the town of Deadwood took pride in being lawless, murdering anyone who dared to bring civility.").

drug users to get off the wagon or newbies to try them out.[126] Each goal is a legitimate one, and the government may use the criminal law to achieve them. If they cannot, entire neighborhoods will resemble the post-apocalyptic scenes depicted in films that now have become a reality in American cities.[127]

[126] *See, e.g.*, Alex Haracopos & Mike Hough, *Drug Dealing in Open-Air Markets*, Problem Oriented Guides for Police No. 31, CNTR. FOR PROBLEM-ORIENTED POLICING 7 (Mar. 2010) ("Open-air markets represent the lowest level of the drug distribution network. Low-level markets need to be tackled effectively not only because of the risks posed to market participants, but also to reduce the harms that illicit drug use can inflict on the local community."), 8-9 ("Drug dealing in open-air markets generates or contributes to a wide range of social disorder and drug-related crime in the surrounding community that can have a marked effect on the local residents' quality of life. Residents may feel a diminished sense of public safety as drug-related activity becomes more blatant and there is evidence that communal areas such as parks are often taken over by drug sellers and their customers, rendering them unusable to the local population. Spin-off problems associated with drug dealing in open-air markets include: traffic congestion; noise (from traffic and people); disorderly conduct; begging; loitering; vandalism; drug use and littering (discarded drug paraphernalia); criminal damage to property; prostitution; robbery; residential and commercial burglary; theft from motor vehicles; fencing stolen goods; weapons offenses; and assaults and homicides]") (footnotes and punctuation omitted); SHELLENBERGER, *supra* note 6, at 43 ("'You hear screams in the night and the sounds of power tools cutting through bike locks all day.'"), 78-79 ("Part of the reason that it's important to break up the open drug scenes . . . is to end the visibility and availability of such dangerous temptations. Researchers find that it is easier for people to quit drugs when they aren't being constantly offered or exposed to them, which recovering addicts say 'trigger' their cravings. Part of what drug dealers and drug users like about large, highly visible drug scenes in neighborhoods . . . is precisely the fact that they do trigger users. . . . Their very existence advertises drugs."), 79 ("Open-air drug markets also reduce costs by eliminating the time-consuming process of dealers and users having to find each other."); Markowitz, *supra* note 85, at 51 ("Although the presence of homeless persons and public order offenses may be primarily a nuisance, they are a significant source of neighborhood disorder, generating fear and reducing social cohesion among neighborhood residents, thus facilitating more serious crime, such as robbery.") (citations omitted).

[127] Consider the factual findings made by an Arizona trial court describing one homeless encampment. *See* Brown v. Phoenix, No. CV 2022-010439, slip op. 5 (Super Ct. Maricopa Cnty. Sept. 20, 2023), https://www.goldwaterinstitute.org/wp-content/uploads/2023/09/CV2022-010439-926-09202023.pdf: "There is rampant victimization in homeless encampments such as the Zone. . . . [A] portion of the homeless in the Zone have been resistant to going into shelters because they have accumulated a large number of possessions on the street or because they are prohibited from taking contraband into the shelter, for example: drugs and weapons. Although unthinkable for the general public, there are many individuals in the Zone that choose to live in a tent on the sidewalks or in the street, with three meals each day provided by the Human Services Campus [HSC] and the ability to engage in antisocial behavior and drug use. . . . About 70% of the individuals in the Zone accepted services when offered, which in turn means that about 30% have resisted the services. But even the 70% number can be misleading because the City is unable to determine how many individuals accepted a free hotel room for the night and then returned to the Zone the next day."), 7 ("Unsheltered homeless generally live on the street and are typically single adults. About 75% of unsheltered homeless have mental health issues or substance abuse as a factor in their status. Only about 25% to 45% of the unsheltered homeless would agree to go into shelters. Large numbers of the unsheltered homeless avoid shelters because, again, they do not wish to comply with the shelters' rules, such as no drugs, no weapons, curfews, etc. The lack of shelter beds is not determinative as to why these individuals sleep on the street. The unsheltered homeless population is more mobile and oftentimes comes from outside of the city, particularly when meals and services are offered, such as those offered at the HSC."), 8 ("There has been a dramatic increase in violent crime in the Zone since 2018, including assault and homicide. Police officers have responded on multiple occasions to situations involving burned or burning human bodies in the Zone, including that of a burned, deceased newborn baby found lying in the street and a deceased man found burned alive in a dumpster. Business owners and employees no longer feel safe and must travel in groups. There is a constant risk of violent crime to property owners, their family members, business owners and their employees while on their property or in their businesses. Employees of businesses in the Zone have been violently attacked and they face verbal confrontations with homeless individuals almost daily. There are also frequent fights involving anywhere from two to six homeless individuals."), 9 ("Every week there is some sort of violent criminal act committed in the Zone, including shootings. There had been multiple homicides in the Zone in the weeks leading up to trial (after issuance of the *Preliminary Injunction*), with the most recent homicide occurring the weekend before trial. Violence is an everyday theme, and there are random fist fights, yelling and screaming, and the brandishing of weapons daily. . . . Homeless individuals in the Zone receive threats from other homeless individuals–and even from 'advocates' for the homeless–warning them not to cooperate with City officials, such as by voluntarily moving their possessions during clean-ups. Individuals occupying the Zone are forced to pay gangs or individuals to 'rent' a spot for

The experience of law enforcement professionals, a healthy dose of common sense, and even some voices in the academy agree that neighborhood collapse is a fertile ground for public disorder and crime. Over the last 40 years, there has been considerable agreement that the physical and social deterioration of a neighborhood (such as dilapidated, abandoned, or boarded-up buildings) and an increase of public order offenses (such as open sales of illicit drugs, sleeping on public sidewalks, or public urination and defecation) over time can generate increasingly serious and violent crime. The explanation for that proposition, known as the "Broken

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their tent or structure–with the most expensive spots located next to the roads where non-profits conduct street feeding. Homeless victims are too afraid to speak with law enforcement or testify in court. These alarming facts establish that there is a violent, organized crime element that exists in the Zone. . . . There has been a proliferation in public drug use in the Zone since 2018. This includes use of needles and the smoking of dangerous substances, such as fentanyl and methamphetamine. Individuals in the Zone often smoke these dangerous substances by the doors and windows of Plaintiffs' businesses and homes, resulting in the toxic smoke coming into the residence or business and forcing Plaintiffs and their employees to risk breathing it in. There are frequent overdose cases on the property of area businesses and driveways. Plaintiffs routinely find used needles on their properties, in addition to pieces of tin foil with burned residue of fentanyl pills all over the sidewalks. Business owners and property owners often find intoxicated, unconscious individuals sleeping right up against and/or on the patios of their properties and businesses."), 10 ("Since 2018, the Zone has evolved into a serious environmental nuisance–a biohazard–that empties into the state's waterways. The City does not dispute this fact. There is a considerable amount of human waste, food waste, and trash dumped on the streets or around the streets. Homeless individuals defecate and urinate in the open on the streets, sidewalks, lawns, and buildings. Property and business owners are forced to clean up the human waste each day. When it rains, the soil in and around the area is so soaked with urine and human feces that the rain intensifies the smell. Business and property owners do not go outside when it rains because of the puddles full of human urine and feces. The proliferation of human excrement and half-eaten food causes an infestation of flies and other insects in the Zone. . . . As stated above, there are used needles lying everywhere in the Zone. And users leave pieces of tin foil with burned residue of fentanyl pills in them on the lawns, in the street, and on the sidewalks. The fentanyl-tainted pieces of tin foil blow around in the wind and come into contact with residents, business owners, their employees, and even their children. . . . There is a dramatic increase in trash since 2018. The City has provided some dumpsters in the Zone, but they are constantly overflowing. The issue is often exacerbated when the homeless climb into the dumpsters and throw the trash onto the street. Individuals living on the street dump their trash onto the sidewalks and curbs and when the wind blows, the trash is carried all over the businesses, sidewalks, and properties."), 10-11 ("Residents and business owners in the Zone have seen a dramatic increase in property crimes with the influx of homeless individuals since 2018. Plaintiffs experience break-ins of their properties during and after business hours, even when the buildings are occupied. Business owners have had to install multiple locks over and over again just to offer some sort of temporary security but the homeless continue breaking in to steal anything of value. Plaintiffs also experience frequent break-ins of their vehicles, with one Plaintiff having found a cinderblock thrown through the window of his truck so that the thief could look for anything of value inside."), 11 ("The increase in homeless individuals and drugs, coupled with the City's decrease in enforcement, has resulted in illegal prostitution, frequent public nudity, and lewd acts in plain view directly adjacent to Plaintiffs' businesses and properties. At least several times each month, business owners and/or their employees witness sex acts right out in the open or in tents with open tent flaps and open windows. There is frequent prostitution in the evenings and sex workers walk up and down the street offering to engage in sex for money. There is a tent outside one of the Plaintiffs' properties and it is routinely used for prostitution. That particular Plaintiff has been solicited when arriving at or leaving his property. There is also frequent public masturbation in plain view of business owners, their employees, and family members. . . The individuals that reside on the streets of the Zone light fires for cooking and for heat, in the open, often with nobody tending to the bonfires because the individual has passed out or walked away. At times the wind picks up and adds to the danger of the fires in the closely-packed line of tents and makeshift structures. Structure fires are not uncommon in the Zone. . . . Rights of way in the Zone are blocked. Wall-to-wall tents and encampments line the sides of the streets. The tents and makeshift structures block the entire sidewalk and portions of the street with buckets of human excrement spilling over into the streets. In most areas the tents extend five to eight feet into the street, blocking traffic, including emergency vehicles. Property and business owners find it impossible to park. Safety is also an issue because the openings to the tents are in the street, and anyone can emerge from the tent into the street, without warning and while intoxicated. Other individuals in the Zone do not have tents. Instead, they use tarps that are supported by chains located in the easements, further blocking the rights of way."

Windows" Theory, is not a difficult one to fathom.[128] As public order evaporates, offenders, believing that no one, including the police, will intervene to stop law-breaking, graduate from petty crimes to more serious offenses. Gradually, what starts out small in scale grows as additional offenders follow suit. A homeless encampment is a natural triggering condition for that prospect. The eruption of out-of-control tent communities seen wherever localities cannot or will not stop their spread—as they now cannot throughout the Ninth Circuit—can lead to a municipal "death spiral" or "doom loop," an outcome that helps no one.[129]

C. The Ninth Circuit's Rule Constitutionalizes the Law of Criminal Responsibility, Including the Insanity Defense

To borrow a quote made by the famous twentieth-century philosopher Yogi Berra, the Ninth Circuit's ruling is "like déjà vu all over again." By holding that the Constitution bars a state from punishing conduct that is the product of an overwhelming, involuntary, internal human compulsion, force, or desire, the Ninth Circuit has resurrected the question whether the Constitution federalizes the mental elements of crime, along with the insanity defense. Numerous mental and physical diseases—such as schizophrenia, bipolar disorder, dementia, infection, traumatic brain injury, or nutritional shortcomings (such as a Vitamin B1 (thiamine)

[128] The article that birthed this theory was the 1982 James Q. Wilson and George Kelling article *Broken Windows: The Police and Neighborhood Safety,* ATLANTIC 29 (Mar. 1982). There is a sizeable literature building on that foundation. *See, e.g.*, GEORGE L. KELLING, BROKEN WINDOWS AND POLICE DISCRETION (1999); WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS (1990); Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J. L. & ECON. 235 (2005); Philip B. Heymann, *The New Policing,* 28 FORDHAM URB. L. J. 407, 418, 429-32 (2000); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367-73 (1997); William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality of Life Crimes*, 3 J.L. & POL'Y 447 (1995); George Kelling & William J. Bratton, *Declining Crime Rates: Insiders' Views of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217 (1998); Cody W. Telep & David Weisburd, *What Is Known About the Effectiveness of Police Practices in Reducing Crime and Disorder*?, 15 POLICE Q. 331 (2012). *See generally* Paul J. Larkin, Jr. & David L. Rosenthal, *Flight, Race, and* Terry *Stops*: Commonwealth v. Warren, 16 GEO. J.L. & PUB. POL'Y 163, 166 & 168, & nn.8, 16-18 (2016).

[129] *See, e.g.*, Jim Carlton & Katherine Bindley, *Can San Francisco Save Itself from the Doom Loop?*, WALL ST. J., Aug. 13, 2023, https://www.wsj.com/articles/san-francisco-crime-downtown-doom-loop-e5fcd7ba [https://perma.cc/WVM3-KSWF] ("Those changes [from working remotely] have collided with a series of intertwined problems that have been festering in San Francisco for years, including high housing costs, street homelessness, rampant property crime, the fentanyl crisis and a precipitous drop in public transit ridership since the pandemic. . . . 'I don't feel safe, there are so many vagrants walking around and there is garbage everywhere,' said 63-year-old Sandra Brealey, a longtime city resident who used to go downtown regularly, but has largely stopped over the past five years. . . . 'The contract is, you provide a safe place to do business and I'll provide tax revenue,' said Steven Buss, a former tech worker who now works at a nonprofit called GrowSF. 'Until we can provide a safe place to do business, I don't know if businesses will come back.'").

Not everyone agrees. Consider former San Francisco District Attorney Chesa Boudin. He believed that "the city must implement a comprehensive transformation of the criminal justice system to decriminalize and treat mental illness, housing instability, and substance use as public health issues rather than criminal justice issues." Rufo, *supra* note 97, at 40 (footnote and punctuation omitted). How did that work out? "Boudin's plan for 'mass decarceration,' which appeals to the fallacy that crime can be solved through social services alone, amounts to a reverse Broken Windows theory and would almost certainly lead to an increase in the overall crime rate. This principle can be illustrated with an especially pernicious crime in San Francisco: car break-ins. In 2019, the city had an incredible 25,667 'smash-and grabs,' as thieves sought valuables and other property to sell on the black market. Rather than attempt to prevent or even to disincentivize this crime, Boudin had proposed a $1.5 million fund to pay for auto glass repair, arguing that it 'will help put money into San Francisco jobs and San Francisco businesses.' In literal terms, Boudin is subsidizing broken windows, under the absurd notion that it can be transformed into a Keynesian job-creation program." *Id*. at 41 (footnotes omitted).

deficit)[130]—can cause cognitive deterioration, which could then give rise to a claim that a party should not be held criminally responsible for his conduct because he could not control his actions.[131] The Ninth Circuit's rulings have opened a new avenue of litigation in criminal cases, particularly homicide prosecutions.

The *Martin* and *Grants Pass* rulings could, for instance, require acquittal of anyone raising the so-called "Irresistible Impulse" version of the insanity defense. It would exonerate a defendant whose mental disease prevented him from controlling his conduct.[132] Yet, the Supreme Court long ago rejected that defense. In 1952, in *Leland v. Oregon*, the Supreme Court rejected the claim that the Due Process Clause requires such a defense be available to a defendant.[133] Neither *Robinson* nor *Powell* overruled *Leland*; in fact, neither of those opinions even cited that decision.[134] More recent Supreme Court precedent is to the same effect. In *Clark v. Arizona*,[135] decided in 2006, and *Kahler v. Kansas*,[136] decided only four years ago, the Court repeatedly and approvingly cited *Leland* while refusing to dictate to the states what

[130] Dementia is an umbrella term used to classify mental deterioration caused by diseases such as Alzheimer's Disease, Lewy Body Disease, Parkinson's Disease, Huntington's Disease, Frontotemporal Lobar Degeneration, Vascular Disease, or other mental afflictions. *See* Neha Sharma et al., *Neurocognitive Impairment in Homeless Persons*, *in* Castadelli-Maia, *supra* note 97, at 192-93, 197-202, 206-08.

[131] What is more, given that the Ninth Circuit in *Grants Pass* applied the Cruel and Unusual Punishments Clause to civil actions, the Ninth Circuit's law might even make *civil commitment* of the dangerous mentally ill a questionable matter.

[132] *See, e.g.*, WAYNE R. LAFAVE, *supra* note 1, § 7.3, at 411-14. Among the criticisms of that defense is its weakening of the criminal law's deterrent effect. *See, e.g.*, People v. Hubert, 51 P. 329, 331 (1897) ("We do not know that the impulse was irresistible, but only that it was not resisted. Whether irresistible or not must depend upon the relative force of the impulse and the restraining force; and it has been well said that to grant immunity from punishment to one who retains sufficient intelligence to understand the consequences to him of a violation of the law may be to make an impulse irresistible which before was not.").

[133] 343 U.S. 790, 800-01 (1952) ("Much we have said applies also to appellant's contention that due process is violated by the Oregon statute providing that a 'morbid propensity to commit prohibited acts, existing in the mind of a person, who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.' That statute amounts to no more than a legislative adoption of the 'right and wrong' test of legal insanity in preference to the 'irresistible impulse' test. Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions. The science of psychiatry has made tremendous strides since that test was laid down in *M'Naghten's Case*, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement among those who have studied it. In these circumstances it is clear that adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty.'") (footnotes omitted)

[134] Neither *Robinson* nor the Marshall plurality opinion in *Powell* nor the White concurring opinion in the latter case cited *Leland*. Justice Black cited *Leland* in his concurring opinion in *Powell*, but only for the purpose of rejecting any argument that *Leland* should be overruled. 392 U.S. at 545 ("But even if we were to limit any holding in this field to 'compulsions' that are 'symptomatic' of a 'disease,' in the words of the findings of the trial court, the sweep of that holding would still be startling. Such a ruling would make it clear beyond any doubt that a narcotics addict could not be punished for 'being' in possession of drugs or, for that matter, for 'being' guilty of using them. A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease. More generally speaking, a form of the insanity defense would be made a constitutional requirement throughout the Nation, should the Court now hold it cruel and unusual to punish a person afflicted with any mental disease whenever his conduct was part of the pattern of his disease and occasioned by a compulsion symptomatic of the disease. Such a holding would appear to overrule *Leland v. State of Oregon*, 343 U.S. 790 (1952), where the majority opinion and the dissenting opinion in which I joined both stressed the indefensibility of imposing on the States any particular test of criminal responsibility.").

[135] 548 U.S. 735 (2006).

[136] 140 S. Ct. 1031 (2020).

elements an insanity defense must contain.[137] Endorsing the Ninth Circuit's decisions in *Martin* and *Grants Pass* would require the Supreme Court to upset long-settled case law.

A similar defense is the "Product of Mental Illness" standard that Judge David Bazelon created for the D.C. Circuit in *Durham v. United States*.[138] It would exculpate a party if "his unlawful act was the product of mental disease or mental defect."[139] *Durham* did not define the term "product," which essentially left the jury the unenviable task of interpreting that term as it saw fit.[140] The D.C. Circuit tried to flesh out the proper scope and application of the *Durham* rule,[141] but ultimately overruled *Durham* in *United States v. Brawner* in favor of an insanity test proposed by the American Law Institute.[142] The Supreme Court never endorsed the *Durham* test, and Congress rejected it in the Insanity Defense Reform Act of 1984.[143] The Ninth Circuit would resurrect that defense as a matter of constitutional law.

The Ninth Circuit's voluntariness-based theory would allow a defendant to do precisely what Leroy Powell sought to do in the case that bears his name: rely on a substance use disorder—there, alcohol—to be exonerated for whatever crimes he committed while in that state or to obtain that drug. Here, based on recent scientific discoveries,[144] a defendant would argue that a physical consequence of addiction is the hard-wiring of the pleasure (amygdala) and reasoning (prefrontal cortex) centers of the brain to overcome his free will and force him to obtain his drug of choice by whatever means necessary. The result would be to transform a constitutional provision designed to ban only hideously painful punishments into a right to injure the person or property of someone else to satisfy the offender's insatiable need for pleasure (or pain avoidance) that he or she *voluntarily acquired at some past time*. *Robinson* did not explain why a party cannot be held responsible for the consequences of his voluntary decision to start down the road of illicit drug use,[145] the *Powell* plurality opinion certainly drew a line well short of endorsing any such "I couldn't help myself" defense,[146] and Justice White's separate opinion acknowledged that an individual can be held responsible for the avoidable harms associated with his actions.[147] The Ninth Circuit gave no good reason why the law should be any different today.

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[137] *See Clark*, 548 U.S. at 74-71 (citing *Leland* five times); *Kahler*, 140 S. Ct. at 1027-37 (citing *Leland* eight times).

[138] 214 F.2d 862 (D.C. Cir. 1954).

[139] *Id*. at 874-75.

[140] *See* Herbert Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 369 (1955) (noting that "the concept of causality" is "a difficult and subtle matter"); *infra* note 151.

[141] *See, e.g.*, Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967); McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962) (en banc); Wright v. United States, 250 F.2d 4 (D.C. Cir. 1957) (en banc).

[142] 471 F.2d 969, 1000 (D.C. Cir. 1972) (en banc).

[143] 18 U.S.C. § 17(a) (2018) ("It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. *Mental disease or defect does not otherwise constitute a defense*.") (emphasis added).

[144] *See, e.g.*, Rita Z. Goldstein & Nora D. Volkow, *Dysfunction of the Prefrontal Cortex in Addiction: Neuroimaging Findings and Clinical Implications*, 12 NATURE REVS. NEUROSCIENCE 652 (2011).

[145] *See supra* notes 50-51.

[146] *Powell*, 392 U.S. at 533.

[147] *Id*. at 549 (White, J., concurring in the result).

Moreover, there is considerable variety among the states and federal government as to how to define an insanity defense. Congress uses a version of the American Law Institute's test, which focuses on a defendant's ability to know the nature and quality of his actions, or their wrongfulness. Congress also prohibits an "Irresistible Impulse" Defense in federal prosecutions.[148] States differ among themselves as to the nature and scope of their insanity defenses.[149] The Supreme Court has considered the insanity defense on a few occasions since *Robinson* and *Powell*,[150] and the Court has not ordered the federal or state governments to use one particular standard. The Court's decisions do not require that an insanity defense be available *at all*, let alone one that rests on the medically and philosophically inscrutable problem of determining whether a person's actions are "involuntary."[151] Indeed, the Supreme Court has consistently held that the Due Process Clause does *not* require *any* mental element in criminal offenses *at all*.[152] The Ninth Circuit offered no good reason for the Supreme Court to reconsider those doctrines now.

It is particularly inappropriate to exculpate someone for being homeless when that condition originated in voluntarily drug use.[153] Drug abuse-based homelessness is not visited upon parties without their knowledge and consent. It is the product of the repeated use of drugs such as opiates (like heroin) or stimulants (like crack and

[148] 18 U.S.C. §17(a), *supra* note 143.

[149] Kansas allows a defendant to predicate an insanity defense on proof that he lacked the requisite *mens rea* for a crime, but not on the ground that his illness prevented him from recognizing that his criminal act as morally wrong. Arizona allows a defendant to present an insanity defense by proving that his mental illness prevented him from knowing whether his act was right or wrong but not on the ground that he lacked the mental state for the crime. The Supreme Court upheld each one. *See* Kahler v. Kansas, 140 S. Ct. 1021 (2020); Clark v. Arizona, 548 U.S. 735 (2006). Similarly, Montana does not allow a defendant to maintain that he lacked the mental state necessary for a crime due to voluntary intoxication. The Supreme Court upheld that law too. *See* Montana v. Egelhoff, 518 U.S. 37 (1996).

[150] *See* Kahler v. Kansas, 140 S. Ct. 1021 (2020); Clark v. Arizona, 548 U.S. 735 (2006).

[151] *Compare*, *e.g.*, ROBERT M. SAPOLSKY, DETERMINED: A SCIENCE OF LIFE WITHOUT FREE WILL (2023) (arguing that there is no free will), *with* Paul J. Larkin & GianCarlo Canaparo, *The Fallacy of Systemic Racism in the American Criminal Justice System*, 18 LIBERTY U.L. REV. 1, 62, 151 (2023) (explaining that free will is the foundation of criminal law). *See generally Kahler*, 140 S. Ct. at 1037 ("Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law.").

[152] *See* United States v. Park, 421 U.S. 658, 660, 672-73 (1975) (holding that a company president can be convicted of violating the Federal Food, Drug, and Cosmetic Act without proof that he was aware of unsanitary conditions in a food warehouse); United States v. International Minerals & Chemical Corp., 402 U.S. 558, 563-65 (1971) (holding that a defendant can be convicted of the unlicensed interstate transportation of sulfuric acid); United States v. Freed, 401 U.S. 601, 609 (1971) (holding that a defendant can be convicted of the unlicensed possession of hand grenades); United States v. Dotterweich, 320 U.S. 277, 278, 284-85 (1943) (holding that a company president can be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction); United States v. Balint, 258 U.S. 250, 254 (1922) (holding that a real person can be convicted of the sale of narcotics without a tax stamp even absent proof that he knew that the substance was a narcotic); United States v. Behrman, 258 U.S. 280, 288 (1922) (companion case to *Balint*, holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" even without proof that he knew that his actions exceeded that limit); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68-70 (1910) (holding that a corporation can be convicted for trespass without proof of criminal intent).

[153] There is a considerable debate as to the extent to which homelessness is caused by poor voluntary choices, such as alcohol or drug use, versus adverse structural economic factors. *See, e.g.*, SHINN & KHADDURI, *supra* note 18, at 33-35. The Cruel and Unusual Punishments Clause does not require the courts to answer that question; it is properly left to the political process.

methamphetamine) that hijack the pleasure centers of the brain.[154] Heavy, sustained drug use can lead to homelessness, or consign to the streets people who already live there. Drug abuse also does more than simply cheapen someone's life.[155] It "makes marginally employable adults even less employable, eats up money that would otherwise be available to pay rent, and makes their friends and relatives less willing to shelter them."[156] Widespread drug use—especially methamphetamine nowadays—by the homeless also helps create the encampments we have seen in numerous cities.[157] As Sam Quinones put it, "[t]hough other drugs and alcohol are part of the mix, many encampments are simply meth colonies."[158] And it all begins with a person's decision to use illicit drugs, a decision that the criminal law may deem voluntary.[159]

The hypothetical posed in *Robinson* that a state might make it a crime merely to have a common cold[160] appears to have hypnotized the Court. The opinion never considered the most likely explanations why California defined the crime as being only the status of narcotics addiction—namely, to use addiction as a proxy for past acts taken by an addict, such as the ones necessary to acquire, possess, and use narcotics, as well as the future criminal conduct that an addict would inevitably commit, such as theft or prostitution, to obtain money to purchase additional drugs.[161] The Court never explained why a state could not simply define the timing of an offense in the manner that California did,[162] and the Court certainly did not consider that a voluntariness-based ruling would constitutionalize a defense of alcoholism, drug addiction, or "The devil made me do it." It would be entirely sensible to pare back the *Robinson* decision to a far simpler ruling that the Constitution requires no more than this: When a state seeks to define criminal conduct, whatever it outlaws must either include a forbidden act or be so closely associated with an earlier or later-occurring harmful or dangerous act that it justifies making criminal

[154] *See* JENCKS, *supra* note 100, at 104 ("[T]he homeless are not just passive victims. They made choices, like everyone else."). Methamphetamine produces effects that resemble those displayed by schizophrenics. *See* QUINONES, *supra* note 90, at 4 ("[T]he new meth gnawed at brains in frightening ways. Suddenly users displayed symptoms of schizophrenia—paranoia, hallucinations.")

[155] Although it certainly does that. *See, e.g.*, James Q. Wilson, *Against the Legalization of Drugs*, 89 COMMENT. 21, 26 (1990) ("Tobacco shortens one's life, cocaine debases it. Nicotine alters one's habits, cocaine alters one's soul.").

[156] *See, e.g.*, JENCKS, *supra* note 100, at 44; *id*. ("Whatever their current budgets look like, we have to assume that a significant proportion of today's homeless will spend any additional cash they receive on drugs or alcohol. This is likely to be true whether the extra money comes from a government check or from individual handouts.").

[157] QUINONES, *supra* note 90, at 4 ("The spread of this meth provoked homelessness across the country. Homeless encampments of meth users appeared in rural towns . . . . In the West, large tent encampments formed, populated by people made frantic by unseen demons in Skid Row in Los Angeles, Sunnyslope in Phoenix, the tunnels in Las Vegas. This methamphetamine . . . prompted strange obsessions—with bicycles, with flashlights, with hoarding junk. In each of these places, it seemed mental illness was the problem. It was, but so much of it was induced by the new meth.").

[158] *Id.* at 265 ("They provide a community for users, creating the kinds of environmental cues that USC psychologist Wendy Wood found crucial in forming habits. Encampments are places where addicts flee from treatment, where they can find the warm embrace of approval for their meth use.").

[159] This is not to deny that long-term drug use can hardwire the brain and make it exceptionally difficult to quit an addiction. *See id*. at 144-49, 251, 259-60, 282. The initial decision to use illicit drugs, however, is voluntary.

[160] *Robinson*, 370 U.S. at 677 (quoted *supra* at text accompanying note 58).

[161] *See* Henkin, *supra* note 54, at 70; Note, *supra* note 54, at 107 n.19.

[162] *See* Kelman, *supra* note 55, at 601-02.

what otherwise might be seen as status offense, such as addiction. Anyone must possess a drug to use it, and users who suffer from a substance use disorder—what in less politically correct times was called an "addiction"—are likely to commit crimes to satisfy their craving or desire. People with a cold generally do not steal from package stores to obtain cash to purchase their drug of choice. Heroin addicts do.

If the Supreme Court decides not to go that far, the Court should at least reject an involuntariness defense once and for all. The *Powell* plurality did, but Justice White's separate opinion left just enough room for a clever lawyer to cherry pick sentences and phrases in support of the Ninth Circuit's expansive interpretation of the Eighth Amendment. Even though dissenting opinions are an odd place to look to learn the breadth of a judicial ruling,[163] the Ninth Circuit effectively read the four-justice dissent in *Powell* along with the White concurring opinion to create the involuntariness rule it needed to justify its novel Eighth Amendment holding.[164] Yet the path to rejecting that ruling is a simple one, as noted above. Hopefully, the Supreme Court will take it.

The Supreme Court can remedy this Ninth Circuit's mistake in one or more ways. A ruling that *Robinson* did no more than require some *actus reus* element of a crime would prevent this problem from reappearing. A broader ruling that the Eighth Amendment applies only to punishment, not the definition of crimes, would also prevent rulings like the one below from intruding into the political process. Also valuable would be a ruling that whether and how voluntariness plays a role in the criminal law is for legislatures to resolve, not courts. Otherwise, over time the Supreme Court will simply wind up playing a game of whack-a-mole as different courts repeat the same mistake that the Ninth Circuit made.

CONCLUSION

It is difficult to imagine homelessness as anything other than a life of misery. Indeed, the cruel trifecta of homelessness, substance abuse, and mental illness might be the type of slow, painful death that the Cruel and Unusual Punishments Clause would forbid if the government imposed it as a sanction for crime. But neither that clause nor any other in the Constitution forces the government to eradicate homelessness or its co-occurring misfortunes. Only a Marxist constitutional theory of governance would vest the state with a duty to remedy every social problem not of its own making, and the Eighth Amendment became law in 1791, 27 years before Karl Marx was even born and 76 years before the first volume of *Das Kapital* was published. Unless the courts can treat the Constitution like Silly Putty and shape it into whatever they want, the Cruel and Unusual Punishments Clause provides no basis for ordering the states to address homelessness however the courts see fit.

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[163] *Cf.* Students for Fair Admissions v. President & Fellows of Harvard College, 600 U.S. 181, 230 (2023) ("A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.").

[164] *See Martin*, 920 F.3d at 616 ("Four Justices dissented from the Court's holding in *Powell*; Justice White concurred in the result alone. Justice White noted that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter."). Justice White did not so conclude. *See supra* notes 65-67.

The Ninth Circuit's rulings in *Martin* and *Grants Pass* did not make any effort to reconcile their newly created right to camp on public property with either the text or history of the Cruel and Unusual Punishments Clause. Perhaps that was because any such effort would have been a complete waste of time. If so, that court at least used its resources efficiently, if unwisely. Instead, the Ninth Circuit relied entirely on the Supreme Court's decisions in *Robinson* and *Powell*. In so doing, however, the court of appeals—willfully, it seems—misread those cases. The *Martin* and *Grants Pass* cases should be Exhibits 1 and 2 for the proposition that some judges succumb to the desire to legislate from the bench even more readily than all of us acquiesce in the need to sleep. The Supreme Court should return that responsibility to where it belongs: to the officials elected to address such problems.