Western New England Law Review

Volume 43 *43*
Issue 2

Article 2

2022

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WESTERN NEW ENGLAND LAW REVIEW

Volume 43 2022 Issue 2

CONSTITUTIONAL LAW—PENALIZING THE "UNSIGHTLY": AN ARGUMENT FOR THE ABOLISHMENT OF LAWS CRIMINALIZING LIFE-SUSTAINING BEHAVIORS AMONG THE HOMELESS

Carli Ross

Thousands of people across the country suffer from homelessness. Instead of funding more shelters or dealing with the lack of subsidized housing, cities have chosen to rely on the criminal justice system to regulate homeless behavior. Homeless individuals are being punished with fines and potential jail time for sleeping, sitting, gathering, and camping in public. Not only does this practice contribute to the homelessness crisis in the United States, but it also creates an additional obstacle for homeless individuals. Additionally, relying on the criminal justice system is more costly than helping homeless individuals find a permanent shelter. The Ninth Circuit recently decided that ordinances prohibiting sleeping or camping in public when there is no other shelter option is unconstitutional under the Eighth Amendment. On its face, this decision looks beneficial to those who were once punished for sleeping in public. However, in reality, the effects are not as beneficial as one may think. The Ninth Circuit did not repeal the ordinances altogether. By specifying that these ordinances were only unconstitutional when there are no other shelter options, the Ninth Circuit still condoned their enforcement. Extremely narrow rulings, like the one above, do not stop cities from relying on the criminal justice system when it comes to regulating homeless behavior. Continued enforcement of such ordinances, no matter what the restrictions, punishes people for conducting life-sustaining behaviors. This practice is unconstitutional, as it violates the rights granted under the Eighth Amendment.

INTRODUCTION

Robert Anderson, a Boise, Idaho resident, was a homeless individual who suffered from bipolar disorder, schizophrenia, post-traumatic stress disorder (PTSD), depression, mixed personality disorder, and anxiety.[1] Robert Martin, who also used to be a Boise resident, was a homeless individual who suffered from insomnia, manic-depressive disorder, major depressive disorder, and schizophrenia.[2] Anderson was cited under the City of Boise's camping ordinance[3] when he was forced to sleep outside and received a twenty-five dollar fine.[4] Martin was cited under the same ordinance twice, and was also cited once under the Disorderly Conduct Ordinance.[5] The first time Martin was cited he was unable to stay at any shelter and chose to sleep in a set of bushes near the shelter where his wife and son were staying.[6] For this citation he was sentenced to a seventy-five dollar fine and seventy-five dollars and fifty cents in court costs.[7] The next citation was for sleeping outside near one of the shelters, for which he was sentenced to community service and had to pay a fine.[8] The Disorderly Conduct violation occurred when he was unable to stay at any overnight shelter and fell asleep while waiting for one to open.[9]

Anderson and Martin are only two examples of homeless individuals in one city being affected by the criminalization of homelessness. In the United States as a whole, about 568,000 people were experiencing homelessness on a single night in 2019.[10] The homeless population in

1. Brief of Plaintiffs-Appellants at 9–10, Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018) (No. 15-35845).

2. *Id.*

3. BOISE, IDAHO, CITY CODE, § 9-10-02 (2009) (current version at BOISE, IDAHO, CITY CODE, § 7-3A-2(A) (2014)). Both make it a misdemeanor to use any streets, sidewalks, parks, or public places, as a camping place at any time. *Id.*

4. Brief of Plaintiffs-Appellants at 9–10, *Martin*, 902 F.3d 1031 (No. 15-35845). Anderson was forced to sleep outside because the shelter that he was staying at has a seventeen-day limit and there were no other shelters available at the time. *Id.*

5. *Id.* BOISE, IDAHO, CITY CODE § 6-01-05 (2009) (current version at BOISE, IDAHO, CITY CODE § 5-2-3(A)(1) (2014)). This ordinance originally banned occupying, lodging, or sleeping, in any building, structure, or public place, whether private or public without the permission of the owner or person entitled to possession or in control thereof.

6. Brief of Plaintiffs-Appellants at 9–10, *Martin*, 902 F.3d 1031 (No. 15-35845).

7. *Id.*

8. *Id.*

9. *Id.*

10. MEGHAN HENRY ET AL., U.S. DEP'T HOUS. & URB. DEV., THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2020), https://files.hudexchange.info/resources/documents/2019-AHAR-Part-1.pdf [https://perma.cc/JP8W-AJDE].

America has risen for the third year in a row.[11] The number of individuals with chronic patterns of homelessness has increased by nine percent between 2018 and 2019.[12] There is no denying the national homelessness crisis the United States is facing. However, rather than acting to resolve this issue, a majority of cities across the nation have chosen to punish the homeless.[13] This is done either by imposing civil infractions resulting in a fine, or by criminalizing homeless behaviors.[14]

Cities use ordinances to criminalize behaviors like panhandling,[15] sleeping,[16] sitting,[17] camping,[18] and gathering in groups.[19] As the homeless population in the United States grew, such ordinances became heavily relied upon as solutions to this issue.[20] The argument for these ordinances is that local officials are able to protect the public's interest of health and safety.[21] However, history has shown that the need to control

11. *See Id.* The three percent increase from 2018–2019 alone is primarily because of West Coast states, where most of the litigation discussed is from. California being the front runner, with an increase of sixteen percent or around 21,306 people. *Id.*

12. *Id.* A chronic homeless individual "refers to a person who has been continuously homeless for one year or more or has experienced at least four episodes of homelessness in the last three years where the combined length of time homeless on those occasions is at least [twelve] months." *Id.* at 2.

13. TRISTIA BAUMAN ET AL., NAT'L L. CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 7 (2014), https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf [https://perma.cc/RE6U-T288] [hereinafter NO SAFE PLACE]. This is a report discussing the harms of the criminalization of homelessness, and addresses possible solutions. The Law Center surveyed 187 cities to assess the number and type of municipal codes that criminalize life-sustaining behavior and found that 57% of those cities prohibit camping, 27% prohibit sleeping, and 53% prohibit sitting and lying down. *Id.* at 7–8. There has also been a growth in laws criminalizing homelessness since this report was conducted. TRISTIA BAUMAN ET AL., NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 7 (2019), http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/UYH9-XQJC] [hereinafter HOUSING NOT HANDCUFFS 1].

14. NO SAFE PLACE, *supra* note 13, at 7.

15. MOBILE, ALA., CODE OF ORDINANCES ch. 55, art. V, § 55-101(2)(b) (2010).

16. BOISE, IDAHO, CITY CODE § 5-2-3(A)(1) (2014).

17. CLEARWATER, FLA., CODE OF ORDINANCES ch. 21, art. I, § 21.20 (2012) (making it a crime to sit on a sidewalk, or curb line, pier, boardwalk or dock).

18. BOISE, IDAHO, CITY CODE, § 7-3A-2(A) (2014).

19. TOLEDO, OHIO, CITY CODE, § 509.09. Under this code, loitering is defined as "remaining idle in essentially one location" and further makes it illegal to "loiter" in a way that creates an "unreasonable annoyance to the comfort and repose of any person." *Id.* at § 509.08.

20. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, SERVING AND PROTECTING? 1–2 (2018), https://nlchp.org/wp-content/uploads/2019/02/serveandprotect2018.pdf [https://perma.cc/Y4AF-RJB4]. This report is a survey performed on January 26, 2018 in New York City on ninety homeless individuals done to bring their experiences of criminalization to light. *Id.* at 1.

21. Petition for Writ of Certiorari at 4–5, Martin v. City of Boise, 920 F.3d 584 (9th Cir.

the use of public space is one of the main reasons behind the creation of modern laws which criminalize homelessness.[22] This practice of criminalizing homeless behavior "creates a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back," wasting resources that could otherwise go to reducing the number of people experiencing homelessness.[23]

Homeless individuals have argued that ordinances which punish their way of life violate various rights under the Fourth, Fourteenth, and Eighth Amendments.[24] The Eighth Amendment's Cruel and Unusual Punishment Clause has been the court's main focus when it comes to life-sustaining behaviors.[25] Under this clause, it is unconstitutional to punish an individual based on their condition or status.[26] Although, it is constitutional to punish someone for an act or specific conduct being performed.[27] Determining whether these ordinances are punishing the status of being homeless or the act of sleeping outside, is the issue that the Ninth Circuit had to grapple with in *Martin v. City of Boise*.[28] However, instead of holding that homelessness is a status that cannot be punished, the Ninth Circuit simply held that the sleeping and camping ordinances can be enforced as long as there are other shelter options available.[29] This decision effectively had little impact with the exception of requiring the City of Boise to enforce the rules it already has on the books.

Ending homelessness in the United States should be a priority for each state and municipality since having a roof over one's head is an

2019) (No. 19-247).

22. Javier Ortiz & Matthew Dick, *The Wrong Side of History: A Comparison of Modern and Historical Criminalization Laws*, HOMELESS RTS. ADVOC. PROJECT 1, 1 (2015), https://digitalcommons.law.seattleu.edu/hrap/7 [https://perma.cc/H3KW-LJT4].

23. *See* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS 6 (June 2012), https://www.usich.gov/resources/uploads/asset_library/Searching_Out_Solutions_2012.pdf [https://perma.cc/29SF-WCBW].

24. *See, e.g.*, Joyce v. City & County of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994). Plaintiffs were seeking injunctive relief and failed to establish success on the merit for each constitutional claim, Fourth, Fourteenth, and Eighth. *Id.* at 864. Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992) (holding that the Florida ordinances did violate the cruel and unusual clause, due process clause, fundamental right to travel, and Miami's practice of seizing and destroying property violated their rights under the fourth amendment).

25. *See, e.g.*, Martin v. City of Boise, 920 F.3d 584, 618 (9th Cir. 2019); Jones v. City of L.A., 444 F.3d 1118, 1138 (9th Cir. 2006); *Pottinger*, 810 F. Supp. at 1565; Johnson v. City of Dallas, 860 F. Supp. 344 (N.D. Tex. 1994) *rev'd*, 61 F.3d 442,e445 (5th Cir. 1995).

26. Robinson v. California, 370 U.S. 660, 666 (1962).

27. Powell v. Texas, 392 U.S. 514, 532 (1968).

28. *Martin*, 920 F.3d at 618. This is not the first time the court had to interpret the meaning of the Cruel and Unusual Punishment Clause. *See Jones*, 444 F.3d at 1138.

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

essential right that all people should have. Continuing to punish individuals for sleeping, loitering, sitting, and laying down does not help solve the issue.[30] Instead, it ignores the root of the problem and criminalizes individuals for merely existing.[31] Part I of this Note examines the history and reasoning behind these laws that criminalize homeless behavior. Part II first analyzes past court decisions that have discussed the constitutionality of ordinances that punish sleeping and camping in public. Part II next argues that the narrowness of past decisions has essentially rendered such rulings ineffective. Part III argues that an actual solution to the issues surrounding these ordinances would be to make them unconstitutional under the Eighth Amendment because sleeping, camping, sitting, and laying down should not be considered criminal conduct, or punished as such.

I. HISTORY AND PURPOSE BEHIND THE CRIMINALIZATION OF HOMELESSNESS

Homelessness has been a national crisis for decades. Despite this, homelessness continues to be on the rise nationally while cities struggle to mitigate and manage this problem.[32] Studies show that cities that have implemented Housing First models, or that have expanded access to affordable housing, have lower homeless populations.[33] Regardless of this known solution, there are still a vast amount of cities that rely too heavily on the criminal justice system when it comes to dealing with their homeless populations.[34] By relying on the criminal justice system, these municipalities are criminalizing basic human life-sustaining behaviors such as sitting, eating, or sleeping. These acts, when performed in private, are not criminal acts. Although, since they are deemed criminal activity when they are performed in public, local governments have the power to

30. HOUSING NOT HANDCUFFS 1, *supra* note 13, at 11. Note that the research above shows that the number of homeless people has increased for the third time, along with the number of cities that criminalize homeless behavior. *See supra* note 11.

31. SERVING AND PROTECTING?, *supra* note 20, at 2.

32. Ortiz & Dick, *supra* note 22, at 1.

33. HOUSING NOT HANDCUFFS 1, *supra* note 13, at 85. Under the Housing First model, "homeless people are quickly placed into permanent housing, supplemented by any supportive services necessary to help them maintain housing stability." *Id.* Using this model, seventy-eight communities, and three states have ended veteran homelessness, and four of those communities have ended chronic homelessness. *Id. See also Communities that Have Ended Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, https://www.usich.gov/communities-that-have-ended-homelessness/ (last visited Jan. 25, 2021) [https://perma.cc/4ZEY-MEHR].

34. HOUSING NOT HANDCUFFS 1, *supra* note 13, at 11. An updated report of the same study which began in 2016, describes trends in laws criminalizing homelessness and tracks the significant growth of such laws. *Id.*

punish and regulate these acts however they see fit.[35] There are limitations to such power, but as long as it is in the interest of public health and welfare, such conduct can be regulated.[36] Local authorities argue that these laws are enforced to ensure the health and safety of the public and to prevent crime. However, the roots of these laws insinuate that the fight to control public space is the true drive behind their creation.[37]

A. *Purpose for Ordinances Which Punish Life-Sustaining Behaviors*

Many of the laws that currently criminalize homelessness originated from colonial vagrancy laws.[38] The English initially enacted these laws against "wandering, unemployed indigents" to protect the public from "potential crime by punishing a wide array of persons deemed to be suspicious or vaguely undesirable."[39] In the United States, during the eighteenth and nineteenth centuries, such laws were "justified as a legitimate exercise of the states' police powers, directed at the prevention of crime thought to flow from poverty."[40] Vagrancy laws varied between states; however, the goal of punishing "persons without visible means of support who, although able to work, failed to do so" remained the same.[41] These laws punished individuals because of their homeless status rather than for their conduct or actions.[42]

After World War II, vagrancy laws faced constitutional backlash on numerous grounds.[43] The laws were overturned as "invidious discrimination against the poor,"[44] and on the grounds that they "punished

35. Ortiz & Dick, *supra* note 22, at 2.

36. *Id. See also* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (acknowledging that the Court has long held that local government's police power includes reasonable regulations that will protect the public health and safety).

37. *See* Ortiz & Dick, *supra* note 22, at 12.

38. *Id.* at 2. "A vagrant is a probable criminal; and the purpose of the statue is to prevent crimes which may likely flow from his mode of life." District of Columbia v. Hunt, 163 F.2d 833, 835 (D.C. Cir. 1947). An example of one of the laws the appellee was charged under reads, "a person leading an immoral and profligate life who has no lawful employment had has no lawful means of support realized from a lawful occupation and source." *Id.*

39. Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 637 (1992).

40. *Id.* at 640.

41. *Id.*

42. *Id.*

43. *Id.* at 642.

44. *Id.*; *see also* Wheeler v. Goodman, 306 F. Supp. 58, 62 (W.D.N.C. 1969) (holding that a North Carolina statute violated the equal protection clause because idleness and poverty, without fault, cannot be made the elements of a crime, and one cannot be punished as a vagrant on the premise that he may commit a crime in the future because he is presently poor and unemployed).

status or condition, which amounted to cruel and unusual punishment."[45] Vagrancy laws were also overturned on due process grounds because they were seen as void or vague, because they failed to give notice of the prohibited behavior, and because such indefiniteness led to arbitrary arrests.[46] Nonetheless, police officers continued to arrest poor or homeless individuals under the guise of loitering laws.[47]

In the 1980s, the United States faced a rapid increase in the number of homeless individuals.[48] As a result, local officials insisted that the invalidation of these vagrancy laws was a "dangerous assault on their authority to enforce social order," so they were forced to searched for new ways to regulate homeless behavior.[49] Along with the increase of the homeless population, the public's view and attitude toward homeless individuals became "increasingly hostile," and homeless behavior was met "with frustration, rather than sympathy."[50] Even after the 1980s, the increase in the number of homeless individuals continued.[51]

In the 1990s, new policing strategies were shaped by the "Broken

45. Simon, *supra* note 39, at 642; *see also* Decker v. Fillis, 306 F. Supp. 613,617 (D. Utah 1969) (holding the vagrancy ordinance invalid because it punished "economic condition or status," and thus violated due process).

46. Simon, *supra* note 39, at 643; *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding that Jacksonville Ordinance Code § 26-57 was void for vagueness because it failed to give notice of prohibited conduct and its indefiniteness encouraged arbitrary convictions); Kolender v. Lawson, 461 U.S. 352,361 (1983) (holding that the California statute requiring persons who loiter to provide credible and reliable identification was unconstitutionally void and did not satisfy the requirements of due process).

47. *Orders to Move On and the Prevention of Crime*, 87 YALE L.J. 603, 603 n.4 (1978). Two years after the *Papachristou* decision, police made 40,000 arrests for vagrancy, 36,200 arrests for "suspicion," and 146,400 arrests for loitering and curfew violations. *Id.*

48. Simon, *supra* note 39, at 646. A thirty-state survey found that the primary cause of homelessness in America was due to the loss of low-income housing. *Id.* at n.97. During this period, "[a]n estimated half-million units of low-income housing [were] lost each year due to the collective forces of abandonment, arson, demolition, inflation, and the conversion of low-income housing to other uses." *Id.* This, along with mental illness, substance abuse, the lack of services needed in low-income housing areas, and the number of Americans living in poverty led to the growth of homelessness in the 1980s. *Id.*

49. *Id.* at 645; *see also* Ortiz & Dick, *supra* note 22, at 2.

50. Simon, *supra* note 39, at 647.

51. TRISTIA BAUMAN ET AL., NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 18–19 (2016), https://nlchp.org//wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf. [https://perma.cc/UYH9-XQJC] [hereinafter HOUSING NOT HANDCUFFS 2]. This report provides an overview of criminalization measures implemented in 187 cities across the United States since 2006. *Id.* at 9. The report acknowledges that in the 1980s homelessness became a national epidemic due largely to the loss of subsidized housing, but it further states that it has remained a crisis since then. *Id.* at 33. Even in recent years, between 2016-2017 and 2017-2018, homelessness in the United States still saw increases. *See also* MEGHAN HENRY ET AL., *supra* note 10, at 1.

Windows Theory."[52] The theory claimed that "one poor person in a neighborhood is like a first unrepaired broken window, and if such a 'window' is not immediately fixed or removed, it is a signal that no one cares, disorder will flourish and the community will go to hell . . . ."[53] Law enforcement believed that "[i]f the window is not immediately fixed . . . others will likely break more windows, spray more graffiti, and leave trash in the streets because they will see the area as a place where such a behavior is tolerated."[54] They also believed that criminals sought out neighborhoods that appeared to be disorderly, and that to avoid the "inevitable landslide of criminality," police needed to fix the first window that was broken.[55] Law enforcement, when applying this theory, operated under a presumption that the presence of homeless individuals in an area would inevitably result in criminal activity.[56] This theory was used as justification to remove homeless people from certain public areas and resulted in local authorities criminalizing homeless behaviors.[57] These outdated practices have shaped the laws that punish homeless behavior today.[58]

Local officials argued that they rely on laws that criminalize homelessness to protect the public interest of health and safety.[59] Cities with large homeless populations often struggle with the spread of disease throughout homeless encampments.[60] One such example from 2018 occurred in Seattle where the city health department was combating a serious outbreak of multiple illnesses that resulted in at least two deaths.[61]

52. Ortiz & Dick, *supra* note 22, at 19.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 19–20.

57. *Id.* at 20.

58. Simon, *supra* note 39, at 647.

59. *See, e.g.*, Petition for Writ of Certiorari at 4–5, Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) (No. 19-247).

60. *See* Vivanna Davila & Jonathan Martin, *Rare infectious diseases are rising at an 'alarming' rate in Seattle's homeless population, concerning health officials*, SEATTLE TIMES (Mar. 15, 2018, 5:24 PM), https://www.seattletimes.com/seattle-news/homeless/infectious-disease-oubreaks-in-seattle-homeless-people-concern-health-officials/?utm_source=email&utm_medium=email&utm_campaign=article_left_1.1[https://perma.cc/HR8L-BM27]; Anna Gorman & Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, THE ATLANTIC (Mar. 8, 2019), https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/[https://perma.cc/P6ZE-F4ZN]; *See also* Dakota Smith & David Zahniser, *Filth from homeless camps is luring rats to L.A. City Hall, report says*, L.A. TIMES (June 3, 2019, 5:00 AM), https://www.latimes.com/local/lanow/la-me-ln-rats-homelessness-city-hall-fleas-report-20190603-story.html [https://perma.cc/2JXX-E5JH].

61. Davila & Martin, *supra* note 60.

The Seattle Health Department associated the outbreaks with poor hygiene and sanitation that was exacerbated by the overcrowded conditions.[62] It should be of no surprise that human feces, rats, and contaminated items, such as hypodermic needles, would result in the spread of disease.[63] While the preventing the spread of infectious diseases is a legitimate public concern, it should not, however, be the justification to criminalize those who are left with no other option. Punishing those individuals in camps does not permanently remove or eradicate homeless encampments when they have nowhere else to go.[64]

The City of Boise made a similar argument to the Supreme Court in its petition for a writ of certiorari.[65] In addition to arguing encampments spread diseases, the City stated that encampments produced crime, violence, and created environmental hazards that threaten the public as well as those living in them. Boise also argued that encampments provide a captive and concentrated market for drug dealers and gangs who prey on the vulnerable.[66] Due to all of these concerns, Boise expressed that the ordinances that regulate homeless behavior are critical tools that allow the City to maintain its public spaces and to ensure that these areas remain safe, accessible, and sanitary.[67]

While it is true that these encampments are unsanitary and can attract crime, the ordinances that punish sleeping and camping are not a permanent solution to these issues; ending homelessness is.[68] The argument by local governments that these ordinances are used to protect the health and safety of society is negated by the fact that they are not fulfilling that purpose.[69] The ordinances may prohibit encampments in

62. *Id.*

63. *Id. See also* Pottinger v. City of Miami, 359 F. Supp. 3d 1177, 1190 (S.D. Fla. 2019).

64. Miami has found that abandoning efforts to criminalize sleeping outside in favor of more effective tools has led to a 90% decrease in its homeless population. *Id.* at 1180–81. An effective way to prevent people from sleeping, or sitting outside is to provide them with a shelter. Fines and penalties cannot prevent an individual from doing something they do not want to do in the first place.

65. *See* Petition for Writ of Certiorari at 4, Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) (No. 19-247).

66. *Id.*

67. *Id.*

68. *Id.* at 6.

69. *See* Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States*, 29 ANTIPODE 303, 307 (1997) ("[S]upposed public interests that criminalization is purported to serve . . . are dubious at best."); *see also* Jamie Michael Charles, *"America's Lost Cause": The Unconstitutionality of Criminalizing Our Country's Homeless Population*, 18 B.U. PUB. INT. L.J. 315, 345 (2009) ("The likely result of criminalization measures will be to enhance the overall problem of getting indigents off the streets.").

certain areas, but this is not for health and safety reasons; it is because governments want to regulate where homeless people are allowed to go. Even the American Medical Association has adopted an official policy, which further demonstrates that the best tool to resolve the public health problem associated with unsheltered homelessness is housing.[70] Further, these ordinances are ineffective in protecting anyone's health and safety because imposing fines or putting a homeless individual in jail overnight does not permanently prevent the formation of encampments.[71] Criminalization will never be an appropriate response since merely jailing the homeless does not offer a long term solution.[72] A legitimate solution should be focused around funding affordable housing since the lack thereof is one of the main causes of homelessness.[73]

B. *Ineffectiveness of Criminalizing the Homeless*

In 2019, about 568,000 people were experiencing homelessness in the United States.[74] Roughly 63% were staying in shelters, and about thirty-seven percent were on the streets, in abandoned buildings, or in other unsheltered locations.[75] Despite these numbers likely being an undercount of the homeless population, they do indicate that the population is increasing.[76]

The increase is likely a result of a lack of accessible and affordable

70. Sara Berg, *Homeless People Need More Help, Not Stays in Jail*, AM. MED. ASS'N (June 12, 2019), https://www.ama-assn.org/delivering-care/population-care/homeless-people-need-more-help-not-stays-jail-ama [https://perma.cc/727B-CX4G].

71. Charles, *supra* note 69, at 345 ("indigents inevitably serve a short jail sentence and then return to the streets.").

72. HOUSING NOT HANDCUFFS 2, *supra* note 51, at 36–39. People who are getting arrested for these crimes are not sentenced to life. They will be released, but with hundreds or thousands of dollars in fines and a new criminal record, creating a whole new array of problems. *Id.*

73. COUNCIL OF ECON. ADVISORS, THE STATE OF HOMELESSNESS IN AMERICA 5 (Sept. 2019), https://www.whitehouse.gov/wp-content/uploads/2019/09/The-State-of-Homelessness-in-America.pdf. This report estimates that if eleven metropolitan areas with significantly supply-constrained housing markets were to deregulate the housing markets, overall homelessness in the U.S. would fall by thirteen percent. *Id.*

74. MEGHAN HENRY ET AL., *supra* note 10, at 1. An increase from roughly 553,000 people on a single night in 2018. U.S. DEP'T OF HOUSING & URB. DEV., THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2018), https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf [https://perma.cc/24HA-KDNA].

75. COUNCIL OF ECON. ADVISORS, *supra* note 73, at 6. "A large body of academic literature confirms that higher home prices are indeed associated with higher rates of homeless people." *Id.* at 11.

76. MEGHAN HENRY ET AL., *supra* note 10, at 1. The one-night counts reported are conducted during the last ten days of January each year and are considered estimates throughout the report. *Id.* at 6.

housing.[77] In the 1980s, there was a dramatic reduction of federally-subsidized housing, and this loss corresponded with an increase in rent prices in the private housing market.[78] This trend has continued, and in 2020 only one in four eligible renters were receiving federal housing assistance.[79] According to the 2020 Out of Reach report, "the latest data show[s] that there are only [thirty-six] affordable and available rental homes for every 100 renter households with extremely low incomes."[80] This equates to 86% of extremely low-income renters who cannot afford their rent, and 71% who spend more than half of their incomes on housing costs.[81] For example, in California, the fair market rent for a two-bedroom apartment is $1,922.[82] In order to afford this without spending more than 30% of income on housing, an individual needs to make $36.96 per hour.[83] For someone making minimum wage, this means they need to work 114 hours per week to afford a two-bedroom rental home, and ninety hours per week to afford a one-bedroom rental home.[84] These impossible requirements are not only an issue in California; this trend is seen nationwide. Addressing the roots of the housing affordability crisis would undoubtedly reduce the homeless population. Providing significant capital investments to public housing is not only more effective than criminalizing and incarcerating homeless individuals, but it is also cheaper.

Unhoused people are arrested at disproportionate rates across the country.[85] The cost of keeping those individuals in jails, even for small

77. HOUSING NOT HANDCUFFS 2, *supra* note 51, at 18.

78. *See* Daniel Weinberger, *The Causes of Homelessness in America*, ETHICS OF DEV. IN A GLOB. ENV'T (EDGE), http://web.stanford.edu/class/e297c/poverty_prejudice/soc_sec/hcauses.htm [https://perma.cc/5JGE-E7PW]. Since the mid-1980s, our nation has lost subsidized housing units at a rate of approximately 10,000 per year. ED GRAMLICH, NAT'L LOW INCOME HOUS. COAL., PUBLIC HOUSING 4–8 (2017), https://nlihc.org/sites/default/files/AG-2017/2017AG_Ch04-S04_Public-Housing.pdf. We cannot recover from the homelessness crisis without significant reinvestment in federally subsidized housing for low-income people.

79. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 3 (2020), https://reports.nlihc.org/sites/default/files/oor/OOR_2020.pdf.

80. *Id.* at 8.

81. *Id.*

82. *Id.* at 38. "Fair market rents are estimates of what a family moving today can expect to pay for a modestly priced rental home in a given area." *Id.* at 2.

83. *Id.* at 38.

84. *Id.*

85. Sara Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 101 (2019). In Los Angeles, CA in 2016, one in six bookings were homeless people. Gale Holland & Christine Zhang, *Huge Increase in Arrests of Homeless in L.A.—But Mostly for Minor Offenses*, L.A. TIMES (Feb. 4, 2018, 8:20 AM), https://www.latimes.com/local/politics/la-me-homeless-arrests-20180204-

periods of time, is also outrageous.[86] The annual cost per incarcerated individual averaged $47,057 in thirty-five jurisdictions that responded to a study done by the Vera Institute of Justice.[87] The funding for that amount comes from the same sources that support public hospitals, schools, social services, roads, and other essential functions of local government.[88] Research showed that a large portion of the population being sent to jail were often poor or homeless individuals with mental illness.[89] It has also showed that while the growth of jails in the United States has been costly, such growth has done little to enhance public safety.[90] These facts demonstrate that a vast amount of taxpayer dollars are going towards incarcerating individuals for fundamentally no reason.

In addition, states that have focused on Housing First models have reported saving money, and improving the quality of life for formerly homeless individuals.[91] For example, Massachusetts adopted the Home and Healthy for Good Program, which is a Housing First model aimed at serving the chronically homeless population.[92] Since its adoption in 2006, the program has saved the Commonwealth an annual $9,339 per housed tenant.[93] California, Florida, and Seattle have also reported a cost decrease when implementing a Housing First model.[94] One such model, called Permanent Supportive Housing, has shown to decrease time spent

story.html#:~:text=Officers%20made%2014%2C000%20arrests%20of,for%20nonviolent%20or%20minor%20offenses. In 2018, Seattle, Washington had a homeless population which was about 1% of the general population, but twenty percent of arrests and bookings were homeless people. David Kroman, *In Seattle, 1 in 5 People Booked into Jail Are Homeless*, CROSSCUT (Feb. 19, 2019), https://crosscut.com/2019/02/seattle-1-5-people-booked-jail-are-homeless [https://perma.cc/KJ6F-WHRW].

86. *See* CHRISTIAN HENRICHSON ET AL., VERA INST. OF JUST., THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION (2015), https://www.vera.org/downloads/publications/price-of-jails.pdf [https://perma.cc/6JJ3-BNJ7].

87. *Id.* The report surveyed thirty-five jail jurisdictions in eighteen states to tally the actual price of their jails. One of the jurisdictions in the study was Hampden County, Massachusetts which reported $82,304,261 in total jail costs in 2014. *Id.*

88. *Id.* at 2.

89. RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA, 12 (2015), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf [https://perma.cc/GQ4G-6M26].

90. *Id.*

91. MASS. HOUS. & SHELTER ALL., PERMANENT SUPPORTIVE HOUSING: A SOLUTION-DRIVEN MODEL (2015), https://silo.tips/download/permanent-supportive-housing-a-solution-driven-model [https://perma.cc/FD95-DFJY].

92. *Id.* at 3.

93. *Id.* at 11.

94. HOUSING NOT HANDCUFFS 2, *supra* note 51, at 72.

incarcerated by up to 84.8 percent.[95] Decreasing incarceration saves up to $1,800 per person per year, and this number does not account for all the considerable costs associated with arrests, adjudication, or post-release.[96] Focusing on solutions to the homelessness crisis and ending its criminalization has proven to be more cost-effective, and more beneficial to the homeless population. However, criminalization is more than ineffective, it is also unconstitutional under the Eighth Amendment.[97]

II. THE NARROW-MINDED VIEW OF THE COURTS

Many courts have ruled that anti-sleeping and anti-camping ordinances do not violate the Eighth Amendment.[98] Other courts have held that anti-sleeping and anti-camping ordinances constitute cruel and unusual punishment, but only when there are no available shelter options.[99] While these decisions seem beneficial to ending the criminalization of homelessness on paper, in practice, they are not effecting much change.[100] This is in part because the court rulings are extremely narrow as to when these ordinances are unconstitutional.[101] Instead of directly ruling against the enforcement of these laws, the

95. LAVENA STATEN & SARA K. RANKIN, HOMELESS RTS. ADVOC. PROJECT, PENNY WISE BUT POUND FOOLISH: HOW PERMANENT SUPPORTIVE HOUSING CAN PREVENT A WORLD OF HURT ii (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3419187. Permanent Supportive Housing provides non-time limited, low barrier housing, and offers optional supportive services. *Id.* at 1.

96. *Id.* at 27.

97. U.S. CONST. amend. VIII.

98. Joel v. City of Orlando, 232 F.3d 1353, 1361–62 (11th Cir. 2000) (holding that municipal ordinances that prohibited any camping on public property did not violate the Eighth Amendment because they punish conduct, not status); Joyce v. City & Cnty. of S.F., 846 F. Supp. 843, 853–58 (N.D. Cal. 1994) (rejecting the plaintiff's argument that the failure of San Francisco to provide sufficient housing makes homelessness a status protected under the Eighth Amendment); Tobe v. City of Santa Ana, 892 P.2d 1145, 1166 (Cal. 1995) (holding that the ordinances which banned camping constitutionally permit punishment for the proscribed conduct, not punishment for status); Allen v. City of Sacramento, 183 Cal. Rptr. 3d. 654, 668–71 (Cal. Ct. App. 2015) (holding that homelessness is not equivalent to an involuntary condition, and therefore the ordinances punishing the act of camping are constitutional).

99. *See, e.g.*, Martin v. City of Boise, 920 F.3d 584, 618 (9th Cir. 2019); Jones v. City of L.A., 444 F.3d 1118, 1138 (9th Cir. 2006); Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992); Johnson v. City of Dall., 869 F. Supp. 344 (N.D. Tex. 1994), *rev'd*, 61 F.3d 442, 445 (4th Cir. 1995).

100. Brief in Opposition at 2, *Martin*, 920 F.3d 584 (No. 19-247).

101. *See Martin*, 920 F.3d at 617("Our holding is a narrow one."); *Jones*, 444 F.3d at 1138 ("[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets on the streets of Los Angeles at any time and at any place."); *Pottinger* 810 F. Supp. at 1565 (holding that "[a]s long as the homeless do not have a single place where they can lawfully be" the ordinances are unconstitutional under the Eighth Amendment).

limiting language allows governments to still enforce the anti-sleeping laws if they ensure that there is some possible shelter option available.[102] Specifically, the Ninth Circuit ruling in *Martin v. City of Boise* "does no more than prohibit the imposition of criminal penalties against homeless individuals" who sleep outside when there are no shelters available.[103] The *Martin* decision, while recent, was one of many cases that resulted in a narrow holding.

A. *Before* Martin v. City of Boise

One of the main cases which has been considered when grappling with this issue was *Pottinger v. Miami*.[104] In 1992, nearly 6,000 homeless individuals filed a class action lawsuit against the City of Miami.[105] The suit challenged the policy of arresting homeless individuals for engaging in life-sustaining activities in public under local ordinances and Florida statutes.[106] Among other things, the plaintiffs alleged that the ordinances were used to "punish homeless persons based on their involuntary homeless status."[107] The court concluded that it was impossible for plaintiffs to avoid public places when engaging in "otherwise innocent conduct," like sleeping.[108] The court held that "[a]s long as the homeless plaintiffs do not have a single place where they can lawfully be" the ordinances were a violation of their Eighth Amendment right to be free from cruel and unusual punishment.[109]

102. *See Martin*, 920 F.3d at 617; *Jones*, 444 F.3d at 1138; *Pottinger*, 810 F. Supp. at 1565. Ignoring the fact that even when "shelter options" may be available, other restrictions still prohibit a homeless individual from staying at that shelter. Margaret Carmel, *A Look Inside Boise's Emergency Shelters and How They Assist Those in Need*, IDAHO PRESS (May 25, 2019), https://www.homelesscoalitionboise.com/alookinsideboisesemergencshelters/ https://perma.cc/4EVZ-REB5].

103. Brief in Opposition at 2, *Martin*, 920 F.3d 584 (No. 19-247). In *Martin*, the Ninth Circuit determined that the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside when they have no home or shelter to go to. *Martin*, 920 F.3d at 618.

104. *See Pottinger*, 810 F. Supp. at 1554.

105. *Id.*

106. *Id. See also* CITY OF MIAMI CODE § 37-53.1 (prohibits obstruction of sidewalks), § 37-63 (prohibits sleeping in public, plaintiffs were punished for sleeping on benches, sidewalks or in parks under this code), § 38-3 (prohibiting being in the park after hours), § 37-34 (prohibits loitering and prowling); FLA. STAT. ANN. § 856.021 (West 1997) ("It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for safety of persons or property in the vicinity."), FLA. STAT. ANN. § 810.08, .09 (prohibiting sleeping, sitting, or standing in public buildings).

107. *Pottinger*, 810 F. Supp. at 1555.

108. *Id.* at 1565.

109. *Id.*

After this ruling, the City of Miami enacted the *Pottinger* agreement, which was aimed at preventing the criminalization of homeless individuals.[110] Initially, the agreement required police to provide aid to homeless persons in finding a shelter before arresting them for conducting life-sustaining activities, like sleeping and camping.[111] Over the years there have been modifications, but in 2019 the agreement was entirely dissolved by the court.[112] During the hearing, the city argued that the Miami Police Department was unlikely to return to the old policies, "given the myriad of programs available to it as a means to aid the homeless."[113] However, this agreement had given the homeless a mechanism to enforce this promise made by the city and without it there is now little to no legal protection against these anti-homeless ordinances.[114]

A similar suit was filed in Dallas, Texas in 1994 involving an ordinance that prohibited sleeping in public.[115] The plaintiffs, a group of homeless individuals, challenged the constitutionality of various city ordinances. The court found all of the ordinances constitutional except the one that prohibited sleeping in public.[116] The court held that "as long as the homeless have no other place to be, they may not be prevented from sleeping in public."[117] However, the Fifth Circuit reversed this decision in 1995, and held that the plaintiffs—now appellees—lacked standing to raise their Eighth Amendment claim.[118] The court held that the Cruel and Unusual Punishment Clause was designed to protect those convicted of crimes,[119] and because the Appellees had only received fines, they did not

110. Settlement Agreement, Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992) (No. 88-2406-CIV-ATKINS).

111. *Id.*

112. Pottinger v. City of Miami, 359 F. Supp. 3d 1177, (S.D. Fla. 2019). In 2014, the Agreement was modified to exclude sexual offenders from the protected class of the homeless. *Id.* at 1180.

113. *Id.* at 1183. The court felt that since "so much has changed in how the City of Miami treats its homeless population" that the agreement was no longer necessary. *Id.* at 1181.

114. *Id. See also* Amelia Daynes, *The Criminalization of Homelessness in a Post-Pottinger World*, U. MIAMI. L. REV. (Apr. 15, 2019), https://lawreview.law.miami.edu/criminalization-homelessness-post-pottinger-world/ [https://perma.cc/7W85-D999].

115. Johnson v. City of Dallas, 860 F. Supp. 344, 346 (N.D. Tex. 1994); *see also* DALL., TEX., CITY ORDINANCE § 31-13 (1960) (a person commits the offense of sleeping in a public place when they "sleep[] or doze[] in a street, alley, park or other public place; or sleep[] or doze[] in a vacant lot adjoining a public street or highway.").

116. *Johnson*, 860 F. Supp. at 349.

117. *Id.* at 351.

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

119. *Id.* at 444. *See also* Ingraham v. Wright, 430 U.S. 651, 664 (1977).

have standing to bring a claim.[120] As a result, this ordinance can still be enforced today.

Another claim was brought to the Ninth Circuit in 2006 with *Jones v. City of Los Angeles*.[121] The court here was faced with deciding whether the Eighth Amendment prohibited the enforcement of Los Angeles ordinances as applied to homeless individuals involuntarily sitting, lying, or sleeping on the street due to the unavailability of shelter in Los Angeles.[122] The Los Angeles ordinance at issue states that "no person shall sit, lie, or sleep in or upon any street, sidewalk or any other public way."[123] If a person is found in violation of this statute, they can be punished with a fine of up to $1,000 and/or imprisoned for up to six months.[124]

In its conclusion, the Ninth Circuit specifically stated that its "holding is a limited one,"[125] followed by the statement that the court "do[es] not hold that the Eighth Amendment . . . prevents the state from criminalizing conduct that is not an unavoidable consequence of being homeless, such as panhandling or obstructing public thoroughfares."[126] This court held only that punishing involuntary sitting, lying, or sleeping on public sidewalks, which are unavoidable consequences of being homeless, is prohibited under the Eighth Amendment when there are no available shelters.[127] This ruling occurred roughly thirteen years ago, and the ordinances punishing these behaviors are still enforced.[128] The homeless advocates of Los Angeles have continuously argued that the ordinances should be repealed, while the homeless population has continued to increase.[129]

120. *Johnson*, 61 F.3d at 445 ("While we find that numerous tickets have been issued, we find no indication that any Appellees have been *convicted* of violating the sleeping in public ordinance.").

121. Jones v. City of Los Angeles, 444 F.3d 1118, 1120 (9th Cir. 2006).

122. *Id.* at 1120.

123. L.A., CAL., MUN. CODE § 41.18(d) (2005).

124. *Id.*

125. *Jones*, 444 F.3d at 1137.

126. *Id.*

127. *Id.* at 1138.

128. Zoie Matthew, *Protests Over Proposed Sidewalk Sleeping Law Bring City Council Meeting to a Halt*, L.A. MAG. (Sept. 25, 2019), https://www.lamag.com/citythinkblog/sidewalk-sleeping-city-council/ [https://perma.cc/X6FP-AT8T].

129. *Id.* Between 2018 and 2019, the homeless population in the United States declined as a country, but the state of California's homeless population increased by sixteen percent. MEGHAN HENRY ET AL., *supra* note 10, at 1.

B. *The* Martin *Decision*

The ruling in *Jones* became the 9th Circuit's framework for handling ordinances that criminalize homelessness. When *Martin v. Boise* got to the Ninth Circuit the ordinances in dispute were an anti-camping ordinance and a disorderly conduct ordinance.[130] The anti-camping ordinance made it a misdemeanor for "any person to use any of the streets, sidewalks, parks, or public places, as a camping place at any time."[131] The disorderly conduct ordinance prohibited any person from "occupying, lodging, or sleeping in any building, structure or place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof."[132] A different city, different ordinances, more than ten years later, and the Ninth Circuit still relied on the *Jones* decision.[133] The court again concluded that a city cannot criminalize sleeping, sitting, and lying without violating the Eighth Amendment when no sleeping space is practically available in any shelter.[134] This ruling is not just limited; it also ignores important details surrounding the shelters available in Boise and their numerous restrictions.[135]

In the background section of the decision, the court discusses at length the fact that there were only three shelters in the entire city.[136] First, Sanctuary is the only shelter Boise has which is open to men, women, and children, and that has no religious requirements.[137] This shelter has seventy-five beds reserved for men, twenty-two beds for women, and sixty beds for families.[138] There are two other shelters run by a Christian organization, one for only men and the other for only women and children.[139]

130. Martin v. City of Boise, 920 F.3d 584, 584 (9th Cir. 2019). *See also* BOISE, ID., CITY CODE § 7-3A-2(A); BOISE, ID., CITY CODE § 5-2-3(A)(1).

131. BOISE, ID., CITY CODE § 7-3A-2(A). Camping is defined as the "use of public property as a temporary or permanent place of dwelling, lodging or residence, or as a living accommodation at any time between sunset and sunset, or as a sojourn." *Id.*

132. § 5-2-3(A)(1).

133. *Martin*, 920 F.3d at 617. *See also* Statement of Interest of the United States at 4, Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) (No. 09-CV-540) (advocating that the *Jones* framework is appropriate for analyzing the plaintiff's Eighth Amendment claims in *Martin*).

134. *Martin*, 920 F.3d at 618.

135. *Id.* at 605–07.

136. *Id.*

137. Carol Craighill, *A Look inside Boise's emergency shelters and how they assist those in need*, BOISE CNTY. HOMELESS COAL. (June 3, 2019), https://www.homelesscoalitionboise.com/alookinsideboisesemergencshelters/ [https://perma.cc/4EVZ-REB5].

138. *Id.*

139. *Id.*

The check-in for both of these shelters is between 4:00 p.m. and 5:30 p.m. Those who arrive between 5:30 p.m. and 8:00 p.m. may be denied if they do not have a reason for being late, and those who arrive after 8:00 p.m. are generally denied shelter.[140] With the exception of winter, men are only allowed to stay in their shelter for up to seventeen consecutive nights, and the women up to thirty consecutive nights.[141] Once these limits are reached, residents are given the option to join an "intensive, Christ-based residential recovery program," in exchange for an extended stay.[142] If they reject this program, they cannot return to the shelter for at least thirty days.[143] However, there is no mention of these restrictions in the Ninth Circuit holding.

Due to the lack of shelters available, in 2010 the City of Boise prohibited the enforcement of the ordinances at issue against any homeless person when the shelters had no overnight space.[144] This is known as the "Shelter Protocol," and under this rule if any of the three shelters reach capacity, they are required to notify the police.[145] Police will not know whether the shelters have reached capacity unless the shelters informed them.[146] Since this rule was enacted, Sanctuary has reported that it was full forty percent of the time, while both the men's and women's shelter have never reported being full.[147]

Despite the "Shelter Protocol's" enactment, Boise police have still been able to enforce the ordinances against homeless individuals at all times.[148] As a result, homeless individuals are still susceptible to being cited on a night where Sanctuary is full and they are denied entry from one of the other shelters for any of the other restrictive reasons. In fact, two out of the six plaintiffs who brought this claim were cited after its enactment.[149] Despite all this information, the court still gave an extremely limited ruling.[150]

140. *Id.*
141. *Id.*
142. *Id.*
143. Martin v. City of Boise, 920 F.3d 584, 606 (9th Cir. 2019).
144. *Id.* at 607.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 606.
150. *Id.* at 618. *See also Eighth Amendment—Criminalization of Homelessness—Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public*, 133 HARV. L. REV. 699, 704–06 (2019) (discussing how the ruling in *Martin* essentially makes no difference to the homeless population of Boise and, is "insufficiently protective").

These rulings are important because they discuss how such ordinances are in fact unconstitutional, however, the limiting language the courts use does not abolish these laws all together.[151] They are, in fact, still enforceable as long as there are "shelter options" in the eyes of the officials.[152] Narrow court decisions, like *Pottinger*, *Jones*, and *Martin* exemplify how courts have chosen to deal with these issues in the past.[153] In order to be as effective as possible, courts need to hold that these ordinances are unconstitutional under the Cruel and Unusual Punishment Clause, and do away with the limiting language that applies only when no shelters are available. By not doing so, courts are not following the standard set forth in *Robinson* and are allowing cities to criminalize being homeless.

III. UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT

Rather than limiting the language of their opinions, courts must instead hold that these ordinances violate the rights protected under the Cruel and Unusual Punishment Clause of the Eighth Amendment.[154] This clause has been interpreted to restrict the criminal process in three ways.[155] It limits the type of punishment the government may impose, it proscribes punishment that is grossly disproportionate to the severity of the crime, and it places substantive limits on what the government may criminalize.[156]

The third limitation is the one that courts have deemed most pertinent to the issue of criminalizing behaviors such as sleeping, camping, sitting,

151. "The opinion makes clear that [Boise] remains free to enforce the ordinance against any 'individual[] who do[es] have access to adequate temporary shelter . . . . [e]ven where shelter is unavailable', the City can impose anti-camping provisions so long as they are limited to 'particular times or in particular locations.'" Brief in Opposition at 28, Martin v. the City of Boise, 920 F.3d 584 (9th Cir. 2019) (No. 19-247) (alteration in original) (quoting Pet. App. 62a n.8).

152. *See Martin*, 920 F.3d at 618. *See also* Shipp v. Schaaf, 379 F. Supp. 3d 1033 (N.D. Cal. 2019), Le Van Hung v. Schaaf, No. 19-CV-01436, 2019 WL 1779584 (N.D. Cal. Apr. 23, 2019), Quintero v. City of Santa Cruz, No. 19-CV-01898, 2019 WL 1924990 (N.D. Cal. Apr. 30, 2019) (all holding that the decision in *Martin* does not extend to their case, and each failed on the likelihood of success on the merits of their Eighth Amendment Claim).

153. *See, e.g.*, *Martin*, 920 F.3d at 618; Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006); Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992).

154. *See* U.S. CONST. amend. VIII.

155. Ingraham v. Wright, 430 U.S. 651, 667–68 (1977) (holding that the Cruel and Unusual Punishment Clause did not apply to disciplinary corporal punishment in public schools). The Supreme Court granted certiorari in this case to address the scope of the Cruel and Unusual Punishment Clause. *Id.* at 659.

156. *Id.* at 667.

and lying in public.[157] Criminalization of the aforementioned life-sustaining behaviors should be unconstitutional under this limitation. These ordinances criminalize homeless individuals for otherwise legal behavior that is an involuntary manifestation of their status, which has been deemed unconstitutional under the Eighth Amendment.[158] These are the type of ordinances which *Robinson* deemed unconstitutional[159] and they do not fit any of the reasons why our criminal justice system punishes people.

A. *Theories of Punishment: Why We Punish Criminal Behavior*

The United States criminal justice system relies on punishing individuals who commit crimes through the deprivation of life, liberty, property, or sometimes infliction of physical pain.[160] Criminal sanctions are imposed to discourage the violations of such laws, and are in the interest of the general health and welfare of a community.[161] "Punishment, at its core, is the deliberate infliction of harm in response to wrongdoing."[162] The harm caused by punishing however is justified because in theory, it is being inflicted for a beneficial reason.[163] As a society, we condone punishment of those who commit crimes because it is for the greater good of society as a whole.[164] The idea is that people who commit crimes deserve to be punished, and in return it will make them better people.[165] This purpose makes the harm done from punishment justified.[166]

The main reasons to punish are to deter, incapacitate, and rehabilitate.[167] The deterrence theory is that the threat of punishment dissuades people from committing crimes.[168] If the negative

157. *See, e.g.*, *Martin*, 920 F.3d at 618; *Jones*, 444 F.3d at 1138; *Pottinger*, 810 F. Supp. at 1565.

158. Robinson v. California, 370 U.S. 660, 666–67 (1962). *See also* Manning v. Caldwell for City of Roanoke, 930 F.3d 264, 268 (4th Cir. 2019). "What the Eighth Amendment cannot tolerate is the targeted criminalization of otherwise legal behavior that is an involuntary manifestation of an illness." *Id.* at 285.

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

160. DEIRDRE GOLASH, THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW 1 (2005).

161. PUNISHMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER 4 (A. John Simmons et al. eds., 1994) [hereinafter PUNISHMENT].

162. GOLASH, *supra* note 160, at 1.

163. *See id.*

164. *Id.*

165. *See* GOLASH, *supra* note 160, at 5.

166. *See id.*

167. *Id.* at 1. *See also* Harmelin v. Michigan, 501 U.S. 957, 959 (1991).

168. *See* GOLASH, *supra*, note 160, at 24.

consequences of an action outweigh other considerations, then often people refrain from committing that act.[169] For those who are not deterred from committing crimes, the next solution is incapacitation or imprisonment.[170] The imprisonment theory is that a person is unable to harm others when in custody.[171] The rehabilitation theory is based on the idea that certain places of imprisonment aim to rehabilitate individuals through educational or vocational programs.[172] This idea justifies imprisonment of offenders if rehabilitation seems to be necessary to their success.[173] Our criminal justice system is built on these theories of punishment.

Governments make certain acts criminal to protect society from them, and from people who commit such acts.[174] However, making the acts of sleeping, camping, sitting, or lying in public criminal, and punishing them as such, is not justified by any of these theories of punishment.[175] Homeless individuals carrying out these behaviors cannot be deterred because they are not performed by choice.[176] Regarding deterrence, most homeless people do not weigh the negative consequences of sleeping outside against the positive consequences before making a decision to sleep outside. More often than not they are sleeping outside because that is their only option.[177] Punishment cannot deter someone from an action that they have no control over.

Further, sleeping, camping, sitting, and lying in public are harmless, and otherwise legal, activities. Governments argue that ordinances which prohibit such behavior are necessary to the health and safety of society because public encampments have produced crime and violence, incubated disease, and created environmental hazards.[178] However, the actions being punished are not themselves creating hazards or disease.[179]

169. *Id.*

170. *See id.* at 29.

171. *See id.*

172. *Id.* at 37.

173. *Id.*

174. PUNISHMENT, *supra* note 161, at 4.

175. *See* Terry Skolnik, *Homelessness and the Impossibility to Obey the Law*, 43 FORDHAM URB. L.J. 741, 742 (2016) ("[I]mposing laws which people may not be able to consistently avoid breaking undermines the legitimacy of holding people accountable for their behavior through punishment, disregards their dignity and autonomy, and undermines the law.").

176. *See* NO SAFE PLACE, *supra* note 13, at 12.

177. *Id.* at 7.

178. *See supra* Part I.

179. Least serious misdemeanors, like jaywalking, trespassing, and disorderly conduct are designed to regulate unwanted conduct, and to move "disfavored" individuals in and out of

If homeless individuals had a shelter or home to go to, they would not have to form large encampments, and therefore there would be fewer diseases and less violence.

Sleeping, camping, sitting, and lying are not wrongful acts, and thus do not deserve to be punished.[180] Criminalizing such behaviors and penalizing homeless individuals for these actions is not beneficial to society as a whole. Turning these everyday life-sustaining behaviors into crimes when they are performed outside should be deemed unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment.[181]

B. *Interpretation of the Cruel and Unusual Punishment Clause*

The Eighth Amendment places substantive limits on what governments may criminalize.[182] This is not readily apparent from the language of the Amendment itself;[183] however; courts have had to interpret that language to decide whether conduct violates the Amendment.[184] One of the first cases to interpret such language was *Robinson v. California.*[185]

In *Robinson*, the Supreme Court declared that the Eighth Amendment applies to states via the Fourteenth Amendment."[186] In that case, the Court concluded that laws which punish someone for their status are unconstitutional under the Cruel and Unusual Punishment Clause, focusing on the fact that addiction cannot be made criminal.[187] The California statute at issue made it a misdemeanor for a person "either to use narcotics, or to be addicted to the use of narcotics."[188] The jury was

certain places. "They target unpopular people and groups who are deemed unpleasant or inherently risky, not individuals who have harmed someone else or done something morally wrong." ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 49 (2018).

180. PUNISHMENT, *supra* note 161, at 4.

181. *See* U.S. CONST. amend. VIII.

182. Ingraham v. Wright, 430 U.S. 651, 667–68 (1977). The Eighth Amendment limits the type of punishment the government may impose, proscribes punishment "grossly disproportionate" to the severity of the crime, and places substantive limits on what the government may criminalize. *Id.*

183. *See* U.S. CONST. amend. VIII.

184. JOHN D. BRESSLER, CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 194 (2012).

185. Robinson v. California, 370 U.S. 660, 667 (1962).

186. *Id. See generally* U.S. CONST. amend. XIV.

187. *Robinson*, 370 U.S. at 662.

188. *Id. See also* CAL. HEALTH & SAFETY CODE § 11721 (West 1972) ("No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when

given an instruction that the individual could be convicted if the jury found that he either committed the act of using a narcotic in Los Angeles County, or that he was of the status of being addicted to the use of narcotics while there.[189]

The Court determined that the statute was not enacted to punish a person for the use of narcotics, for their purchase, sale or possessions, or for the disorder resulting from their administration.[190] Instead, the statute made the status of narcotic addiction a criminal offense, punishable at any time before the individual reforms.[191] The Court compared this statute to one which would make it a criminal offense to be mentally ill, and stated that such a law would "doubtless be universally thought to be an infliction of cruel and unusual punishment."[192] This decision made it unconstitutional under the Eighth Amendment to punish an individual based on their condition or status.[193]

A few years later, the Court faced a similar issue regarding a Texas statute punishing public drunkenness.[194] The offender argued that his conduct should not be punished because he was "afflicted with the disease of chronic alcoholism" and his appearance in public while drunk was involuntary.[195] This argument was unsuccessful for two main reasons. First, the appellant was not convicted for being a chronic alcoholic, but for being drunk in public.[196] "Texas thus has not sought to punish a mere status . . . . [I]t has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards."[197] The Court reasoned that this was on its face different from the California statute which did punish mere status.[198]

Second, the Court stated that *Robinson* does not address the question of "whether certain conduct cannot constitutionally be punished because it is . . . 'involuntary.'"[199] In its decision, the majority quotes the dissent,

administered by or under the direction of a person licensed by the State to prescribe and administer narcotics.").

189. *Robinson*, 370 U.S. at 662.

190. *Id.* at 666.

191. *Id.*

192. *Id.*

193. *Id.*

194. Powell v. Texas, 392 U.S. 514, 517 (1968). *See also* TEX. CODE. ANN. § 477 (1952) ("Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.").

195. *Powell*, 392 U.S. at 517.

196. *Id.* at 532.

197. *Id.*

198. *Id.*

199. *Id.* at 533.

which interpreted *Robinson* to mean that criminal penalties cannot be inflicted on an individual for lacking the element of mens rea.[200] The majority disagrees with that interpretation and argues that the entire thrust of *Robinson* is that criminal penalties may be inflicted only if the accused has committed some actus reus.[201] They did not touch on the issue surrounding involuntary acts.[202] The distinction between these two cases was that one punished the *conduct* of being drunk in public,[203] while the other punished the *status* of addiction.[204]

However, when dealing with the issues regarding statutes punishing conduct such as sleeping, or camping, courts have considered Justice White's concurrence in *Powell* along with the four-Justice dissent.[205] Justice White's concurrence takes into account those chronic alcoholic individuals who may not have homes, and he states that as applied to them the statute in *Powell* is punishing them for the act of getting drunk.[206] Justice White goes on to say that the act of getting drunk is not an act that can be punished under the Eighth Amendment.[207] Using that interpretation, courts have determined "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being."[208] Sleeping and camping in public is always an unavoidable consequence of being homeless.[209]

200. *Id.* Specifically, the dissent states that *Robinson* stands on the principle that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 567 (Fortas, J., dissenting).

201. *Id.* at 533.

202. *Id.*

203. *Id.* at 532.

204. Robinson v. California, 370 U.S. 660, 662 (1962).

205. *See, e.g.*, Martin v. City of Boise, 920 F.3d 584, 616 (9th Cir. 2019); Jones v. City of Los Angeles, 444 F.3d 1118, 1134–37 (9th Cir. 2006); Pottinger v. City of Miami, 810 F. Supp. 1551, 1562–64 (S.D. Fla. 1992). In the analysis of the Eighth Amendment in *Martin*, the Ninth Circuit mentions that the four dissenting Justices in *Powell* adopted a position consistent with that taken by Justice White, and they all argue that the main principle of *Robinson* was that one cannot punish an unavoidable consequence of one's status. *Id.* This principle compelled the decision in this case.

206. *Powell*, 392 U.S. at 549–53 (White, J., concurring).

207. *Id.* at 551.

208. *Martin*, 920 F.3d at 616 (quoting *Jones*, 444 F.3d at 1135). *See also* Manning v. Caldwell, 930 F.3d 264, 268 (4th Cir. 2019) (holding that a statutory scheme which makes it a crime for "habitual drunkards" to possess consume or purchase alcohol is unconstitutional under the Eighth Amendment if individuals can show "that resisting drunkenness [was] impossible and that avoiding public places when intoxicated was also impossible") (alteration in original (quoting Powell, 392 U.S. at 551)).

209. *See also Jones*, 444 F.3d at 1136 ("Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human.").

C. *Ordinances That Criminalize Life-Sustaining Behaviors Need to Be Abolished Completely*

Not repealing ordinances that punish life-sustaining activities indicates that local governments and courts are under the impression that sleeping or camping in public is only an unavoidable consequence if all shelters are full.[210] This, however, is not the case. Even if there are a few shelter options available, sleeping, camping, or sitting in public are always unavoidable consequences of being homeless. By definition, being homeless describes a person who lacks a fixed, regular, and adequate nighttime residence.[211] A person who is homeless living in an area with shelters will still, at times, be forced to sleep outside.[212] One reason for this is because many shelters have strict rules, like specific check-in times, length-of-stay restrictions, and specific religious beliefs or gender restrictions.[213] For example, in Boise, an individual who has met the maximum length of stay requirement will not be allowed to return to the shelters for at least thirty days.[214] In that instance, the check-in times for all the shelters in Boise are between 4:00 p.m. and 5:30 p.m. If that person misses the time, they will be compelled to sleep anywhere they can find, which will likely be somewhere in public.[215] The shelters may in fact have available beds, but those beds are not available to this individual who did not meet the check-in curfew, therefore they can be punished.

210. *Jones*, 444 F.3d at 1138 ("[T]he Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks *that is an unavoidable consequence of being human and homeless without shelter*.") (emphasis added). This decision was solely based on the fact that the homeless population in Los Angeles outnumbered the amount of beds available. *Id.* They specifically ignore confronting the issue of punishment when there are beds available, ignoring the fact that even if there are beds, that does not mean they are available to everyone. *Id.*

211. MEGHAN HENRY ET AL., *supra* note 10, at 2.

212. For example, the City of Boise has 753 homeless individuals in one county according to the Point-in-Time count from January 2014. They have only three homeless shelters offering emergency shelter services, and only one of those shelters is open to men, women, and children. The other separate men and women shelters have strict check-in times, and homeless individuals are only allowed to stay there for up to seventeen consecutive nights and may not return for at least thirty days if they do not choose to join an "intensive, Christ-based residential recovery program." *Martin*, 920 F.3d at 604–06.

213. Another example can be seen right here in Hampden County. Emergency shelters for short-term relief usually only allow a maximum stay of three months or less, and only three out of five stays are free of charge. Hampden County Shelter Listings, SHELTERLISTINGS.ORG, https://www.shelterlistings.org/county/ma-hampden-county.html [https://perma.cc/N2LV-FB2G]. *See also* Carol Craighill, *A Look Inside Boise's Emergency Shelters*, BOISE/ADA CNTY. HOMELESS COAL. (June 3, 2019), https://www.homelesscoalitionboise.com/alookinsideboisesemergencshelters/ [https://perma.cc/4EVZ-REB5].

214. Craighill, *supra* note 213.

215. *Id.*

Punishing this behavior is the same as punishing a person for a status or condition that they have no capacity to change or avoid; such punishment is prohibited by the Cruel and Unusual Punishment Clause under *Robinson*.[216] The crime of sleeping in public usually consists of two elements: sleeping, occupying, or lodging, and being found in a public place while doing so.[217] That crime is different from the law challenged in *Robinson*, mainly because it punishes more than mere status.[218] However, the same essential constitutional defects that punish someone for being addicted to narcotics or for being mentally ill are present.[219] Homeless individuals are continuously punished for performing an act which they have no control over. The majority of the homeless population is not choosing to sleep outside; they are forced to because every human being needs to sleep.[220]

Under the standard established in *Robinson* and *Powell* one could argue that these are punishable acts because the individuals are not being punished for their homeless status, but for the conduct of sleeping, camping, and sitting in public.[221] However, when applied to homeless individuals, the acts of sleeping, camping, or sitting in public are involuntary, making them acts that cannot be punished under the Eighth Amendment.

Justice White's concurrence in *Powell*, which has been heavily relied upon in cases regarding this issue, clearly states that he only affirmed Powell's conviction because there were not enough facts that established the involuntariness of his public alcoholism.[222] Justice White discusses how many chronic alcoholics do not have homes and says, "[f]or some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when

216. Robinson v. California, 370 U.S. 660, 666–67 (1962).

217. *See, e.g.*, BOISE, ID., CITY CODE § 5-2-3(A)(1).

218. CAL. HEALTH AND SAFETY CODE, *supra* note 188.

219. *See supra* p.19.

220. Robinson v. California, 370 U.S. 660, 666 (1962). Powell v. Texas, 392 U.S. 514, 548–53 (1968) (White., J. concurring). NO SAFE PLACE, *supra* note 13, at 16 ("The men and women out here, they don't want to be homeless . . . . I don't care how broken down you are, not one person out on the street wants to be homeless"). This quote was from a homeless individual researched in the study. *Id.* In a study in Massachusetts found that unsheltered homeless individuals face a ten times higher mortality rate than the general population. Jill S. Roncarati et al., *Mortality Among Unsheltered Homeless Adults in Boston, Massachusetts, 2000-2009*, JAMA NETWORK (Sept. 2018), https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2687991#:~:text=The%20all%2Dcause%20mortality%20rate,CI%2C%202.3%2D3.2) [https://perma.cc/2ZZM-N8V4].

221. Powell v. Texas, 392 U.S. 514, 532 (1968). *See also* Robinson v. California, 370 U.S. 660, 662 (1962).

222. *Powell*, 392 U.S. at 549–53 (White, J., concurring).

intoxicated is also impossible."[223] He continues to state that when the statute in *Powell* applies to such individuals it punishes them for the act of getting drunk, which is an act they cannot be convicted of under the Eighth Amendment.[224]

Recently the Fourth Circuit heard a factually similar statutory scheme that was aimed at punishing "habitual drunkards."[225] The decision of the Fourth Circuit relied on Justice White's concurrence from *Powell* and ruled that the Plaintiffs there did establish that resisting drunkenness was impossible and that avoiding public places when intoxicated was also impossible.[226] The court found that as applied to the Plaintiffs, the challenged statutory scheme targets them for conduct that is an involuntary manifestation of their illness, does not rest on a single volitional element, and would otherwise be legal for the general population.[227] Due to these facts, the scheme was punishing plaintiffs for the act of getting drunk, which is unconstitutional under the Eighth Amendment.[228]

In the holding above, replace the "act of getting drunk" with the "act of sleeping," "the act of camping," or "the act of sitting." All of these acts are an involuntary manifestation of the status of being homeless, and avoiding public places when sleeping, sitting, or camping is also impossible for a homeless individual. In addition, these are acts that would otherwise be legal to the general population. The standard set out above is clear. It is unconstitutional for homeless individuals to be punished for these acts; however, the narrow decisions and limiting language of the courts still allow these ordinances to be enforced.[229] A shelter bed being available on a given night in Boise, Los Angeles, or Miami does not change the status of a homeless individual. Assuming they are allowed in a shelter, that person is still faced with the hardships that are part of being homeless. There is no need to exacerbate their status by punishing acts that they have no ability to control.

223. *Id.* at 551.

224. *Id.*

225. Manning v. Caldwell, 930 F.3d 264 (4th Cir. 2019). Plaintiffs in this case argued that the statutory scheme punished them for conduct that is "compelled by their illness, and is otherwise lawful for those of legal drinking age." *Id.* at 281.

226. *Id.* at 280–84.

227. *Id.* at 284.

228. *Id. See also Powell*, 392 U.S. at 549–53, Robinson v. California, 370 U.S. 660, 662 (1962).

229. *See, e.g.*, Martin v. City of Boise, 920 F.3d 584, 618 (9th Cir. 2019); Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007); Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992); Johnson v. City of Dallas, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd*, 61 F.3d 442, 445 (5th Cir. 1995).

Criminalizing homelessness does not punish mere status, on its face, but it does make the act of sleeping, sitting, or camping criminal. This should always be prohibited by the Cruel and Unusual Punishment Clause and not just when governments and courts believe it to be unavoidable. The main principle of *Robinson* was that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[230] Penalizing life-sustaining behaviors are the type of act that *Robinson* ruled could not be made criminal. Therefore, enforcement of ordinances that punish such behavior should be abolished entirely.

CONCLUSION

Ordinances that punish sleeping, camping, sitting, and lying are unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment. There is a significant amount of the United States population that is homeless, and it is a critical problem. Many organizations are advocating for that population, but still, there has been little change.[231] Ending the criminalization of homelessness could be a positive step towards permanently reducing the number of homeless people. Shifting away from punishing such behavior and focusing more on helping a population in need will benefit not only the homeless community, but also the public at large.

Declaring these ordinances that punish life-sustaining behaviors as unconstitutional will help to end the criminalization of homelessness. Most of society views homeless individuals as "unsightly," and "undesirable." This view, along with local government's drive to control public space, is mainly why these ordinances are still enforced today. Simply limiting when cities are allowed to punish an individual for sleeping in public, while seemingly helpful, is not effecting change.[232] Abolishing such laws completely will force governments to rely on something other than the criminal justice system when it comes to "dealing" with their homeless population. Local authorities and governments will be more focused on helping fund low-income housing or local shelters. They may even be focused on helping reform those who have been punished and are struggling to find permanent shelter or employment.

The abolishment of these laws is constitutionally necessary because the Eighth Amendment prohibits them. Imposing criminal penalties on

230. *Martin*, 920 F.3d at 616 (quoting *Powell*, 392 U.S. at 567 (Fortas, J., dissenting)).

231. The homeless population has increased three years in a row, from 2016 to 2019. MEGHAN HENRY ET AL., *supra* note 10, at 1.

232. *See* sources cited *supra* notes 151 & 153.

individuals for being in a condition they are powerless to change has long been prohibited by the Eighth Amendment.[233] That is exactly what the ordinances which punish life-sustaining behaviors are doing. Sleeping and camping in public are always an involuntary action of being homeless. Enforcement of these ordinances are unconstitutional even when there are shelter options available, because there will always be homeless individuals who are forced to find shelter in public.

The Cruel and Unusual Punishment Clause's limitation of determining what can be made criminal is "one to be applied sparingly,"[234] and this is one of those occasions. The homeless population will continue to rise if local governments keep relying on the criminal justice system. The most effective way to get rid of that possibility is to abolish the enforcement of laws that criminalize sleeping, camping, sitting, and lying in public.

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

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