Notes

THE CRUEL AND UNUSUAL CRIMINALIZATION OF HOMELESSNESS: FACTORING INDIVIDUAL ACCOUNTABILITY INTO THE PROPORTIONALITY PRINCIPLE

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I. INTRODUCTION: THE PROBLEM

In June 2005, County Judge David L. Denkin struck down the second attempt by the City Commission in Sarasota, Florida to stop homeless individuals from sleeping outdoors.[1] The Commission's first attempt, an ordinance prohibiting all "camping" on public property, was ruled unconstitutional by a state court in 2004 on the grounds that it was too vague and punished innocent conduct. So, in February 2005, the Commission unanimously approved a more specific ordinance prohibiting "lodging out of doors" on any public or private property without permission from the property owner. Unlike the first ordinance, which didn't define "camping," the second ordinance included a list of "lodging"-related activities, such as making a fire, laying down blankets, and putting up a tent. However, Judge Denkin said that this second ordinance still gave police officers too much discretion, because it was not clear how many of these activities would have to occur at once in order for a person to be arrested.

Initially, Judge Denkin's decision was hailed as a victory for Sarasota's homeless population. Just two months after the decision, however, the City Commission passed yet another identically intentioned

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1. NATIONAL COALITION FOR THE HOMELESS (NCH) & NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY (NLCHP), A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 25 (2006) http://www.nationalhomeless.org/crimreport/report.pdf (hereinafter "A DREAM DENIED"). The following history of Sarasota's anti-camping ordinances summarizes A DREAM DENIED 25-26.

ordinance. The new ordinance makes it a crime to sleep without permission on city or private property, either in a tent or makeshift shelter, or while "atop or covered by materials." Moreover, the ordinance specifies five additional criteria, at least one of which must be observed by a police officer in order for him to make an arrest. One of these criteria is that the suspect "is asleep and when awakened states that he or she has no other place to live." In other words, the city attempted to solve the vagueness problems of its earlier anti-homeless ordinances by explicitly targeting only the homeless population. This new law has been upheld by the court which struck down the previous two.

The saga of these ordinances, as well as the city's other policies towards the homeless, earned Sarasota the title of "Meanest City" from a coalition of homeless advocates in 2006.[2] However, while Sarasota may have been particularly unsubtle in its anti-homeless efforts, city laws criminalizing behavior generally associated with homelessness are increasingly becoming the norm across the country. Indeed, as of January 2006, 16% of cities surveyed had sweeping citywide prohibitions on loitering, loafing, and/or vagrancy, and an additional 20% had citywide bans on either sleeping or camping in public.[3] Two cities, Des Moines, Iowa and Montpelier, Vermont, even had laws preventing property owners from giving vagrants permission to sleep on their property.[4] In fact, only four cities in the United States had no legal limitations on the ability of the homeless to sleep, camp, lie or sit in public: Baton Rouge, Louisiana; Fairbanks, Alaska; Montgomery, Alabama; and New York, New York.[5] New York was actually named the fourteenth meanest city in the country, because of its discriminatory enforcement of neutral laws.[6]

Rather than demonstrating anything exceptional about Sarasota, the fight over that city's ordinances exemplifies the legal battle that homeless advocates are currently engaged in nationwide. Indeed, the Sarasota saga's most important lesson might be its demonstration of the inherent danger of challenging anti-homeless legislation as unconstitutionally vague. This approach has been the most popular strategy for legal challenges to such legislation since the Supreme Court's decision in *Papachristou v. City of Jacksonville.*[7] Since homeless advocates only lodge this type of vagueness challenge strategically—their actual objection to this sort of legislation is not that it inadvertently condemns the innocently napping housewife—the strategy can backfire. That is, if, instead of abandoning its quest to criminalize

2. *Id.* at 24. *See also Sarasota, Fla. named meanest city for homeless*, USA TODAY (Jan. 13, 2006), available at: http://www.usatoday.com/news/nation/2006-01-13-homeless-cities_x.htm.

3. A DREAM DENIED, *supra* note 1, at 9.

4. *Id.* at 135-45.

5. *Id.* (excluding surveyed Puerto Rican cities).

6. *Id.* at 24.

7. 405 U.S. 156 (1972).

certain behavior often engaged in by the homeless after a successful vagueness challenge, a city reacts like Sarasota and simply makes its laws more specifically targeted to such behavior *only* as engaged in by the homeless, then the homeless may actually be made worse off.

The Sarasota saga suggests that legal challenges to anti-homeless legislation should be based on the real problem with such legislation from the perspective of the homeless: not that it incidentally reaches the innocent conduct of the non-homeless, but that it intentionally targets the equally innocent conduct of the homeless. Indeed, in a few cases, anti-homeless statutes have been challenged on this basis as being in violation of the Eighth Amendment's prohibition on cruel and unusual punishment—with mixed results.[8] However, these challenges have been narrowly focused on whether such statutes impermissibly criminalize the status of being homeless in contravention of the "Status Crimes Doctrine."[9] In *Robinson v. California*,[10] the Supreme Court held that a California statute criminalizing narcotics addiction constituted cruel and unusual punishment because it penalized individuals merely on the basis of their status. Thus, challenges to anti-homelessness statutes under the Status Crimes Doctrine focus on whether the Eighth Amendment prohibition on criminalizing status extends to criminalizing involuntary acts that are derivative of status, and whether, given the shortage of shelter and other services for the homeless in most cities, the particular acts targeted by the challenged statutes can be characterized as involuntary.

The Eighth Amendment is indeed an important vehicle for challenging anti-homeless statutes, particularly those (like all three manifestations of Sarasota's anti-camping ordinances) that criminalize the performance of basic human functions in public. This paper argues, however, that the current focus in such challenges, in practice and in academic literature, on directly applying the Robinson Doctrine to the homelessness context is misplaced. The fundamental problem with the current approach is that it incorrectly treats *Robinson* as a standalone strand of Eighth Amendment jurisprudence, rather than locating it within the broader context of the Eighth Amendment's restrictions on disproportionate punishment. Instead, *Robinson*'s categorical prohibition on status crimes should be seen merely as a result of applying the Eighth Amendment's general prohibition on disproportionate punishment to a particular class of cases in which *any* given punishment would be disproportionate because the "conduct" sanctioned is *entirely* innocent.

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8. *Compare* Joyce v. City and County of San Francisco, 87 F.3d 1320 (9th Cir. 1996) (rejecting an 8th Amendment-based challenge); *with* Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006).

9. *See, e.g., Jones*, 444 F.3d at 1131-1148 (discussing the 8th Amendment-based challenge to an anti-homeless law purely in terms of Robinson-based precedent, as well as analyzing the similarly-focused analysis of other courts considering similar challenges).

10. 370 U.S. 660 (1962).

Thus, the current *Robinson*-based approach to challenging anti-homeless statutes has it backwards: rather than attempting to extrapolate a broader Eighth Amendment prohibition on punishing innocent conduct from the *Robinson* prohibition on punishing status, the *Robinson* doctrine should be viewed as one particular manifestation of the Eighth Amendment's broader prohibition on punishing innocent conduct. Future challenges to anti-homeless legislation, then, should ignore status-specific issues and instead be directly grounded in the Eighth Amendment's prohibition on disproportionate punishment. Under this approach, any anti-homeless statute that would have been invalidated under a broad reading of *Robinson*—that is, on the grounds that it targeted purely involuntary behavior symptomatic of an individual's homeless status—will still be invalidated on the grounds that it disproportionately punishes an act for which no punishment is permissible. However, statutes that would definitely have been upheld under the *Robinson*-based approach for targeting behavior that is at least somewhat voluntary, such as the Sarasota ordinance's prohibition on lodging (as opposed to on mere sleeping), may now also be invalidated if they assign punishment disproportionate to the offense committed.

Section II of this paper will discuss the history of the "criminalization of homelessness" and the current state of anti-homeless legislation. Section III will argue that *Robinson*-based challenges to anti-homeless statutes are insufficient to ensure that legislation is actually consistent with the Eighth Amendment, and thus also insufficient to protect the homeless. Subsection III(A) will argue that the Eighth Amendment is a particularly appropriate constitutional basis on which to challenge criminalization statutes. III(B) will discuss the specific Eighth Amendment theory that has grounded past challenges: the Status Crimes Doctrine's prohibition on criminalizing status as developed in *Robinson* and *Powell*. III(C) will explore the grounds on which past *Robinson*-based challenges have succeeded in the context of anti-homeless legislation. Subsection III(D) will conclude that the interests of the homeless are insufficiently protected even under the broadest plausible interpretation of the Robinson Doctrine.

Section IV of this paper will propose a new Eighth Amendment framework for challenging anti-homeless legislation that locates the Robinson Doctrine within the Amendment's general prohibition on disproportionate punishment. Subsection IV(A) will lay out the proposed framework: the amount of punishment permitted under the Eighth Amendment for the commission of a particular act is a function of an individual's responsibility for committing that act and the interest of society in punishing that act. IV(B) will explain how the framework fits into existing Eighth Amendment case law. IV(C) will consider the constitutionality of anti-homeless legislation within the proposed framework. Finally, Section V will offer a brief conclusion.

II. THE CONTEXT: HISTORY OF THE CRIMINALIZATION OF HOMELESSNESS

Public awareness of homelessness[11] can be traced back to the late 1970s, "when beggars and 'street people' became increasingly noticeable in the downtowns of many cities."[12] There are many different definitions of homelessness, [13] but perhaps the most common is the one adopted by Congress: a homeless individual is one who lacks a fixed, regular, and adequate night-time residence, and whose primary night-time residence is either a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings, or a shelter, or similar facility, designed to provide temporary living accommodations.[14] The fact that whether this definition is sufficiently inclusive became the subject of debate even before its adoption[15] is only of limited importance to this paper, since the definition covers the kind of individuals that tend to be targeted by anti-homeless legislation: the visibly homeless.[16]

The method that should be used to measure the size of the homeless population is also the subject of dispute.[17] The most reliable available estimates indicate that roughly 3.5 million Americans now experience homelessness during the course of a year,[18] while between 400,000 and 850,000 are believed to be homeless on any given night,

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11. Or, more particularly, of "new homelessness," since some form of homelessness has been present (with varying degrees of prevalence and of social awareness) for centuries. KENNETH L. KUSMER, DOWN & OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY 3 (2002).

12. *Id.* at 239.

13. Most of the debate surrounding the definition of homelessness centers on whether it should include individuals living doubled up with friends or relatives and those living in substandard housing. *See* JAMES D. WRIGHT, ADDRESS UNKNOWN: THE HOMELESS IN AMERICA 19-21 (1989). *Cf.* ALICE S. BAUM & DONALD W. BURNS, A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS 173 (1993) (suggesting that this debate is counterproductive to the task of addressing the needs of a heterogeneous homeless population).

14. Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11302 (1988 & Supp. IV 1992).

15. *See generally* HOUSING AND URBAN DEVELOPMENT (HUD), HUD REPORT ON HOMELESSNESS: JOINT HEARINGS SUBCOMM. ON HOUS. AND CMTY. DEV., COMM. ON BANKING, FINANCE, AND URBAN AFFAIRS, AND SUBCOMM. ON MANPOWER AND HOUS., COMM. ON GOVERNMENT OPERATIONS (1983).

16. The definition of homelessness remains of some importance because of its effect on the size of the homeless population, which plays a crucial role in evaluating the adequacy of shelter and service provision. For instance, a study by the Department of Education in 2000 estimated that over one-third of children that it identified as homeless would be excluded under the Congressional definition because they were living with friends or relatives in overcrowded housing. NCH, *How Many People Experience Homelessness?* at 1 (June 2006), http://www.nationalhomeless.org/publications/facts/How_Many.pdf (hereinafter "*How Many*").

17. *Id.* at 2 (comparing the efficacy of "point-in-time counts," which measure the homeless population on a given date, to "period prevalence counts," which measure the homeless population over a given period of time).

18. MARTHA BURT ET AL., HELPING AMERICA'S HOMELESS: EMERGENCY SHELTER OR AFFORDABLE HOUSING? 49-50 (2001). *Accord How Many*, *supra* note 16, at 2 (citing findings by the National Law Center on Homeless and Poverty).

depending on the time of year.[19] This indicates that for most individuals homelessness is only a temporary phenomenon. Indeed, nationally, the average length of time for which an individual remains homeless is approximately seven months.[20] However, despite debate over the exact number of homeless individuals who experience homelessness on a given night or in a given year, there is a consensus among both social scientists and service providers that both of these figures have grown fairly steadily over the past three decades[21] and that they continue to do so.[22]

Although the stereotypical explanations for homelessness generally involves substance abuse, mental illness, or extreme laziness,[23] there is actually considerable consensus that structural causes play a larger role in explaining homelessness—particularly the growth thereof[24]—than personal ones.[25] This is not to say that such personal "deficiencies" have no role in explaining homelessness (there is considerable evidence that substance abuse and mental illness make

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19. The National Survey of Homeless Assistance Providers estimated that 444,000 people were homeless in October 1996, whereas 842,000 were in February of the same year. *How Many*, *supra* note 16, at 2. Other studies place the count closer to 700,000. *See* Martha R. Burt, *Critical Factors in Counting the Homeless*, 65 AM. J. ORTHOPSYCHIATRY 334, 335 (1995).

20. U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 42 (Dec. 2005), http://www.usmayors.org/uscm/hungersurvey/2005/HH2005FINAL.pdf (hereinafter "STATUS REPORT 2005").

21. It is difficult to track the growth of the homeless population precisely, because early estimates of its size are even more disputed than current ones. However, the most widely accepted estimates of the number of individuals homeless on any given night in the mid-1980s place it between 200,000 and 250,000 people. *See* Christopher Jencks, *The Homeless*, 2 FOCUS 16 (Winter 1994-1995); and KUSMER, *supra* note 11, at 239. Moreover, a 1997 review of research conducted over the preceding decade in eleven communities and four states found that shelter capacity more than doubled in nine communities and three states during that time period. While in two communities and two states, shelter capacity tripled over the decade. NCH, *Homelessness in America: Unabated and Increasing* (1997).

22. *See* U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 43 (Dec. 2004), http://www.usmayors.org/uscm/hungersurvey/2004/onlinereport/HungerAndHomelessnessReport2004.pdf (hereinafter "STATUS REPORT 2004")); and STATUS REPORT 2005, *supra* note 20, at 37. Both reports indicate an average growth rate of only 6%, however, which indicates that the growth of the homeless population, while still steady, may have slowed in recent years.

23. Bruce G. Link et al., *Public Attitudes and Beliefs about Homeless People*, *in* HOMELESSNESS IN AMERICA 143, 145 (Jim Baumohl ed., 1996). Indeed, in this survey, 90.8% of respondents identified substance abuse as a primary cause of homelessness, far more than identified any structural cause. *Id.*

24. During the 1980s—the period during which the homeless population grew the fastest—the fastest growing segment of the homeless population (by far) was homeless families. DONNA HAIG FRIEDMAN, PARENTING IN PUBLIC: FAMILY SHELTER AND PUBLIC ASSISTANCE 14 (2000). Given that a much greater proportion of the single adult homeless population is in need of intensive services (in particular, substance abuse and mental health treatment) than of the homeless parent population, it stands to reason that personal deficiencies of the type that would require such intensive services was not responsible for the growth in homelessness. *See* Robert Rosenheck et al., *Special Populations of Homeless Americans* 11, http://aspe.hhs.gov/progsys/homeless/symposium/2-Spclpop.htm (last accessed May 22, 2006).

25. *See* NCH, *Why are People Homeless?* 1 (June 2006), http://www.nationalhomeless.org/publications/facts/Why.pdf (hereinafter "*Why Homeless*"); *and* STATUS REPORT 2005, *supra* note 20, at 63.

particular *individuals* more susceptible to homelessness), but simply that homelessness would continue to exist in society even if all such personal deficiencies were eliminated. In particular, the National Coalition for the Homeless (NCH) identifies two structural trends as largely responsible for the rise in homelessness over the past 20-25 years: a growing shortage of affordable rental housing and a simultaneous increase in poverty.[26]

Mental illness and substance abuse are the two personal deficiencies most associated with homelessness.[27] In fact, two-thirds of mayors of major cities identify mental illness and the lack of facilities to adequately treat it as major causes of homelessness.[28] Estimates of the prevalence of mental illness in the homeless population, however, place it only between 20% and 40%.[29] Still, there is no question that the mass deinstitutionalization of the mentally ill that occurred during the 1960s and 1970s helped account for the "birth" of homelessness, particularly in urban areas.[30] Almost as many mayors identified substance abuse and the lack of facilities to adequately treat it as major causes of homelessness.[31] Indeed, surveys of homeless populations conducted during the 1980s found consistently high rates of addiction, particularly among single men; however, recent research has called the results of those studies into question.[32] While there is no generally accepted "magic number" with respect to the prevalence of addiction disorders among homeless adults, recent evidence places it around 30%, and the frequently cited figure of about 65% is probably at least double the real rate for current addiction disorders among all who are homeless in a given year.[33]

The important lesson to take from the literature is simple: homelessness is rarely, if ever, a choice. On the contrary, homelessness

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26. *Why Homeless*, *supra* note 25, at 1. These are also the two factors most frequently identified by mayors as "major causes" of homelessness in their cities. STATUS REPORT 2005, *supra* note 20, at 63.

27. Another frequently cited cause of homelessness that might be categorized as "personal," but is obviously of a different species than other personal causes, is domestic violence. Different studies place the percentage of homeless mothers and their children who left their last residence in order to flee domestic violence between 22% and 50%. *See, e.g.*, J. Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 421-429 (1991).

28. STATUS REPORT 2005, *supra* note 20, at 64.

29. *See id.* at 72; *also see* NCH, *Homelessness: Programs and the People They Serve – Highlights Report*, http://www.huduser.org/publications/homeless/homelessness/highrpt.html (last accessed May 22, 2006),

30. *See, e.g.*, MICHAEL J. DEAR & JENNIFER R. WOLCH, LANDSCAPES OF DESPAIR: FROM DEINSTITUTIONALIZATION TO HOMELESSNESS 110-38 (1987). Indeed, the deinstitutionalization phenomenon caused the population of state mental hospitals to drop from approximately 500,000 in the 1950s to less than 100,000 by the early 1990s. Edmund V. Ludwig, *The Mentally Ill Homeless: Evolving Commitment Issues*, 36 VILL. L. REV. 1085, 1086 (1991).

31. STATUS REPORT 2004, *supra* note 22, at 85.

32. *See generally* Paul Koegel et al., *The Causes of Homelessness*, *in* HOMELESSNESS IN AMERICA 24 (Jim Baumohl ed., 1996).

33. NCH, *Who is Homeless?* 3-4 (June 2006), http://www.nationalhomeless.org/publications/facts/Whois.pdf.

is generally the result of structural factors, to which personal choices may render a given individual more susceptible. Indeed, even those analysts who identify personal deficiencies as the primary causes of homelessness recognize that structural factors contribute to those deficiencies (e.g., the "gentrification" of addictions treatment that has dramatically reduced treatment for indigent addicts),[34] and disavow the view that homeless people have chosen their lifestyle.[35]

By the early 1980s, the homeless had become such a visible part of the urban landscape that newspapers across the country declared a looming "crisis."[36] However, the first comprehensive federal legislation aimed at combating that crisis, the Stewart B. McKinney Homeless Assistance Act,[37] was not signed into law by President Ronald Reagan until July 22, 1987, nearly a decade after the "birth" of homelessness.[38] Even this legislation soon proved inadequate, however, with a 1994 Congressional report estimating that 275,000 shelter spaces[39] were available to serve a nightly homeless population of roughly 700,000.[40] More recent studies indicate that current shelter availability is still woefully inadequate. A 2004 review of fifty cities found that "in virtually every city, the city's official estimated number of homeless people greatly exceeded the number of emergency shelter and transitional housing spaces" available.[41] A review of twenty-seven cities in that same year found that 23% of all actual requests for emergency shelter went unmet due to lack of resources, including 32% of such requests from families.[42]

Due in part to this lack of sufficient temporary shelter, the street homeless had become a constant of the urban landscape by the early 1990s, and the public at large had become increasingly apathetic to their plight.[43] As the effects of the presence of a sizeable population of street

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34. *See, e.g.*, BAUM & BURNES, *supra* note 13, at 155.

35. *Id.* at 159-62.

36. *E.g.*, Deirdre Carmody, *New York is Facing 'Crisis' on Vagrants*, N.Y. TIMES, June 28, 1981, at A1.

37. 42 U.S.C.A. § 11301 *et seq.* (authorizing $325 million in appropriations for FY 1987). After the death of its sponsor, Rep. McKinney, the Act was renamed the McKinney-Vento Homeless Assistance Act. *Id.*

38. U.S. Department of Housing & Urban Development, *McKinney-Vento Homeless Assistance Act*, at: http://www.hud.gov/offices/cpd/homeless/rulesandregs/laws/index.cfm (last accessed May 22, 2006). For an analysis of the original McKinney Act, see MARY ELLEN HOMBS, AMERICAN HOMELESSNESS 47-48 (1990).

39. INTERAGENCY COUNCIL ON THE HOMELESS, PRIORITY: HOME!: THE FEDERAL PLAN TO BREAK THE CYCLE OF HOMELESSNESS 40 (1994).

40. *See* Burt, *supra* note 19, at 335.

41. *How Many*, *supra* note 16, at 1.

42. *See* STATUS REPORT 2004, *supra* note 22, at 43.

43. *See, e.g.*, Robert C. Ellickson, *Controlling Chronic Misconduct in Public Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165, 1169 (1996); Nancy A. Millich, *Compasion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways*, 27 U.C. DAVIS L. REV. 255, 264 (1994). However, some commentators question whether the public is *actually* unsympathetic to the homeless, or whether local governments simply impute this view to them. *See, e.g.*, Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 YALE

homeless began to be felt by the general public, the aim of policies directed at the homeless shifted from social welfare to social control—that is, to minimizing the effects of homelessness on the "quality of life," particularly in urban areas. Cities cited a variety of specific concerns in adopting quality of life measures of this sort, including the link between homeless individuals and crime,[44] the sanitation and public health problems associated with the homeless,[45] the effect of the homeless on tourism and business,[46] and even purely aesthetic concerns.[47] Some cities explicitly admitted, however, that their intention was to drive their homeless residents out of the city[48] or at least to render the homeless "invisible."[49] Given the motivation of these quality of life measures, it is perhaps not surprising that they are more prevalent in those localities that do not provide sufficient shelter space for their homeless population.[50]

The particular forms that modern anti-homeless statutes take are influenced by legal challenges to the historical predecessors to these quality of life measures. In 1972, the Supreme Court found a typical vagrancy ordinance to be overbroad in violation of the Fourteenth Amendment's Due Process Clause in *Papachristou v. City of Jacksonville*.[51] Then, about a decade later, in *Kolender v. Lawson*, the Court voided for vagueness a typical loitering statute, which required people "who loiter or wander the streets" to provide "reliable" identification and to account for their presence when asked to by a police officer.[52] In other words, these statutes were invalidated not because the Court believed there was anything intrinsically wrong with criminalizing

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L. & POL'Y REV. 1, 51 (1996) ("Public opinion polls, however, do not support the view that the public is not sympathetic to homeless people. A December 1995 Gallup poll on public attitudes on homelessness found that 86% of the public are sympathetic to homeless people, and that 33% report that they feel more sympathy now than they did five years ago") (*citing* Constance Casey, *One in Six Americans Say They Fear They Could Become Homeless*, *in* NEWHOUSE NEWS SERVICE (Dec. 28, 1995)).

44. The link between the homeless and crime can be more or less pernicious. *Compare* National NLCHP, *No Homeless People Allowed* 22 (1984) (discussing an anti-homeless ordinance justified at least in part by likening the presence of the homeless to the presence of "broken windows" in James Q. Wilson's so-named theory); *with* Foscarinis, *supra* note 43, at 23 n.185 (citing an ordinance justified on the grounds that the homeless were themselves directly responsible for serious criminal activity).

45. *See, e.g.*, Roulette v. City of Seattle, 850 F. Supp. 1442, 1445 (W.D. Wash. 1994), preliminary injunction vacated, 64 U.S.L.W. 2598 (9th Cir. Mar. 18, 1996).

46. *See* Foscarinis, *supra* note 43, at 24 (citing Memorandum from Michael F. Brown, City Manager, Tuscon, Arizona, to Mayor and City Council of Tuscon, Arizona (n.d.)(on file with author)).

47. Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 395 (Cal. App. 1994), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev'd*, 892 P.2d 1145 (Cal. 1995).

48. *See, e.g.*, *Tobe*, 27 Cal. Rptr. 2d at 387 (quoting Allen E. Doby, Executive Director of the Recreation Services Agency, Vagrants (Municipal Memorandum dated June 16, 1988)).

49. Brief for Appellant at 8, & 8 n.5, *Joyce v. City of San Francisco*, No. 95-16940 (9th Cir., filed Jan. 16, 1996)(citations omitted).

50. Jonathan L. Hafetz, Homeless *Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1235 (2003).

51. 405 U.S. 156, 171 (1972).

52. 461 U.S. 352, 353 (1983).

the sorts of behaviors that the statutes were aimed at, but because, interpreted literally, the statutes also criminalized behavior typically considered to be innocent and thus gave insufficient notice with regards to which behaviors they would be enforced against.[53] As a result of these two decisions—and the subsequent invalidation of similar statutes by lower courts around the country—the new wave of anti-homeless statutes is characterized by much more specific language, carefully tailored to criminalize only particular acts associated with homelessness.[54] As Andrea Sachs noted in the American Bar Association Journal, "[i]t is especially worth noting that homeless survival is often the intended target of strict liability crimes that do not require any mens rea. For example . . . a city may pass an ordinance making it unlawful to store personal property on city land, regardless of any criminal intent. Such ordinances, which criminalize behavior that is well known by everyone to be associated with the street homeless, are likely to be aimed at the homeless."[55]

Many such statutes challenge the very presence of the homeless in public spaces. According to a 2005 study, over 97% of surveyed cities had at least one statute regulating the purely passive behavior of the homeless.[56] These statutes range from the very broad, like Dallas, Texas' prohibition on all sleeping in public places,[57] to the very specific, like Santa Monica, California's statute prohibiting sleeping on the beach at night.[58] A number of cities specifically target the homeless by prohibiting the sort of passive behavior that the homeless—as opposed to other city residents—tend to engage in, such as Denver, Colorado's prohibition on the building or placing of any "tent building, shack, booth, stand, or other structure" on public land,[59] and New York, New York's prohibition on "using a park bench in a way that interferes with its use by other people."[60] Indeed, 14% of U.S. cities surveyed had citywide prohibitions on sleeping, while an additional 29% had prohibitions on sleeping in certain areas; 19% of cities prohibited "camping" citywide, while an additional 33% percent prohibited camping in certain areas; and 97% of cities had some other restriction on the passive behavior of the homeless, such as an ordinance against sleeping or lying on the sidewalk,

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53. *See Papachristou*, 405 U.S. at 163.

54. *See* Harry Simon, *Towns Without Pity*, 66 TUL. L. REV. 631, 650 (1992).

55. Andrea Sachs, A *Right to Sleep Outside?: Law Designed to Keep Homeless Out of Public Areas Spurs Lawsuits*, A.B.A. J. 38 (Aug. 1993). Moreover, though this paper is concerned primarily with laws criminalizing homelessness per se, recently there have also been a number of indirect restrictions on homelessness passed in the form of limitations on individuals and groups seeking to aid the homeless. *See* A DREAM DENIED, *supra* note 1, at 9.

56. A DREAM DENIED, *supra* note 1, at 135-144.

57. Dallas, Tex. City Code § 31-13 (a)(1)(1992).

58. Santa Monica, Cal., Ordinance 1738 (Apr. 26, 1994), amending Santa Monica, Cal. Mun. Code § 4.08.090.

59. Denver, Col., Rev. Code § 39-7 (b)(1997).

60. N.Y.C. Parks and Recreation Rules, Article iii, § 19 (1984).

or an anti-vagrancy or loitering statute.[61]

Still other statutes target specific active behaviors that tend to be engaged in primarily be homeless; 93% of cities surveyed were found to have at least one such statute.[62] Begging is one frequently criminalized activity, with 18% of surveyed U.S. cities having blanket city-wide begging prohibitions and 74% having at least some restrictions on begging.[63] The performance of personal hygiene-related activities in public is also often targeted (although, somewhat perversely, some cities also criminalize the failure to have performed them).[64] Public urination and defecation are frequently subject to sanction: in San Antonio, Texas, urinating on the sidewalk is a class C misdemeanor that can lead to a fine of up to $500;[65] in Ventura, California, police have teamed with service providers to ensure that public urination or defecation will cause a homeless offender to lose access to much needed social services;[66] and in Albany, Oregon, city officials "monitor" homeless individuals who "make a mess."[67] Bathing in public is also often prohibited, as in Newark, New Jersey, where "disrobing" and bathing are prohibited in transit station bathrooms.[68]

Finally, there are cities that eschew laws explicitly criminalizing activities associated with homelessness, but which nevertheless target the homeless population. Such cities generally use statutes that appear neutral towards the homeless on their faces—that is, target relatively specific conduct (with apparent social cost) that does not seem to be predominantly performed by the homeless population—but enforce them against the homeless disproportionately.[69] These statutes might take the form of a passive behavior restriction, like Seattle, Washington's prohibition on sidewalk obstruction,[70] or an active behavior restriction, like Savannah, Georgia's anti-spitting ordinance.[71] Indeed, there is reason to believe that this strategy has been employed as of late in New York City, the city with the largest reported homeless population in the eastern U.S.[72] In New York, though there are no statutes that directly target obviously "homeless-specific" behavior (such as begging or camping), the number of homeless individuals arrested has "skyrocketed

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61. A DREAM DENIED, *supra* note 1, at 135-144.

62. *Id.*

63. *Id.*

64. *See, e.g.*, *id.* at 140 (discussing Minneapolis, Minnesota's simultaneous prohibitions on public bathing and "creating an odor").

65. *Id.* at 37.

66. *Id.* at 76.

67. *Id.* at 44.

68. A DREAM DENIED, *supra* note 1, at 64.

69. *See, e.g.*, Johnson v. City of Dallas, 860 F. Supp 344, 346 (N.D. Tex. 1994).

70. Seattle, Wash. Ordinance Forbidding Sitting or Lying Down on Public Sidewalks, adding § 15.48.040 (1993): Prohibiting sitting or lying down on sidewalks.

71. A DREAM DENIED, *supra* note 1, at 73.

72. ELLEN BAXTER & KIM HOPPER, PRIVATE LIVES/ PUBLIC SPACES: HOMELESS ADULTS ON THE STREETS OF NEW YORK CITY 9 (1981).

in the past few years," from 737 in 2000 to 3,086 in 2004.[73]

Overall, the criminalization of behavior associated with homelessness has steadily increased over the last two decades, while services for the homeless (even as basic as emergency shelter) have remained consistently inadequate.[74] As a result, by 2002, all 57 communities surveyed by the National Law Center on Homelessness & Poverty had both some type of public-space restriction and insufficient shelter space to serve their homeless populations.[75]

III. TOWARD THE SOLUTION: EIGHTH AMENDMENT-BASED CHALLENGES TO CRIMINALIZATION

A. WHY THE EIGHTH AMENDMENT?

Given the increase in the criminalization of homelessness during the last two decades, it is perhaps not surprising that homeless advocates (and others affected) have launched a number of legal challenges to criminalization statutes[76] during this period.[77] Constitutional challenges, in particular, have an important role to play in combating anti-homeless legislation, because they result in nationally uniform standards regarding the treatment of the homeless and thus circumvent the race to the bottom that occurs between municipalities (and/or states) when they are entirely free to set their own homelessness-related policies. Even if an individual municipality would like to fairly balance the rights of its homeless population with the needs of its community, it has an overriding incentive not to make its community more attractive to the homeless than neighboring communities lest it invite an influx of homeless people. As a result, in the long-term, successful challenges to anti-homeless legislation will affect policy nationwide—something which constitutional challenges are uniquely suited to do.

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73. A DREAM DENIED, *supra* note 1, at 38. See *id.* at 37-38 for a description of the discriminatory enforcement practices engaged in by the New York City Police Department.

74. Since 1991, the NLCHP and the NCH have issued a series of reports chronicling this increase. These publications are all available in the publications area of http://www.nlchp.org.

75. NLCHP & NCH, *Punishing Poverty: The Criminalization of Homelessness, Litigation, and Recommendations for Solutions* at v (2003) (hereinafter "*Punishing Poverty*").

76. There have also been a number of challenges to the treatment of the homeless, in particular the property of the homeless, on Fourth Amendment grounds. *See, e.g.*, Hiibel v. Sixth Judicial District of Nevada, 542 U.S. 177 (2004). These challenges have usually not been to the criminalization of homelessness per se (that is, to anti-homeless statutes or the application of such statutes), but instead to state actions which occurred in conjunction with the enforcement of such statutes. Indeed, because these actions are usually not even explicitly authorized by statute, advocates sometimes have difficulty proving that they are "official policy" or "pervasive practice or custom" as required for municipal liability for monetary damages. *See, e.g.*, Church v. City of Huntsville, 30 F.3d 1332, 1242-43 (11th Cir. 1994).

77. For a relatively complete account of the various suits that have been filed in federal and state courts against criminalization statutes, see A DREAM DENIED, *supra* note 1, at 79-134.

The majority of constitutional challenges to criminalization statutes to date—and the vast majority of successful ones[78]—have been grounded in the Fourteenth Amendment's Due Process Clause.[79] Indeed, in the wake of the Supreme Court's decision in *City of Chicago v. Morales*, striking down the Gang Congregation Ordinance on vagueness grounds,[80] such challenges have skyrocketed.[81] Though the Court's earlier decisions in *Papachristou*[82] and *Kolender*[83] had laid the groundwork for due process-based challenges to homeless criminalization statutes in theory, pre-*Morales* these challenges enjoyed only limited success.[84] Post-*Morales*, however, such challenges have been more favorably received by courts—for instance, the challenges to Sarasota's camping ordinances discussed in the introduction.[85]

Because due process-based challenges have had considerable success in overturning anti-homeless laws, advocates might be tempted to concentrate their efforts on launching similar challenges in the future. This would be a mistake, however, for such challenges have actually incentivized the creation of more specifically targeted anti-homeless laws that are likely to obtain judicial approval. That is, the basic rule that has emerged from due process-based challenges is as follows: the more specifically a statute targets particular "non-innocent" behavior, the more likely it is to be upheld. However, since the particular types of behavior

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78. There have also been a number of First Amendment-based challenges to anti-homeless laws. However, such challenges have been primarily limited to anti-begging ordinances challenged as overly broad in violation of the First Amendment. I won't discuss these challenges at length here, because their constitutional rationales are so limited to the speech-specific context, and thus have no real implications for challenging anti-homeless ordinances in general. *See, e.g.*, Roulette v. City of Seattle, 97 F.3d 300, 303-04 (9th Cir. 1996) (holding that sitting and lying not generally associated with expression, so since statute prohibiting those activities does not seek to regulate "spoken words" or patently "expressive or communicative conduct," statute consistent with First Amendment). Indeed, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Supreme Court held that even where sleeping, camping, sitting or lying in a public place is imbued with a particular message because of the context, laws prohibiting such activities will generally be constitutionally permissible time, place, or manner restrictions.

79. Advocates for the homeless have also launched both facial and as applied challenges to statutes criminalizing homelessness on the basis of the Fourteenth Amendment's Equal Protection Clause. *See, e.g.*, Ramos v. Town of Vernon, 353 F.3d 171 (2d Cir. 2003). In general, facial challenges to laws which target the homeless have failed on the grounds that the homeless are not a suspect or quasi-suspect class and that the challenged laws are rationally related to a legitimate state interest. *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000). However, suits that have alleged the selective enforcement of laws against the homeless have had some success—though typically via out of court settlements. *See, e.g.*, Picture the Homeless v. City of New York, No. 02 Civ. 9379 (S.D.N.Y. March 31, 2003).

80. 527 U.S. 41 (1999) (finding that the law it did not provide adequate notice of the proscribed conduct nor set minimal guidelines for law enforcement, in violation of the due process clause of the Fourteenth Amendment).

81. *Punishing Poverty*, *supra* note 75, at x.

82. 405 U.S. 156 (1972).

83. 461 U.S. 352, 353 (1983).

84. See, e.g., Schleifer v. City of Charlottesville, 159 F.3d 843 (4th Cir. 1998), *cert. denied*, 1999 U.S. LEXIS 1908 (1999).

85. See, e.g., City of Sarasota v. Nipper, No. 2005 MO 4369 NC (Fla. Cir. Ct. 2005); City of Sarasota v. Tillman, No. 2003 CA 15645 NC (Fla. Cir. Ct. 2004).

likely to be engaged in by the homeless—sleeping or camping as opposed to accidentally napping, for example—are not considered "innocent," legislatures are incentivized to *more* specifically target these actions, as they are likely to be engaged in by the homeless. Thus, while advocates may claim small victories from the successes of individual challenges insofar as their efforts prevent vague laws from being used to harass the homeless in the short term, such victories seem rather hollow in light of their long-term impact of incentivizing the creation of specifically anti-homeless laws to take their place.[86]

These bad incentives come about because homeless advocates lodge due process-based challenges to anti-homeless legislation purely strategically; that is, because so-challenged statutes are found to be unconstitutional for reasons unrelated to advocates' real objections thereto, legislatures can remedy their constitutional flaws without addressing—indeed, even while exacerbating—the statutes' actual flaws from the advocates' perspective. It would seem preferable for advocates to challenge anti-homeless legislation on a constitutional basis that actually comports with their intuition regarding what is actually wrong with the legislation. And, indeed, the criminalization of homelessness has also been challenged on the grounds that it violates the Eighth Amendment's prohibition on cruel and unusual punishment—a constitutional basis that seems to fit the bill.[87] That is, it would seem entirely consistent with the ultimate aims of homeless advocates if successful Eighth Amendment-based challenges resulted in the creation of less "cruel and unusual" laws.

B. THE "STATUS CRIMES DOCTRINE"[88]

Advocates have argued that criminalization laws violate the Eighth Amendment by impermissibly punishing the homeless solely on the basis of their "status."[89]

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86. Such challenges run the risk of undermining any broad-based political support for the non-judicially mandated repeal of vague laws by turning them into a "homeless-only" issue. That is, a number of groups in society have an interest in opposing laws which might be enforced against innocent nappers or are vague enough to be selectively enforced at will by the police department, whereas few of these groups have an interest in opposing laws which only target behaviors as engaged in by the homeless.

87. *See, e.g.*, Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 394-95 (Cal. App. 1994). For a discussion of all of these challenges, *see infra* III.C.

88. I will refer to the *Robinson* and *Powell* precedent as the "status crimes doctrine"—as it is commonly referred. However, as shall become clear, it is far from apparent that these cases should be read as only standing for a specific prohibition on criminalizing status.

89. *See, e.g.*, *Tobe*, 27 Cal. Rptr. 2d at 394 (referencing Robison v. California, 370 U.S. 660 (1962)).

1. *ROBINSON*

The Supreme Court first established the status crimes doctrine in *Robinson v. California.*[90] In that case, the Court struck down a statute that made it a criminal offense for a person to "be addicted to the use of narcotics."[91] The Court described the statute as "not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration," but rather one "which makes the 'status' of narcotic addiction a criminal offense."[92] In its characterization of the statute, then, the Court seemed to object on the grounds that it punishes a status rather than an act. This reading of *Robinson* is bolstered by the Court's eventual conclusion that "a state law which imprisons a person...even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment."[93] However, the Court's opinion offers little justification for drawing a bright line between acts as presumptively punishable and status as definitively non-punishable. The only direct consequence of the distinction that the Court even points to is that "a person can be continuously guilty of [a status] offense," and thus "may be prosecuted 'at any time before he reforms.'"[94] And, though one might be able to imagine why the possibility of continuous guilt presents an Eighth Amendment problem, the Court itself does not offer such an explanation.

Instead, the bulk of Justice Stewart's majority opinion focuses on the Eighth Amendment problems with punishing an individual for something that he is not responsible for. Likening narcotics addiction to mental illness, leprosy, venereal disease and the common cold, the Court suggests that punishment for "illness which may be contracted innocently or involuntarily"[95] is always cruel and unusual:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of

90. 370 U.S. 660 (1962).

91. *Id.* at 660, 667.

92. *Id.* at 666.

93. *Id.* at 667.

94. *Id.* at 666. One might also argue that the Court's emphasis on the fact that the defendant may have committed no act *in the State in which he is being tried* in its characterization of the offense points to a jurisdictional problem as well. However, this argument assumes its result: that merely being of a status in a given jurisdiction is constitutionally insufficient for punishment in that jurisdiction. Also, the Court offers no explanation of the link between this possible jurisdictional problem and the Eighth Amendment.

95. *Id.* at 667.

> these and other human afflictions be dealt with by compulsory treatment ... But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.
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> We cannot but consider the statute before us as of the same category.[96]

It is easy to conflate this conclusion—that individuals should not be punished for the involuntary—with the Court's earlier conclusion—that individuals should not be punished for status—because the Court only discusses involuntariness in the context of the acquisition of status. However, there are clearly statuses that can only be voluntarily acquired (e.g., being a bigamist)[97], just as there are acts that can only be performed involuntarily (e.g., sleepwalking).[98] Thus, a prohibition on punishing status will lead to the invalidation of different punishments than a prohibition on punishing the involuntary. For instance, the former would lead to the invalidation of a conviction for bigamy but not sleepwalking, whereas the latter would lead to the opposite, the invalidation of a conviction for sleepwalking but not bigamy.

Because the exact rationale for the Court's decision in *Robinson* is somewhat unclear from the opinion, it is not surprising that there was some variation in its interpretation and application by lower courts.[99] While three courts invalidated statutes similar to the statute at issue in *Robinson*,[100] others simply interpreted the statutes before them as

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96. *Id.* at 666-67.

97. Of course, the bigamist could be punished for his second marriage even under the prohibition on status punishments reading of the Eighth Amendment. Thus, drawing a distinction between punishing for being a bigamist and for marrying a second time may seem purely semantic, but remember that this is precisely the distinction drawn by the Court in *Robinson* under this reading (that is, between *being* a narcotics addict and *using* narcotics).

98. A sleepwalker may be in some sense responsible for his sleepwalking (e.g. if he knew he was prone to sleepwalking and took no steps to prevent it). However, a narcotics addict may bear similar responsibility for his narcotic addiction (e.g. he became addicted as a result of recreational drug use), and, indeed, in *Robinson*, though there is a long discussion of how one might become a narcotics addict without being responsible for causing the condition, there is no suggestion that Robinson himself is such a person. *See Robinson*, 370 U.S. at 667 and accompanying footnotes.

99 Indeed, at least one contemporary commentator pointed to *three* possible rationales for the decision: first, the law may not punish mere condition, but must address the acts of individuals; second, the law may not punish an individual for a status he "cannot change," because such a law can have no deterrent effect and is thus morally repugnant; and, third, the law may not punish an individual for a condition that he contracted "innocently or involuntarily." *See* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 646-65 (1966). *See also* Donald E. Baker, Comment, *'Anti-Homeless' Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417, 437-38 (1991).

100. Commonwealth v. Hall, 394 S.W. 2d 448 (Ky. 1965); People v. Davis, 27 Ill. 2d 57 (1963); State v. Bridges, 360 S.W. 2d 648 (Mo. 1962).

requiring proof of use and concluded on that basis that they passed constitutional muster.[101] The behavior of these latter courts was emblematic of the general tendency of courts hearing narcotics-related cases to distinguish the cases before them from *Robinson* in whichever way they could. Thus, some courts upheld convictions of proven addicts for narcotics use by interpreting *Robinson* as applying solely to status crimes,[102] while other courts were forced to interpret "status" as narrowly as possible—for example, by categorizing "being under the influence of narcotics" as an act rather than a status—to avoid being bound by *Robinson*.[103] Courts also tended to apply narrow readings of *Robinson* to challenges to statutes criminalizing homosexual acts.[104] However, for no obvious jurisprudential reason, in the context of alcohol-related cases, at least a few courts opted to give *Robinson* more teeth.[105] For instance, in *Driver v. Hinnant*, the Fourth Circuit reasoned that *Robinson* prohibited the conviction of a chronic alcoholic for public intoxication, because being drunk in public was merely an involuntary symptom of the disease of alcoholism.[106] On the Fourth Circuit's reading, then, *Robinson* stood not for a sharp distinction between status and act, but for a broader prohibition on punishing the involuntary.[107]

2. *POWELL*

Six years after its decision in *Robinson*, the Supreme Court took *Powell v. Texas*, a case in which a chronic alcoholic urged the Supreme Court to adopt the *Driver* court's interpretation of *Robinson* as prohibiting his conviction for public intoxication.[108] In *Powell*, a four Justice plurality rejected *Driver*'s reasoning vis-à-vis *Robinson* in particular, and its conclusion vis-à-vis the Eighth Amendment more generally, in three steps. First, the plurality rejected *Driver*'s reading of *Robinson*, endorsing instead the narrow status-act distinction reading thereof:

> The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal

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101. *See, e.g.*, State *ex rel.* Blouin v. Walker, 244 La. 699 (1963).

102. *See, e.g.*, Castle v. U.S., 347 F.2d 492 (D.C. Cir. 1965), *cert denied* 381 U.S. 929 (1965).

103. State v. Margo, 40 N.J. 188 (1963).

104. *See, e.g.*, Perkins v. State, 234 F. Supp. 333 (W.D.N.C. 1964)(relying on the status-act distinction).

105. *See, e.g.*, Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

106. 356 F.2d 761, 764 (4th Cir. 1966).

107. *Cf.* People v Hoy, 3 Mich App 666, 143 NW2d 577 (1966). *See generally* Charles A. Evans, *Imprisonment of Chronic Alcoholic is Not Cruel and Unusual Punishment*, 2 GA. STATE BAR J. 239 (1965) (critiquing the logic of *Driver* and *Easter*).

108. 392 U.S. 514, 532-33 (1968).

> penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing ... It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or "occasioned by compulsion."[109]

On that basis, the plurality concluded that the *Powell* facts did not "fall within [the *Robinson*] holding, since the appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion."[110] Justice Marshall's plurality opinion continued: "The only relevance of *Robinson* to this issue is that because the Court interpreted the statute there involved as making a 'status' criminal, it was able to suggest that the statute would cover even a situation in which addiction had been acquired involuntarily."[111] Of course, this explanation for the discussion of involuntariness in *Robinson* begs the question of why the *Robinson* Court would have been concerned that punishment for status might be punishment for involuntarily acquired status if it were not ascribing any constitutional relevance to voluntariness.

Second, the plurality rejected *Driver*'s contention that public intoxication is involuntary in the relevant sense:

> We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication."[112]

The Court argued that if Powell's public intoxication were to be deemed involuntary, it would be impossible not to deem the act of murder involuntary when committed by an individual who, "while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill, which is an 'exceedingly strong influence,' but 'not completely overpowering.'"[113]

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109. *Id.* at 533.
110. *Id.* at 532.
111. *Id.* at 534 (internal citation omitted).
112. *Id.* at 535.
113. *Id.* at 534 (internal citation omitted).

Third, the plurality concluded that even if Powell's behavior were to be deemed involuntary, the Eighth Amendment offered him no protection:

> [I]n any event this Court has never articulated a general constitutional doctrine of *mens rea*.
>
> ....
>
> ... The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.[114]

However, the Court's reasoning here seems flawed on several levels. Most apparently, the Court seems to base its reasoning on the assumption that all of the named doctrines must be on equal footing in constitutional terms—but this assumption is in obvious tension with the Powell Court's reading of *Robinson* as establishing just such a "general constitutional doctrine" of actus reus. The fact that the Court's assumption thus breaks down is all the more problematic given that it goes on to justify its unwillingness to recognize mens rea[115] as having a constitutional dimension solely on the basis of the difficulties inherent in recognizing insanity as having one: "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case."[116] Since there is no reason to presume that the doctrines of mens rea and insanity are on equal constitutional footing, for the Court's reasoning to follow, recognizing voluntariness as constitutionally required must logically require recognizing insanity as such. There is no question, however, that someone the law might recognize as insane (that is, someone who cannot distinguish right from wrong) can nevertheless take voluntary actions (that is, that are a product of his will).[117] Thus, there is no reason that

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114. *Id.* at 535-36.

115. It is important to recognize that although "mens rea" is the Latin term for "guilty mind," the proposed requirement that an act be voluntary does not amount to a requirement that that act be the product of any particular culpable mental state (e.g. purposefulness or recklessness), but merely that it be the product of *some* mental state—that is, for lack of better terminology, the product of will rather than reflex.

116. *Powell*, 392 U.S. at 536.

117. This is not to say that there are not some mental defects that an individual might have that might not also undermine the voluntariness of some of their actions (e.g., Tourette's Syndrome and cursing). However, this does not require the creation of a separate test for insanity in order to

recognizing a basic constitutional voluntariness requirement logically requires recognizing an independent sanity requirement. Indeed, although both doctrines may ultimately seem to resonate in a theory of criminal punishment that requires individual culpability, the intuition underlying the recognition of a voluntariness requirement is not undermined by the *Powell* Court's justification for not recognizing a sanity one, because the latter is entirely based on prudential concerns.[118]

Though the plurality in *Powell* attempted to limit and clarify *Robinson*'s holding, the tension between its opinion and Justice White's concurrence in the result (which was necessary to obtain a majority for the case's outcome) left the *Robinson* precedent even more confused.[119] While Justice White reached the same result as the *Powell* plurality, he disagreed with nearly every step of its reasoning. Most basically, Justice White read *Robinson* not as standing only for the plurality's narrow status-act distinction, but also as having broad implications for the permissibility of punishing for the involuntary in general:

> If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion.[120]

He only declined to apply this rule to the facts of *Powell* because he agreed with the plurality that there was no evidence that Powell could not have avoided being drunk *in public*, even if he could not have avoided *being drunk*, and thus that there was no evidence that his conviction rested only on involuntary behavior.[121]

However, Justice White did not endorse the plurality's more sweeping claim that *no* alcoholic would be able to prove that not just his intoxication, but his public intoxication, was involuntary:

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protect voluntariness, but rather the recognition that the test for voluntariness may ensnare some individuals who would also be recognized as insane.

118. *See, e.g.*, *Powell*, 392 U.S. at 536-37 ("But formulating a constitutional rule [regarding insanity] would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold").

119. *See id.* at 548-54 (White, J. concurring in result). It is also worth noting some of the tension between the apparent logic of the majority opinion in *Robinson* and its interpretation by the plurality in *Powell* comes from the fact that just as many members of the *Robinson* majority (Justices Stewart, Douglass, and Brennan) joined the dissent in *Powell* as joined the plurality (Justices Warren, Harlan, and Black). Indeed, one of the Justices to dissent from the Court's reading of *Robinson* in the *Powell* decision was Justice Stewart, the author of the *Robinson* majority opinion.

120. *Id.* at 548 (internal citation omitted).

121. *Id.* at 549.

> It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that he loses the power to control his movements and for that reason appears in public. The Eighth Amendment might also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue.[122]

Indeed, Justice White pointed specifically to homeless alcoholics as individuals who could likely show that for them "avoiding public places when intoxicated is ... impossible."[123] And he thus concluded that, as applied to these individuals, "this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk."[124]

In some ways, the conclusion of Justice White's concurrence in result—that is, that the Eighth Amendment generally prohibits punishment for the involuntary and that an individual can make a fact-specific argument for involuntariness—was more sweeping than that of Justice Fortas' dissent.[125] Justice White attempted to apply his principle to the sorts of extreme cases with which the plurality was concerned[126] by arguing that it did not "necessarily follow" from invalidating an individual's conviction for public drunkenness that "it would be unconstitutional to convict him for committing crimes involving much greater risk to society."[127] Justice Fortas, on the other hand, denied that his reasoning even applied directly to involuntary *conduct*, for he describes *Powell* as concerning "the mere *condition* of being intoxicated in public."[128] He explains further:

> It is not foreseeable that findings such as those which are decisive here—namely that the appellant's being intoxicated in public was a part of the pattern of his disease and due to a compulsion symptomatic of that disease—could or would be made in the case of offenses

122. *Id.* at 551-52.
123. *Id.* at 551.
124. *Id.*
125. *See id.* at 554-570 (Fortas, J. dissenting).
126. Recall the plurality's worry about an individual with a "compulsion" to kill, which is an "exceedingly strong influence," but "not completely overpowering," for example. *Id.* at 534.
127. *Powell*, 392 U.S. at 552 n.4 (White, J. concurring in result). Of course, since Justice White would also hold an individual accountable for failing to take adequate preparations to avoid lawbreaking before becoming intoxicated, the worry that the principle might be extended to extreme cases is lessened. *See id.* at 551-52.
128. *Id.* at 559 (Fortas, J. dissenting).

> such as driving a car while intoxicated, assault, theft, or robbery. Such offenses require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism.[129]

However, Justice Fortas did not explain why the distinction he drew between a "condition" and an "act" accurately reflects the difference between "a compulsion symptomatic of [a] disease" and an "independent act or conduct" as he described them. That is, it seems strange to call a sneeze a "condition" rather than an "act," when a sneeze is certainly "symptomatic of [a] disease" rather than an "independent act or conduct." Moreover, Justice Fortas gave no justification for his classification of the behavior at issue in *Powell* as a "condition" rather than an "act." Indeed, it seems that the condition of "being intoxicated in public" could easily be re-imagined as the predicate act of "going into public while intoxicated," just as the predicate act of "buying a gun if you are a felon" could be reimagined as the condition of "being in a felon in possession of a gun."

Thus, post-*Powell*, the state of the *Robinson* doctrine—both as it was originally intended and as it was modified (if at all) by *Powell*—is even less clear than it was post-*Robinson*. As a result, few courts have extended *Robinson* beyond its clear repudiation of laws criminalizing status in the context of addiction.[130] Nevertheless, in part because *Robinson* was the first time the Court invalidated a statute's substantive provisions on the basis of the Eighth Amendment,[131] plaintiffs have continued to launch *Robinson*-based challenges to a wide variety of laws, including anti-sodomy,[132] anti-child molestation,[133] and anti-prostitution statutes.[134]

C. THE *POTTINGER* APPROACH: APPLYING *ROBINSON* TO ANTI-HOMELESS STATUTES

Although a number of *Robinson*-based challenges to anti-homeless statutes have been considered by courts, the number is relatively small in light of the ubiquity of such statutes.[135] Those challenges that have been

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129. *Id.* at 559 n.2.

130. *See* Robin Yeamans, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 788 (1968). For an example of a court that did, see Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971), which struck down an anti-vagrancy statute as an impermissible criminalization of status.

131. *See The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, *supra* note 99, at 645-56.

132. *See, e.g.*, People v. Griffes, 13 Mich. App. 299 (1968).

133. *See, e.g.*, People v. Stevenson, 28 Mich. App. 538 (1970).

134. *See, e.g.*, State v. Anderson, 280 Minn. 461 (1968).

135. For the most complete accounting of such cases that I could amass, see *infra* note 143.

lodged have typically taken this form: statute X impermissibly criminalizes the status of homelessness in violation of *Robinson*, because the behavior it targets is an involuntary symptom of that status.[136] In other words, because, based on *Robinson*, it would be impermissible to criminalize homelessness *per se*, it is similarly impermissible to penalize an activity (e.g., sleeping) that an individual of homeless status has no choice but to engage in. The basic message of such challenges, as one commentator put it, is that homeless persons arrested for survival activity should "be thought of as criminally homeless rather than homeless criminals."[137]

It is easy to see why the *Robinson* doctrine seems to advocate an attractive avenue for challenging anti-homeless legislation. That is, "homelessness" seems similar to "narcotics addiction" insofar as both are statuses that can be contracted involuntarily; indeed, it seems likely that a much higher percentage of the homeless population than of the addicted population will be homeless through no fault of their own.[138] However, just as statutes criminalizing the use of narcotics by addicts have survived, statutes criminalizing conduct associated with homelessness would clearly survive *Robinson* scrutiny under the logic of the *Powell* plurality, because they at least nominally target acts rather than status.[139] Equally clear, however, is that homeless survival behavior would merit some *Robinson* protection under the logic of the *Powell* dissent, because such behavior is more akin to "a compulsion symptomatic" of the status of homelessness than to an "independent act[]."[140] It seems, then, that the treatment that such challenges would expect to receive under the logic of Justice White's concurrence in *Powell* is crucial to the jurisprudential foundation of such challenges. Since Justice White supports a reading of *Robinson* that extends constitutional protection from mere status to involuntary manifestations of that status for which an individual bears no responsibility,[141] and specifically mentions the homelessness of the homeless as such non-culpable behavior,[142] it seems that challenges to criminalization of homelessness statutes should find at least some traction in the combined *Robinson-Powell* precedent.

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136. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1555 (S.D. Fl. 1992)("Specifically, plaintiffs allege the following...Count I: that the ordinances under which the City arrests class members for engaging in essential, life-sustaining activities—such as sleeping, eating, standing and congregating—are used by the City to punish homeless persons based on their involuntary homeless status in violation of the protection against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution.").

137. Pamela J. Fischer, *Criminal Behavior and Victimization Among Homeless People*, *in* HOMELESSNESS 87, 104 (Rene I. Jahiel ed., 1992).

138. *See* supra § III(A). *See also* BAUM & BURNES, *supra* note 13, at 155, 159-62.

139. Powell v. Texas, 392 U.S. 514, 533 (1968).

140. *Id.* at 559 n.2 (Fortas, J. dissenting).

141. *Id.* at 549 (White, J. concurring).

142. *Id.* at 551.

However, in practice, *Robinson*-based challenges to anti-homeless laws have met with only moderate success. Of the nine cases that I could locate[143] in which courts have ruled on such challenges, in only four have the decisions of the highest courts to consider the Eighth Amendment issue been favorable to the plaintiff.[144] However, the first of these, *Pottinger v. City of Miami*, was the first reported case to consider an application of *Robinson* to the context of homeless criminalization, and the Southern District of Florida District Court's receptiveness to the theory is likely responsible for the subsequent *Robinson*-based challenges.[145] Moreover, in the most recent of these cases, *Jones v. City of Los Angeles*, the Ninth Circuit overturned a district court's decision on the grounds that the district court had too narrowly interpreted the *Robinson-Powell* precedent in finding it inapplicable to the homeless context.[146] This decision, the first in which a circuit court has overturned a district court decision rejecting a *Robinson*-based challenge to an anti-homelessness law, seems likely to spark a new wave of *Robinson*-based litigation.

In *Pottinger*, plaintiffs sought to have the City of Miami enjoined from enforcing ordinances again sleeping, eating, and congregating in public against the city's homeless population.[147] Plaintiffs argued that their "status of being homeless [was] involuntary and beyond their immediate ability to alter and that the conduct for which they [were] arrested is inseparable from their involuntary homeless status."[148] Consequently, the plaintiffs argued, the "application of these ordinances to [the homeless] is cruel and unusual in violation of the Eighth Amendment."[149] Before turning to the plaintiffs' legal argument, the

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143. Only seven of these cases are reported: Jones v. City of Los Angeles, 444 F. 3d 1118 (9th Cir. 2006); Joel v. City of Orlando, 232 F.3d 1353 (11th Cir. 2000), *cert. denied* 199 L.Ed.2d 480 (2001); Joyce v. City and County of San Francisco, 87 F.3d 1320 (9th Cir. 1996); Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995); Davison v. City of Tuscon, 924 F. Supp. 989 (D. Ariz. 1996); Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir.1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (1996); Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995). State v. Wicks, Nos. 271174 & 2711743 (Ore. Cir Ct. Multnomah County 2000), is available at: http://www.outofthedoorways.org/articles/gallagher.html. A summary of State v. Folks, No. 96-19569 MM (Fla. Cir. Ct. Nov. 21, 1996), can be found in A DREAM DENIED, *supra* note 1, at 102. It has been appealed to the 9th Circuit, Docket No. 04-55324, and oral arguments were heard on Dec 6, 2005. Ninth Circuit Calendar, available at:
http://www.ca9.uscourts.gov/ca9/calendar.nsf/0/b712bd717403a9e58825709f0066250c?OpenDocument. *See also* A DREAM DENIED, *supra* note 1, at 98 (summarizing Spencer v. City of San Diego, No. 04 CV-2314 BEN (S.D. Cal. 2004), which is currently pending on this issue).

144. *Jones*, 444 F. 3d 1118; *Pottinger*, 810 F. Supp. 1551; *Wicks*, Nos. 2711742 & 2711743; *Folks*, No. 96-19569 MM.

145. *See, e.g., Joel*, 232 F.3d at 1362 ("Joel relies upon *Robinson*, as well as *Pottinger v. City of Miami*, where the district court held that the City of Miami's practice of arresting homeless individuals for such basic activities as sleeping and eating in public places constitutes cruel and unusual punishment in violation of the Eighth Amendment.")(internal citations omitted).

146. *Jones*, 444 F. 3d at 1131.

147. *Pottinger*, 810 F.Supp. at 1554.

148. *Id.* at 1561.

149. *Id.*

court made two relevant findings of fact. First, on the basis of expert sociological testimony, the court concluded that "most homeless individuals are profoundly poor, have high levels of mental or physical disability, and live in social isolation. . . . [These] individuals rarely, if ever, choose to be homeless. Generally people become homeless as the result of a financial crisis or because of mental or physical illness."[150] Second, on the basis of "testimony and the documentary evidence regarding the arrests of the homeless," "the sheer volume of homeless people in the City of Miami," and "the dearth of shelter space," the court concluded that "there is no public place where [the homeless] can perform basic, essential acts such as sleeping without the possibility of being arrested."[151] The court then read *Robinson* as prohibiting punishment not only for involuntary[152] status or condition,[153] but also for acts inseparable from that status or condition:

> Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places. The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless. Consequently, arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless. This effect is no different from the vagrancy ordinances which courts struck because they punished "innocent victims of misfortune" and made a crime of being "unemployed, without funds, and in a public place."[154]

On this basis, and others, the court issued an injunction against Miami's enforcement of the challenged ordinances.[155]

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150. *Id.* at 1557.

151. *Id.* at 1560.

152. This interpretation of *Robinson* seems somewhat at odds with the outcome of the case given that there was no evidence that Robinson himself acquired his addiction involuntarily. *See generally* Robinson v. California, 370 U.S. 660 (1962). However, this reading makes sense if we understand the Court as saying that the State has the burden to prove that a given status was *not* acquired involuntarily—a burden which the State failed to meet in *Robinson* where no evidence of the origin of Robinson's status was presented.

153. *Pottinger*, 810 F.Supp. at 1562.

154. *Id.* at 1564 (quoting Headley v. Selkowitz, 171 So. 2d 368, 370 (Fla. 1965).

155. *Id.* at 1583. The other three cases in which *Robinson*-based challenges have been accepted have all rested on a reading of *Robinson-Powell* akin to *Pottinger*'s. In *Jones*, the plaintiff explicitly based his theory on *Pottinger*. *See* Jones v. City of Los Angeles, 444 F. 3d 1118 (9th Cir. 2006). The *Wicks* court explicitly referenced the *Pottinger* decision. State v. Wicks, Nos. 271174 & 2711743 (Ore. Cir Ct. Multnomah County 2000). *See also* State v. Folks, No. 96-19569 MM (Fla. Cir. Ct. Nov. 21, 1996).

D. WHY EVEN *POTTINGER*'S *ROBINSON* READING FAILS TO ADEQUATELY PROTECT THE HOMELESS

The courts that have thus far considered *Robinson*-based challenges to anti-homeless statutes have identified five separate grounds on which such claims may fail—namely, lack of standing,[156] the availability of a necessity defense,[157] the "non-status" nature of homelessness,[158] the *Powell* plurality's status-act distinction reading of *Robinson*,[159] and the voluntary nature of some homelessness-related conduct.[160] I will now consider how problematic each of these grounds is for the overall feasibility of challenging anti-homelessness laws on a *Robinson*-based Eighth Amendment theory.

1. LACK OF STANDING

In both *Davison v. City of Tucson*[161] and *Johnson v. City of Dallas*,[162] *Robinson*-based challenges were dismissed on the grounds that the plaintiffs lacked standing. In *Davison*, the court held that an injunction of the type sought by the plaintiffs could not be granted on Eighth Amendment grounds, because only individuals who have actually been convicted under a statute have standing to challenge it as cruel and unusual.[163] The *Johnson* court implied that the bar for Eighth Amendment standing was even higher, rejecting the plaintiffs' claim on the grounds that they had only been cited and fined, rather than convicted, under the statute they wished to challenge.[164]

Two considerations about the impact of such a high bar for standing are worth noting before considering the merits of such a bar. First, in many municipalities with anti-homeless statutes, there are at least some homeless people who have been officially convicted under such statutes, so this is generally a plaintiff-specific problem with

156. *See, e.g.*, Davison v. City of Tucson, 924 F. Supp. 989, 992-93 (D. Ariz. 1996).

157. Tobe v. City of Santa Ana, 892 P.2d 1145, 1166 n.19 (Cal. 1995).

158. *See, e.g.*, Joyce v. City and County of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994).

159. *See, e.g., id.*

160. *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000).

161. 924 F. Supp. at 992-93 (upholding a statute barring homeless encampments from city property).

162. 61 F.3d 442, 443-44 (5th Cir. 1995) (upholding a statute prohibiting sleeping in public that had previously been struck down on Eighth Amendment grounds by the Northern District of Texas District Court in Johnson v. Dallas, 860 F.Supp. 344 (N.D. Tex. 1994)).

163. 924 F. Supp. at 992-93.

164. 61 F.3d at 443-44.

Robinson-based challenges at worst.[165] Nevertheless, because it is generally homeless advocates who seek out plaintiffs to serve as representatives of the general homeless population to challenge laws, and because many of the homeless are disinclined to get involved in such challenges, enforcing a high bar for standing will make it more difficult for advocates to put together challenges. Second, whatever standing bar a court imposes will apply to all Eighth Amendment challenges, not just *Robinson*-based ones.

Fortunately, however, the courts that have held that the Eighth Amendment does not always require a conviction to challenge the constitutionality of a statute (or an application thereof) are on firmer footing in the case law.[166] In spite of *Johnson*'s holding to the contrary,[167] the Supreme Court has explicitly held, in *Ingraham v. Wright*, that "fines . . . traditionally have been associated with the criminal process" and therefore are subject to the limitations imposed by the Eighth Amendment.[168] For these limitations to be realized, individuals who have been fined under a statute must have standing to challenge their fine under the Eighth Amendment. Since the majority of challenges to anti-homeless laws include plaintiffs who have been cited or fined under criminalization statutes, such a standing requirement will have very little practical effect on the viability of most claims. Moreover, in *Joyce v. City and County of San Francisco*, the court explained that *Ingraham* stands for the proposition that in some cases a plaintiff need not have received any punishment under a statute in order to have standing to challenge its constitutionality under the Eighth Amendment:

> Although the City claims the protections of the Eighth Amendment are limited 'only to those convicted of crimes,' this proposition is refuted by the express language of *Ingraham*. In describing the breadth of application of the Eighth Amendment, the Court provided that, in addition to proscribing certain types of punishments to those convicted of crimes, the amendment 'imposes substantive limits on what can be made criminal.' Accordingly, the protections of the Eighth Amendment cannot be deemed wholly inapplicable to the controversy now before the Court.[169]

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165. *See, e.g.*, A DREAM DENIED, *supra* note 1, at 98 (summarizing Spencer v. City of San Diego, No. 04 CV-2314 BEN (S.D. Cal. 2004) (in which plaintiffs responded to a standing challenge by amending their complaint to explicitly include the convictions of seven plaintiffs).

166. *See, e.g.*, Joyce v. City and County of San Francisco, 846 F. Supp. 843, 853 (N.D. Cal. 1994).

167. 61 F.3d at 443-44.

168. Ingraham v. Wright, 430 U.S. 651, 664 (1977).

169. 846 F.Supp at 853 n.4 (internal citations omitted).

Given that the homeless rarely serve significant jail time for violating criminalization laws, and can almost never pay any fines levied against them, it is clear that the real effect of such laws is to give city law enforcement a tool that legitimizes their quest to drive the homeless from communities or, at least, to render them invisible. Thus, since the real damage of anti-homeless laws generally comes not from any particular punishment rendered, but from the mere enforcement of the laws, this looser interpretation of standing doctrine seems essential from a theoretical perspective. [170]

2. THE NECESSITY DEFENSE

In *Tobe v. City of Santa Ana*, the California Supreme Court relied on the existence of the necessity defense as a guarantee that the involuntarily homeless could not be convicted for truly involuntary behavior.[171] In *In re Eichorn*, a California court seemingly went even further, rejecting the defendant's ability to challenge his conviction on Eighth Amendment grounds based on the availability of the necessity defense to him.[172] Typically, this defense has been available where there is evidence:

> [S]ufficient to establish that defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency.[173]

However, I could find no evidence that a homeless individual has ever successfully employed this defense when charged with a homelessness-related offense.

In fact, there seems to be a number of problems with the availability of this defense serving as a check on the unconstitutional

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170. *See also* Baker, *supra* note 99, at 447-48.

171. 892 P.2d 1145, 1166 n.19 (Cal. 1995). This suggestion is somewhat ironic in light of the fact that there is no statutory codification of the necessity defense and the California Supreme Court has held that the common law is not part of the criminal law in California. People v. Garziano, 281 Cal. Rptr. 307, 308 (Ct. App. 1991). Nevertheless, the California Supreme Court has repeatedly affirmed the availability of a necessity defense. *See, e.g.*, People v. Pena, 197 Cal. Rptr. 264 (Ct. App. 1983). *See also* Antonia K. Fasanelli, *In Re* Eichorn: *The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 AMER. U. L. REV. 323 (2000) (discussing the benefits of such an approach).

172. 69 Cal. App. 4th 382, 390-91 (1998).

173. People v. Pepper, 41 Cal. App. 4th 1029, 1035 (1996).

application of anti-homeless laws.[174] First, the necessity defense has yet to be recognized as a constitutional requirement, and as a result its definition and availability varies from state to state.[175] It seems problematic from a constitutional perspective that the potential availability of only a statutory or common law defense could serve to guarantee the constitutionality of applications of criminalization of homelessness laws. At the very least, it would seem to render the necessity defense a constitutional requirement. Second, by its very nature, the necessity defense implies a well-reasoned voluntary choice.[176] Though some commentators favor an image of the homeless as choosing "from a range of unacceptable options," rather than acting truly involuntarily, in at least some cases (e.g. sleeping), this seems to misdescribe the 'crimes' of the homeless.[177] Third, because the homeless are typically not aware of their legal options, and very few have any access to legal counsel in what are predominantly misdemeanor matters, most homeless defendants don't have the realistic ability to employ a necessity defense.[178] Fourth, the necessity defense can only be employed on an individual level by someone accused of a crime; as a result, it cannot form the basis of an injunction against the future enforcement of a law. Given the indigence of the homeless and the fact that anti-homeless laws are often used merely to harass them, this lack of a pro-active effect is particularly problematic.[179] Fifth, the requirement that a defendant employing the necessity defense must "not [have] substantially contribute[d] to the emergency" seems problematic in the context of the homeless.[180] Individuals are usually homeless for a variety of reasons, including both systemic and personal factors, thus

174. David Smith suggests a modified version of the duress defense, rather than the necessity defense, might be used by the homeless to challenge criminalization of homelessness laws. *See* David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487, 498-516 (1994). I believe that my criticisms of the necessity defense apply to Smith's proposal as well. *See also* United States v. Bailey, 444 U.S. 394, 410 (1980) (maintaining that modern cases tend to blur the distinction between the defenses of duress and necessity such that courts may decide to disregard the distinctions and instead examine the underlying policies of the defenses).

175. *Compare* 11 Alaska Statute § 11.81.320 (merely codifying the "common law" necessity defense without further specification); *with* M.P.C. § 2.03 (specifying six conditions that must be met in order for a defendant to successfully use the necessity defense). The MPC's version of the necessity defense has been implemented statutorily in a number of states.

176. *In re Eichorn*, 69 Cal. App. 4th at 389 ("Unlike duress, the threatened harm is in the immediate future, which contemplates the defendant having time to balance alternative courses of conduct.").

177. *See, e.g.*, Wes Daniels, *'Derelicts,' Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 690 (1997).

178. Jones v. City of Los Angeles, 444 F. 3d 1118, 1131 (9th Cir. 2006) ("Homeless individuals, who may suffer from mental illness, substance abuse problems, unemployment, and poverty, are unlikely to have the knowledge or resources to assert a necessity defense to a section 41.18(d) charge, much less to have access to counsel when they are arrested and arraigned.").

179. *See id.* ("If there is no offense for which the homeless can be convicted, is the City admitting that all that comes before is merely police harassment of a vulnerable population?").

180. People v. Pepper, 41 Cal. App. 4th 1029, 1035 (1996).

even if a homeless individual is *now* involuntarily homeless, it will be difficult for him to prove beyond a preponderance of the evidence (the standard necessary to successfully employ the necessity defense) that he did not contribute substantially to his homeless status initially. [181] Overall, the possible availability of a statutory or common law necessity defense seems insufficient grounds for rejecting an Eighth Amendment-based objection to anti-homeless laws.

3. "NON-STATUS" NATURE OF HOMELESSNESS

In *Joyce*, the court rejected a *Robinson*-based challenge to anti-homeless legislation on the grounds that "homelessness" is not a status.[182] The court reasoned that the plaintiffs' claim "that the failure of the City to provide sufficient housing compels the conclusion that homelessness on the streets of San Francisco is cognizable as a status" was "unavailing at least for the fundamental reason that status cannot be defined as a function of the discretionary acts of others."[183] The court's reasoning fails on two counts. First, one's status clearly can be and often *is* defined by the discretionary acts of others. For instance, the very argument used in *Robinson* to show that one might innocently or involuntarily become addicted to narcotics—that one might be born to a mother that used narcotics while pregnant—proves that the discretionary acts of others can define one's status.[184] Indeed, it seems likely that the plaintiffs were highlighting the state's role in creating homelessness precisely to demonstrate its often involuntary nature. Second, the opinion in *Joyce* never offers any explanation for why something's *cause* has any role in its classification as a "status" or as something else.[185] At its root, this claim seems motivated by a conflation of "status" in the *Robinson* sense and "status" of the sort that might form the basis of a suspect classification, since we often think of the latter category as including only those arbitrary results of the natural lottery (i.e. *uncaused* traits). However, *Robinson* itself offers no support for this conflation, most obviously because the very status at issue in that case, narcotics addiction, is not uncaused in the relevant sense.

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181. People v. Heath, 207 Cal. App. 3d 892, 901 (1989).

182. Joyce v. City and County of San Francisco, 846 F. Supp. 842, 857 (N.D. Cal. 1994).

183. *Id.*

184. Robinson v. California, 370 U.S. 660, 667 n.9 (1962).

185. A footnote to the court's claim reads: "As the Supreme Court has declined to find any 'constitutional guarantee of access to dwellings of a particular quality,' Lindsey v. Normet, 405 U.S. 56, (1972), the housing provided to the City's homeless is a matter for the discretion of the City and State." *Joyce*, 846 F. Supp. at 857 n.10 (internal citations shortened). However, while this may explain why the provision of housing is discretional, it does not explain why discretional conduct cannot form the basis of status.

The *Joyce* court also reasons that homelessness should be classified as a "condition" rather than as a "status," because "the distinction between the ability to eliminate one's drug addiction as compared to one's homelessness is a distinction in kind as much as in degree."[186] Even if we were to accept the court's classification, however, it is not at all clear what constitutional implications it would have given that the two terms are actually used interchangeably throughout the *Robinson* and *Powell* opinions.[187] It is also not at all clear why we should accept this classification—or, more particularly, what the relevance of the distinction that the court points to is. Indeed, it seems like the ease of eliminating one's status is only a relevant consideration insofar as it might affect the voluntariness of one's status or of acts deriving from that status. However, the *Joyce* court does not claim that it is easier for someone to eliminate their own homelessness than for someone to eliminate their own addiction—indeed, if anything, it seems like willpower alone is more likely to cure one's addiction than one's homelessness. Instead, the court claims that to classify homelessness as a status "is to deny the efficacy of acts of social intervention to change the condition of those currently homeless."[188] However, given that the individual homeless person does not control the "social intervention" of others, the fact that one's homeless status *could be* eliminated by the acts of others does not seem to make it any less voluntary. As a result, the possible efficacy of social intervention in eliminating an individual's homelessness seems to be irrelevant to the question of whether that homelessness is properly considered a "status."[189]

4. ACTS NOT STATUS TARGETED

The *Joyce* court also read *Robinson* as standing only for a prohibition on punishing status itself, and not for acts derivative from it:

> On no occasion, moreover, has the Supreme Court invoked the Eighth Amendment in order to protect acts derivative of a person's status. *Robinson* prohibited penalizing a person based on their status as having been addicted, whereas the plurality in *Powell* approved a state's prosecution of the act of appearing intoxicated in

186. *Id.* at 857.

187. *See, e.g.*, *Robinson*, 370 U.S. at 662.

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

189. Moreover, even if the Joyce court is correct that a single case of homelessness might be easier to eliminate than a single case of narcotics addiction, the idea that simple "social intervention" could eliminate the condition of homelessness across the board seems to vastly oversimplify the issue.

> public. What justified invocation of the Eighth Amendment in one case and not the other was not the difference between drug and alcohol addiction; such distinction is without analytical difference. Rather, the different results were reached because of the distinct targets of the challenged laws—one punished a status, the other an act.[190]

On that basis, after rejecting the plaintiffs' counter-argument based on Justice White's homelessness-related *Powell* concurrence as "sheer speculation" based only on "dicta," the court held that *Robinson* had no implications at all for anti-homeless statutes.[191]

In fact, whether *Robinson* stands for a prohibition on punishing for status, punishing for the involuntary, or some combination thereof is not entirely clear from the language of the opinion.[192] Indeed, each of these three readings of *Robinson* appears in an opinion filed in *Powell*: it prohibits only the criminalization of status (plurality); it prohibits the criminalization of anything truly involuntary (concurrence); and it prohibits the criminalization of certain "conditions," at least some of which seem to involve conduct (dissent). What is clear, however, is that, post-*Powell*, the majority of the Court did not adopt the strict status-act distinction that deems *Robinson* irrelevant to the constitutionality of anti-homeless laws simply because they ostensibly target behavior.[193] Thus, courts that claim that the combined *Robinson-Powell* precedent requires the rejection of *Robinson*-based challenges to anti-homeless laws are misreading the case law. However, what is equally clear from the *Robinson-Powell* precedent is that it does not explicitly require the acceptance of *Robinson*-based challenges to anti-homeless laws. That is, because the Eighth Amendment principle presented in *Robinson* itself is relatively obscure, and because both Justice White [194] and the dissenters[195] try to limit the reach of the principles they present in their *Powell* opinions so that some involuntary conduct may still be constitutionally punishable, it is not at all clear what even a *correct* reading of the current *Robinson-Powell* precedent has to say about anti-homeless legislation.

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

191. *Id.*

192. *See supra* notes 90-98 and accompanying text (discussing *Robinson*).

193. Both the concurrence and the dissent, which together account for the views of five Justices, reject the strict status-act distinction at least implicitly.

194. Powell v. Texas, 392 U.S. 514, 552 n.4 (White, J. concurring in result) (arguing that it does not "necessarily follow" from invalidating an individual's conviction for public drunkenness that "it would be unconstitutional to convict him for committing crimes involving a much greater risk to society").

195. *Id.* at 559, 559 n.2 (Fortas, J. dissenting) (arguing that the instant case involved the "mere condition of being drunk in public," and that "[i]t is not foreseeable that the findings here...could or would be made in the case of offenses such as driving a car while intoxicated").

Reliance on *Robinson* to ground Eighth-Amendment based challenges to anti-homeless legislation is thus not a simple matter of showing that existing precedent in effect already prohibits such legislation, but rather trying to justify the extension of existing precedent on the basis of its underlying logic to such legislation. The problem with this approach is evident: the logic underlying the current precedent is at best unclear and at worst nonexistent. Moreover, practically speaking, because courts will be worried about the same slippery slope problem—that a broad prohibition on punishing involuntary conduct will shield even the most extreme of such actions—that all of the authors of opinions in *Powell* acknowledged, they historically have been and will continue to be reluctant to abandon the bright line status-act distinction of the *Powell* plurality.[196]

5. VOLUNTARY NATURE OF HOMELESS CONDUCT

In *Tobe* and *Joel v. City of Orlando,*, the courts held that at least some conduct targeted by anti-homeless statutes is actually voluntary.[197] As Rob Teir put it, "one must sleep, but one need not do so with the accouterments of camping, such as shopping carts filled with belongings, bedrolls, or make-shift tents."[198] If some of the behavior targeted by anti-homeless legislation is voluntary then even a logical extension of the *Robinson* principle has little to say about such statutes. Since even the broadest interpretation of *Robinson* only prohibits the criminalization of involuntary behavior, we are left with two choices: abandon our attempt to protect camping and other partially voluntary homelessness-related conduct or look beyond *Robinson* for an Eighth Amendment-based defense of such conduct. Not all voluntary camping-related conduct is worthy of constitutional protection, but at least some of it—for example, the use of a sleeping bag during the winter—seems nearly as blameless as the involuntary behavior we seek to protect if not in precisely the same way. Thus, it seems we need to look at the Eighth Amendment beyond a mere extension of *Robinson* to ground our challenges to anti-homeless laws.[199]

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196. *See, id.* at 534; 552 n.4 (White, J. concurring in judgment); 559 (Fortas, J. dissenting).

197. Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000); Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 1105 (1995).

198. Rob Teir, *Restoring Order in Urban Public Spaces*, 2 TEX. REV. L. & POL. 255, 270 (1998).

199. *See also* Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-Or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619 (1995) (also suggesting non-*Robinson* based Eighth Amendment challenges to criminalization of homelessness laws, but only in the context of "do-or-die acts of homelessness").

IV. A BETTER SOLUTION: A TWIST ON EIGHTH AMENDMENT-BASED CHALLENGES

A. THE PROPOSED FRAMEWORK

The temptation to treat *Robinson* as standing for an independent Eighth Amendment principle—that is, a "status crimes doctrine" not grounded in more fundamental or previously articulated Eighth Amendment principles—is rooted in the language of the *Robinson* opinion itself, because that language fails to convincingly articulate the foundation of the decision in either principle or case law, which ultimately leaves even the basis of the Court's decision unclear.[200] Indeed, I believe that part of the reason so many courts since *Robinson*, including the Supreme Court itself in *Powell*, have struggled to apply the *Robinson* precedent to "semi-status crimes"—i.e., prohibitions on things in the gray area between status and act—is because they have given into this temptation. In other words, these courts have attempted to apply an independent *Robinson*-based prohibition on punishment for status to semi-status crimes and thus have been left to answer the impossible question: Is the thing being prohibited more like a status or more like an act?[201] Instead, what the courts should be asking is this: What makes punishment for status cruel and unusual, and does that principle also render punishing for the particular semi-status offense cruel and unusual?

I would argue that *Robinson*'s prohibition on criminalizing status is but one application of the Eighth Amendment's general prohibition on disproportionate punishment.[202] Although *Robinson* itself does not appeal to this principle, the Supreme Court has subsequently explicitly recognized it as the basis of its decision: "The constitutional principle of proportionality has been recognized explicitly in this Court for almost a

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200. *See supra* § III(B). For contemporary criticisms of the decision, *see also* Ralph A. White, Jr., *Criminality of a Status*, 41 N.C. L. REV. 244, 244-53 (1963); Comment, *Criminal Penalties for Drug Addiction*, 76 HARV. L. REV. 143-47 (1962); Comment, *Criminal Penalty for Narcotic Addiction is Cruel and Unusual Punishment*, 47 MINN. L. REV. 484, 484-93 (1963).

201. *Compare, e.g.*, Powell v. Texas, 392 U.S. 514, 559 (1968) (Fortas, J. dissenting) (arguing that for an alcoholic to be being drunk in public is a "condition" as opposed to "conduct," and thus covered by *Robinson*'s status crime doctrine); *with* Joyce v. City and County of San Francisco, 846 F.Supp. 843, 857 (N.D. Cal. 1994) (holding that homelessness is a "condition" and thus does not qualify for protection under the status crime doctrine).

202. *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910)(striking down a law as disproportionate in violation of the Eighth Amendment for the first time). Since then, the Court has repeatedly struck down punishments, particularly within the context of the death penalty, as disproportionate. *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982) (holding the death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"). Moreover, all nine members of the Court recently joined opinions acknowledging some form of a proportionality requirement even outside of the death penalty context in Lockyer v. Andrade, 538 U.S. 63 (2003).

century. . . . [We] applied the principle to invalidate a criminal sentence in *Robinson v. California*. A 90-day sentence was found to be excessive for the crime of being 'addicted to the use of narcotics.'"[203] Without further definition, however, a principle of "proportionality" leaves us almost as unguided in our attempt to apply the Eighth Amendment to anti-homeless legislation as *Robinson* itself did. Thus, I propose the following framework for evaluating whether a given punishment is relevantly proportionate: [204] The amount of punishment[205] that the state may constitutionally impose on an individual for a particular offense is a function of the responsibility that the individual bears[206] and the interest of society in prohibiting the offense.[207]

Because it is a long-established constitutional principle that the amount of punishment that an individual may constitutionally receive and society's interest therein must bear some relation,[208] I will focus on clarifying the role of "individual responsibility" in the above framework. Actually, an individual's lack of responsibility for the commission of a particular offense on one of any number of grounds (e.g., insanity) has long been recognized as a way for an individual to escape conviction (e.g., by pleading the affirmative defense of "not guilty by reason of insanity"). [209] Similarly, the extent to which an individual's responsibility for the commission of an offense may be mitigated by external forces acting on that individual (e.g., physical abuse) has long been considered relevant to the amount of punishment that individual is due (e.g., by allowing for the presentation of mitigating factors during

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203. Solem v. Helm, 463 U.S. 277, 287 (1983) (internal citations omitted).

204. There are, of course, also grounds unrelated to proportionality on which something might be deemed cruel and unusual. *See, e.g.*, Wilson v. Seiter, 501 U.S. 294 (1991) (discussing the right of inmates to be free from cruel and unusual prison conditions).

205. I use this phrase entirely in accordance with its common sense meaning. Thus, the two defining features of the "amount" of a particular punishment are the nature of the punishment (fine, civil confinement, incarceration, etc.) and the duration of the punishment.

206. Hereinafter "individual responsibility." I use this term to refer to both the sorts of factors that severely diminish an individual's culpability for the commission of some offense, such as necessity, duress, insanity, and involuntariness (i.e. statutory defenses), and those that only somewhat diminish an individual's culpability for the commission of some offense, such as poverty, intoxication, abuse (i.e. mitigating evidence).

207. Hereinafter "society's interest." I use this phrase to refer to the reasons that society has for prohibiting a particular offense irrespective of who the particular offender is. Thus, we might think of it as incorporating the typical "purposes of punishment," such as the need to exact retribution for the harm caused by a particular offense, the need to deter a particular offense, etc.

208. For example, see *McDonald v. Commonwealth*, 53 N.E. 874, 875 (Mass. 1899) for one of the earliest known articulations of this principle ("But it is possible that imprisonment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment.").

209. Though individuals who escape punishment on an insanity plea are often incarcerated in a mental health facility rather than set free, this is not inconsistent with *Robinson*'s holding with regards to status offenders. *See* Robinson v. California, 370 U.S. 660, 664-65 (1962). ("In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics.").

sentencing).[210] Thus, what must be controversial about the role of individual responsibility in my framework must be its role in assessing the *constitutionality* of imposing a particular punishment. However, I would argue that the same intuition that motivates statutory criminal law to incorporate considerations of individual responsibility—that to punish an individual for conduct without reference to the degree of responsibility that he bears for that conduct would lead to excessive punishment—also implicates the Eighth Amendment's principle of proportionality.[211] Thus, while it may be a more established constitutional principle that punishment must be proportionate to society's interest therein than that it must be proportionate to an individual's responsibility therefore, in reality both should play an important role in evaluating the legitimacy of a given punishment.

Even with this clarification, the precise outcome of Eighth Amendment challenges under my framework is still unclear, since the framework itself is stated in quite general terms. However, this generality is actually intentional for two reasons. First, my aim is only to provide a general framework for interpreting the Eighth Amendment, which may, in turn, serve as a useful analytical foundation for future challenges to anti-homeless legislation. The importance of the proposed framework lies not in the outcome of specific challenges under it, but in the extent to which it emphasizes the role of individual responsibility in determining the constitutionality of a given punishment.[212] Second, following Chief Justice Warren's much cited dicta in *Trop v. Dulles*, I believe that attempting to provide a more definitive framework would actually be counterproductive, because "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[213]

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210. Indeed, in *Locket v. Ohio*, 438 U.S. 586 (1978), the Court held that to execute someone whose jury was not permitted to consider all possible mitigating factors was cruel and unusual in violation of the Eighth Amendment.

211. It seems to me that the most solid philosophical foundation for this intuition lies in the Hartian notion that the consequentialism-based pursuit of punishment must be subject to side-constraints, including, most importantly, individual moral desert. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968). This requirement that punishment not be imposed on individuals in excess of their moral desert, whatever advantage to society the imposition of such punishment might offer, also explains the general prohibition on punishing the innocent. However, even someone with a purely consequentialist view of punishment would recognize that, in general, the goals of punishment are not served as well when the individual being punished is not responsible for the conduct he is being punished for (e.g., retribution against such an individual is meaningless, such an individual cannot be deterred).

212. *Cf.* Furman v. Georgia 408 U.S. 238, 282 (1972):

> If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

213. 356 U.S. 86, 101 (1958). This dicta has since been adopted explicitly by the Court. Hudson v. McMillian, 503 U.S. 1, 9 (1992).

B. A CASE LAW-BASED DEFENSE

Even as the Supreme Court has repeatedly reiterated the Eighth Amendment's proportionality principle,[214] it has been reluctant to deem individual punishments disproportionate—except in the death penalty context.[215] However, as the Supreme Court explained in striking down a sentence of life without parole for a minor nonviolent felony under a repeat offender statute:

> [W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional. As the Court noted in *Robinson v. California*, a single day in prison may be unconstitutional in some circumstances.[216]

Indeed, one of the reasons why the proportionality principle has been applied so sparingly is that the Court's jurisprudence in this area has "not been a model of clarity."[217] The Court itself has not set forth a clear framework for evaluating the proportionality of a given punishment, nor even made clear "what factors may indicate gross disproportionality."[218] The Court has given *some* guidance regarding the sorts of factors that are relevant to the proportionality analysis, however. I believe that my proposed framework is not only consistent with this guidance, but that the role that individual responsibility plays in my framework offers the best explanation for the outcome of *Robinson* in the context of this guidance.

In *Solem v. Helm*, the Court explained that "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment . . . [b]ut a combination of objective

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214. For the most recent such reiteration, see *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as "clearly established" under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years.").

215. *See* Solem v. Helm, 463 U.S. 277, 289-90 (1983) ("[O]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare. This does not mean, however, that proportionality analysis is entirely inapplicable in noncapital cases") (internal citations omitted).

216. *Id.* at 290 (*citing* Robinson v. California, 370 U.S. 660, 667 (1962)).

217. *Lockyer*, 538 U.S. at 72.

218. *Id.*

factors can make such analysis possible."[219] The Court then suggested a set of factors that might be included in such an analysis: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[220] Of these, only (i) seems to be of normative importance,[221] and thus only (i) is of particular importance in evaluating whether individual responsibility ought to be included in an analysis of proportionality.[222] At first glance, (i) might simply seem like a restatement of the uncontroversial "the amount of punishment for an offense must be related to society's interest in prohibiting that offense" principle without any acknowledgement of individual responsibility. However, when we consider guidance that the Court offers regarding how to apply (i), (ii), and (iii), we see that this is not the case:

> Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments-just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender.[223]

And then, more specifically:

> Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. A court, of course, is entitled to look at a defendant's motive in

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219. 463 U.S at 291 n.17. *See also* John C. Jeffries & Paul B. Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1376-1377 (1979).

220. *Solem*, 463 U.S. at 292.

221. That is, while looking to (ii) and (iii) might give useful empirical evidence regarding whether a certain punishment is proportional enough to pass constitutional muster, nothing considered in (ii) or (iii) could actually *affect* that punishment proportionality. *See, e.g.*, *Solem*, 463 U.S. at 291 ("[I]t may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is *some indication* that the punishment at issue may be excessive") (emphasis added).

222. However, (ii) and (iii) might prove useful in applying the framework given a particular set of facts; that is, (ii) and (iii) could play the same comparative role in my framework that they would play in an amount of punishment and societal interst-only based framework.

223. *Solem*, 463 U.S. at 292.

> committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. This list is by no means exhaustive.[224]

Thus, it is clear that even though the Court is using language that directly implies only that the proportionality of the amount of punishment and society's interest should be considered when evaluating the constitutionality of a given punishment, the constitutional analysis that they are actually engaging in considers the relationship between the amount of punishment and individual responsibility as well.

Indeed, the role of individual responsibility in the proportionality analysis is the best explanation for the result in *Robinson* and other status crimes cases. In *Solem*, the Court explicitly acknowledged that *Robinson* is indeed a proportionality-based decision: "The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century ... [We] applied the principle to invalidate a criminal sentence in *Robinson v. California*.'" [225] However, when we consider the implications of narcotics addiction merely in terms of society's interest, it seems clear that society has *at least some* interest in preventing narcotics addiction (e.g., it requires the past use—or perhaps more precisely, ingestion—of narcotics, individuals who remain in such a state *must* use narcotics in the future, etc.).[226] The reason that *any* punishment is disproportionate to addiction to narcotics, then, must be related to individual responsibility. Indeed, it is clear that the problem with a law criminalizing narcotics addiction *per se* is that it would not require proof of culpability (a consideration related to individual responsibility), since one could prove that their addiction to narcotics was involuntary and nevertheless be convicted under such a law (since the law has no act requirement).[227]

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224. *Id.* at 293 (internal citations omitted).

225. 463 U.S. at 287.

226. Another way of thinking about this: punishing narcotics addiction may serve at least some of the purposes of punishment in the abstract (e.g., narcotics addictions are harmful to society, and thus society has an interest in deterring them), so it passes society's interest-based scrutiny; however, a statute punishing narcotics addiction without requiring proof of some act (or proof of culpability directly) allows no grounds for the individual to dispute his culpability (that is, even if he shows he is not culpable, he is still technically in violation of the statutes terms), so it fails individual responsibility-based scrutiny.

227. This does not vindicate the status-act distinction-based reading of *Robinson*, because the constitutional problem with the narcotics addiction statute is not that it has no act requirement, but that because it has no act term, it can be used to punish non-culpable offenders.

C. THE BIG TEST: THE FRAMEWORK APPLIED TO HOMELESSNESS

Having examined the Eighth Amendment principles underlying the decision in *Robinson*, I now turn back to the question that motivated this investigation: do these principles offer a foundation for more successfully challenging laws criminalizing homelessness? An analysis of the susceptibility of proportionality-based challenges to the valid objections that past decisions have raised in rejecting *Robinson*-based challenges should give advocates a reason to be optimistic.[228] We have seen that there are some courts even willing to accept challenges to anti-homeless laws that are based directly on *Robinson*, generally by incorrectly reading the combined *Robinson-Powell* precedent to explicitly forbid the criminalization of involuntary conduct derivative of status in addition to pure status;[229] thus, the best test of the usefulness of the proportionality-based approach is how well it stands up to the objections raised by courts that rejected the *Robinson*-based approach. In particular, I will argue that shifting the justification for Eighth Amendment challenges to the proportionality principle helps to avoid objections based on either of the two grounds that I earlier concluded constituted critical failures of the *Robinson*-based approach: the *Powell* plurality's status-act distinction reading of *Robinson* and the voluntary nature of some homelessness-related conduct.[230]

With regards to the first ground, it is easy to see that a narrow reading of the *Robinson-Powell* precedent does not *necessarily* doom a proportionality-based challenge to anti-homeless laws as it does a *Robinson*-based one. That is, if a court asked to consider a challenge to a law criminalizing some homelessness-related conduct believes that the *Robinson* holding applies only to acts of pure status, then it must reject a *Robinson*-based challenge, but might uphold a proportionality-based one. Now, it may be the case that the sorts of courts that tend to read *Robinson-Powell* narrowly will also be reluctant to adopt the relatively thick view of the Eighth Amendment's proportionality principle that the success of a proportionality-based challenge depends on. Nonetheless, at least when faced with a proportionality-based challenge to anti-homeless laws such courts will be forced to consider the merits of such an Eighth Amendment view, as opposed to simply ending their inquiry altogether after determining that *Robinson* directly applies only to status (as they would when faced with a *Robinson*-based challenge). Indeed, the *Powell* plurality opinion suggests that the Supreme Court failed to independently consider the merits of such a thick Eighth Amendment view *precisely*

228. I will use the term "proportionality-based" to describe Eighth Amendment challenges based on the particular sort of proportionality that my framework suggests.

229. *See, e.g.*, Jones v. City of Los Angeles, 444 F. 3d 1118 (9th Cir. 2006).

230. *See infra* § III(C).

because Powell challenged his conviction only by appealing directly to *Robinson*:

> It is suggested in dissent that *Robinson* stands for the "simple" but "subtle" principle that "[criminal] penalties may not be inflicted upon a person for being in a condition he is powerless to change." In that view, appellant's "condition" of public intoxication was "occasioned by a compulsion symptomatic of the disease" of chronic alcoholism, and thus, apparently, his behavior lacked the critical element of *mens rea*. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*.[231]

Thus, proportionality-based challenges to anti-homeless laws may succeed even in front of courts that have adopted the *Powell* plurality's status-act distinction-based view of *Robinson*.

It is also clear that whereas all *Robinson*-based challenges to laws targeting even partially voluntary behavior will necessarily fail, the same is not true for proportionality-based challenges. Though it obviously gets more difficult for courts to make judgments regarding the proportionality of punishment in cases where *some* punishment is given for an offense for which the individual bears *some* responsibility and which society has *some* interest in prohibiting,[232] one of the biggest advantages of my proposed framework is that it does not draw an arbitrary line between involuntary and voluntary conduct with no punishment being constitutionally acceptable in the former case but virtually any being so in the latter.[233] Thus, though courts may ultimately uphold many laws criminalizing homelessness that target voluntary behavior, such courts will still be forced to engage in some analysis of the relationship between how culpable the offender's conduct was, how much interest society has in preventing it, and the severity of the punishment imposed.

Both the conflicting decisions reached by the various courts that have thus far considered *Robinson*-based challenges and difficulties involved with predicting how courts receptive to my proposed framework would decide proportionality-based challenges make it

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231. 392 U.S. 514, 533 (1968).

232. As the Court acknowledged in *Solem* even while striking down such a sentence (that is, in some sense, where "amount of punishment," "individual responsibility," and "society's interest" all have intermediate values): "It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not." Solem v. Helm, 463 U.S. 277, 294 (1983).

233. This, of course, assumes Justice White's reading of *Robinson*, since under the plurality's reading even involuntary conduct would be punishable, and under the dissent's it seems only a certain (not clearly defined) type of involuntary conduct would be.

difficult to compare the outcomes of such challenges in the anti-homeless context in anything but the most general terms. However, even those courts most receptive to *Robinson*-based challenges will likely overturn convictions only in circumstances where the absolute involuntariness of conduct can be established (for those are the only circumstances in which an independent prohibition on status crimes could even "logically" be extended to conduct)—something that is very difficult for the individual homeless defendant to prove at the time of their particular offense. Proportionality-based challenges, on the other hand, aren't subject to this same theoretical restriction. Thus, proportionality-based challenges to laws that generally target involuntary conduct when applied to the homeless (e.g., sleeping and eating in public) should succeed; and laws that punish conduct that may be involuntary, or that an individual is at most only slightly culpable for (e.g., using camping-related paraphernalia, like blankets, especially during the winter, and public bathing) should be heavily scrutinized.

V. CONCLUSION: IMPLICATIONS OF THE FRAMEWORK

Given that there is no evidence that the trend towards the criminalization of behaviors associated with homelessness is abating, homeless advocates are increasingly turning to constitutional challenges in order to fight such legislation. Though there are some laws criminalizing homelessness that lend themselves to non-Eighth Amendment-based challenges (such as broad anti-begging ordinances), the Eighth Amendment provides the best theoretical basis for challenging many of the most disturbing anti-homeless laws: those that criminalize behavior for which the homeless individual bears little or no culpability. However, in the past, advocates that have adopted such an Eighth Amendment-based strategy have narrowly focused their challenges on whether anti-homeless statutes impermissibly criminalize the status of being homeless in contravention of *Robinson*'s status crimes doctrine. Though some *Robinson*-based challenges have been successful, the future utility of such challenges is limited by two critical factors: first, the tendency of courts to interpret the *Robinson-Powell* precedent quite narrowly, i.e., as having *no* implications for the criminalization of conduct; and, second, the voluntary nature of some homelessness-related conduct. Thus, the first-order goal of this paper was to provide an alternative Eighth Amendment basis for challenges to anti-homelessness legislation that is not as vulnerable to these factors—the Eighth Amendment's prohibition on disproportionate punishment.

More than just providing a new possible strategy for homelessness challenges, however, this paper's particular understanding of the proportionality principle explains the link between the Eighth

Amendment and *Robinson* that is missing from the opinion itself (but is later suggested by the Court in *Solem*). The amount of punishment permitted under the Eighth Amendment for the commission of a particular act should be seen as a function of an individual's responsibility for committing that act and the interest of society in punishing that act. Thus, the fundamental problem with the current *Robinson*-based approach to anti-homeless challenges is that it works backwards: it attempts to extrapolate a broader prohibition on punishing innocent conduct from *Robinson*'s prohibition on punishing status, rather than viewing the result in *Robinson* as one particular manifestation of the Eighth Amendment's broader prohibition on disproportionate punishment. Though the "individual responsibility" element of determining proportionate punishment is often neglected in favor of the "societal interest" element, it is crucial both to understanding the result in *Robinson* and to adequately protecting the homeless. Thus, by shifting in focus from *Robinson* to the two element approach to evaluating the proportionality of punishment that is advocated by this paper, future challenges to anti-homeless legislation can both avoid the two factors that tend to derail *Robinson*-based challenges *and* better ensure that such legislation is consistent with the Eighth Amendment.