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Legal Sidebar

# The Eighth Amendment and Homelessness: Supreme Court Upholds Camping Ordinances in *City of Grants Pass v. Johnson*

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On June 28, 2024, the Supreme Court released its opinion in *City of Grants Pass v. Johnson*, holding that laws that regulate camping on public property do not violate the Eighth Amendment. The Eighth Amendment prohibits the government from subjecting individuals to "cruel and unusual" punishments. In two cases from the 1960s—*Robinson v. California* and *Powell v. Texas*—the Supreme Court addressed whether imposing criminal punishment on individuals with an addiction to alcohol or narcotics violates the Eighth Amendment. Most courts have understood these cases to establish a status-conduct distinction: that is, the government may not criminalize "a mere status," but it may punish an individual for their conduct. A few courts, however, have ruled that criminalizing conduct that is an unavoidable consequence of one's status is also constitutionally off limits. In *City of Grants Pass v. Johnson*, the Ninth Circuit held that a municipality may not criminally sanction homeless persons for the biologically compelled conduct of sleeping outside, where their status of homelessness is involuntary due to the lack of adequate housing alternatives.

The Supreme Court reversed the Ninth Circuit's ruling, holding that the ordinances at issue are constitutional because they proscribe conduct, rather than status, and the punishments themselves are neither cruel (in that they are not designed to superadd "terror, pain, or disgrace" to the punishment itself) nor unusual (in that similar sanctions are commonly employed). The Court's decision clarifies the meaning of the Eighth Amendment and the manner in which governments across the country may respond to issues related to what the Court described as a "homelessness crisis."

This Legal Sidebar summarizes the *Grants Pass* case. It begins by outlining early Eighth Amendment jurisprudence and surveying Eighth Amendment caselaw involving laws enforced against homeless individuals. It then discusses the lower court opinions leading up to the Supreme Court decision, outlines the Court's opinion, and concludes with potential considerations for Congress.

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## Relevant Eighth Amendment Background

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment's prohibitions apply to laws enacted by the federal government, and by state governments and their local subdivisions by operation of the Fourteenth Amendment.

The Supreme Court has interpreted the Amendment's prohibition on cruel and unusual punishments to, among other things, impose some "substantive limits on what the government may criminalize." Before *Grants Pass*, the Supreme Court had issued two primary cases elaborating on the Eighth Amendment's substantive limits on what a government may criminalize: *Robinson v. California* and *Powell v. Texas*.

In *Robinson v. California*, a 1962 case, the Court heard an Eighth Amendment challenge to a California law that made it a misdemeanor offense for an individual to "be addicted to the use of narcotics." The defendant was convicted under the law; however, at the time of his arrest, he "was neither under the influence of narcotics nor suffering withdrawal symptoms." The Supreme Court reversed the conviction and expressed concern that the defendant was convicted on the basis of his "status," specifically that he suffered from the "chronic condition . . . of [being] addicted to the use of narcotics." Put differently, the Court was troubled that the defendant was not convicted "upon proof of the actual use of narcotics." The majority thus ruled that, under the Eighth Amendment, an individual may not be punished for a status or in the absence of some conduct (or "*actus reus*").

Six years after *Robinson*, the Court issued its opinion in *Powell v. Texas*, a case involving an Eighth Amendment challenge to a law that proscribed public intoxication. The defendant argued that because he was a chronic alcoholic, being intoxicated in public was "not of his own volition." While the case produced multiple opinions, the plurality determined that "Texas has sought to punish not for a status, as California did in *Robinson*," but rather "for public behavior which may create substantial health and safety hazards, both for [the defendant] and for members of the general public." That is, the plurality indicated that the law at issue criminalized conduct, not status, which it viewed as permissible.

In his concurring opinion in *Powell*, Justice Black stated that *Robinson* established a status-conduct distinction, forbidding punishment when the individual has not committed a "wrongful act." Justice White also concurred in the result. Citing *Robinson*, Justice White opined that "[i]f 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." He thus suggested that an individual may not be punished for conduct symptomatic of or compelled by an addiction. Justice White, however, concluded that the record did not support a finding that the defendant could not avoid being in public while intoxicated. Accordingly, Justice White was not prepared to "say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction [for] the [additional] act of going to or remaining in a public place."

Four Justices dissented. They contended that the defendant was "powerless" to drink, had an "uncontrollable compulsion to drink to the point of intoxication," and that once in this state "he could not prevent himself from appearing in public places." In other words, they suggested that, here, drinking and appearing in public were both involuntary acts making criminal punishment inappropriate.

### Diverging Interpretations of *Robinson* and *Powell*

Some federal courts of appeals have interpreted *Robinson* and *Powell* as establishing a status-conduct distinction, rejecting claims that "involuntary" conduct stemming from an addiction is beyond the reach of criminal law. Not all courts have taken this approach. For instance, the en banc Fourth Circuit adopted a different reading of *Robinson* and *Powell* in a case brought by individuals challenging a Virginia statute that made it unlawful for any person who has a prior intoxication offense or who "has shown himself to be an habitual drunkard" to use or possess alcohol, or to be intoxicated in public. While seven of the

circuit judges would have followed the status-conduct distinction, the majority of eight judges determined that, in light of Justice White's approach and the views of the four dissenting Justices in *Powell*, the Eighth Amendment bars the government from punishing an individual for an involuntary status as well as an involuntary action stemming from that status.

## The Eighth Amendment and Homelessness

In the context of Eighth Amendment cases implicating homelessness, some courts have taken *Robinson* and *Powell* to generally forbid the government from criminalizing conduct intertwined with the status of homelessness, where the homelessness is involuntary. In a 2006 case, *Jones v. City of Los Angeles*, the Ninth Circuit held that the city's enforcement of an ordinance "for involuntarily sitting, lying, and sleeping in public" violated the Eighth Amendment as long as the number of homeless individuals exceeded the number of available beds for the homeless. The Ninth Circuit vacated this opinion following a settlement, rendering it nonbinding on the court in subsequent cases.

In a 2018 case, *Martin v. City of Boise*, the Ninth Circuit adopted and "agree[d] with *Jones's* reasoning and central conclusion." In *Martin*, the city made it a crime to use "any of the streets, sidewalks, parks, or public places" for "camping." Following a federal district court ruling for the city, a panel of the Ninth Circuit reversed. Citing *Jones*, the panel asserted that in *Powell*, "five Justices"—Justice White in concurrence and the four dissenting Justices—interpreted *Robinson* to mean "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." Applying this principle to the ordinances, the panel concluded that the city could not punish an individual for conduct, including sleeping, that is "biologically compelled" and that is a "universal and unavoidable" byproduct of being human, adding that the city could not criminalize homeless individuals on the "false premise that they had a choice in the matter" given the shortage of sufficient available sleeping alternatives. Together, *Jones* and *Martin* inform the background of *Grants Pass*.

## *City of Grants Pass v. Johnson*

### Background

The City of Grants Pass, Oregon, adopted ordinances generally prohibiting sleeping in public, camping in public, and camping in a city park. Prior to *Martin*, the city functionally equated sleeping in public parks with camping. After *Martin*, however, the city amended the definition of *camping* to capture the use of bedding, or the placement of a stove or fire to "maintain[] a temporary place to live." An individual who violated these ordinances faced civil citations and fines and could be temporarily barred from a city park for receiving two relevant citations. If an individual returned to a city park while under such an exclusion order, they faced potential criminal prosecution.

A class of homeless individuals filed suit in federal court, claiming that the ordinances constituted cruel and unusual punishment. Applying *Martin*, the district court agreed. The court acknowledged that the city revised its ordinances to prohibit camping, not sleeping, but found that this amendment made no constitutional difference, as there is a "basic life sustaining need to keep warm and dry while sleeping." The district court also held that camping outside is involuntary when "there is a greater number of homeless individuals in a jurisdiction than beds available in shelters."

A divided panel of the Ninth circuit affirmed. As with *Martin*, the panel stated that the general principle from the fractured *Powell* ruling was the one endorsed by five Justices: "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status." Here, the panel concluded that a homeless individual with no viable alternatives may not be punished for the involuntary "act of

sleeping in public" or using "articles necessary to facilitate sleep." After the full Ninth Circuit declined to rehear the case, the Supreme Court granted the city's petition for review.

## The Supreme Court's Ruling

In a 6-3 decision authored by Justice Gorsuch, the Court sided with the city and held that the "enforcement of generally applicable laws regulating camping on public property does not constitute 'cruel and unusual punishment.'" The Court first reasoned that although other constitutional provisions may limit what conduct a government may criminalize, the Cruel and Unusual Punishments Clause focuses on the "method or kind of punishment a government may impose for the violation of criminal statutes." The history behind the clause suggests the founders were concerned with the imposition of "certain barbaric punishments" that were "calculated to 'superad[d] terror, pain, or disgrace'" and had "long fallen out of use." The criminal punishments that the city imposed for violation of its anticamping ordinances—fines and a possible 30-day jail sentence for repeat offenders—were not cruel or unusual under these standards, according to the Court.

The Court next addressed the plaintiffs' theory that the ordinances were effectively status offenses under *Robinson* because they single out activities for criminalization—such as sleeping outside on public property—that define the status of being homeless. The Court distinguished the Grants Pass ordinances from *Robinson*, explaining that the *Robinson* law lacked proof of an *actus reus* (criminal act) and a *mens rea* (criminal intent)—it simply criminalized the status of being an addict. By contrast, according to the Court, the Grants Pass ordinances prohibited certain acts related to camping in public. The Court also emphasized that the ordinances applied to everyone, not just homeless individuals, furthering its conclusion that the ordinances did not criminalize the status of being homeless. The Court declined to reconsider *Robinson*, reasoning that because the Grants Pass ordinances were not status offenses, *Robinson* was not implicated. While the Court did not overturn *Robinson*, it did express hesitancy to extend *Robinson*'s holding beyond criminalization of "mere status," explaining that *Robinson* "already sits uneasily with the Amendment's terms, original meaning, and our precedents." The Court also explained that laws that qualify as status offenses under *Robinson*—which are seemingly rare—would only include laws that lack an "act undertaken with some *mens rea*."

Although the ordinances were not status offenses under *Robinson*, the Court addressed plaintiffs' argument that *Robinson* should be extended to include laws that criminalize conduct that is an involuntary result of one's status—the theory adopted by the Ninth Circuit in *Martin*. Relying on the *Powell* plurality opinion, the Court rejected this argument. Like in *Powell*, according to the Court, the plaintiffs here sought to expand *Robinson*'s "'small intrusion'" into substantive criminal law beyond "mere status" offenses to "actions that, even if undertaken with the requisite *mens rea*, might 'in some sense' qualify as 'involuntary.'" The Court explained that the *Powell* plurality declined to extend the Eighth Amendment in this way and, in the Court's view, there was no reason to depart from that decision.

Despite concluding that the Grants Pass ordinances were not cruel and unusual punishment under any of the plaintiffs' theories, the Court acknowledged that other legal doctrines are available to protect "those in our criminal justice system from a conviction." The Court observed that many jurisdictions recognize defenses to criminal charges such as necessity, insanity, diminished-capacity, and duress that defendants could assert if charged under anticamping ordinances like those in Grants Pass. The Court also recognized that the Constitution provides additional limits on state prosecutorial power such as fair notice of criminal laws, equal protection under the law, and prohibitions on selective prosecution.

In reaching its conclusion, the Court acknowledged that although the Ninth Circuit's decision was "well-intended," it created an "unworkable" rule that leaves important questions unaddressed. The Court explained that *Martin* requires courts to determine what it means to be "involuntarily homeless" or to decide when "adequate" shelter space is available. Answers to these questions, according to the Court,

"cannot be found in the Cruel and Unusual Punishments Clause." Instead, the Court emphasized that homelessness is a "complex" issue that is best left to policymakers, not federal judges.

In a brief concurring opinion, Justice Thomas expressed his view that *Robinson* should be overruled because its interpretation of the Eighth Amendment is not based on the plain text or history of the Cruel and Unusual Punishments Clause.

In her dissenting opinion, Justice Sotomayor would have held that the ordinances violate *Robinson*'s command that the government may not punish an individual for their status. She reasoned that the ordinances punish the involuntary status of being homeless (lacking temporary shelter) by punishing people for the defining conduct of that status (sleeping outside). She further argued that punishing an "essential bodily function," such as sleeping, does not amount to cognizable conduct under *Robinson*.

## Considerations for Congress

While the Court's decision in *Grants Pass* primarily addressed the enforcement of local anticamping ordinances, the ruling seemingly provides more flexibility for policymakers at all levels, including Congress, to determine how best to approach issues related to public spaces and homelessness. The decision may be of interest to the federal government as the "largest real property owner in the United States," in its management of public spaces, including National Park Service lands. Some federal regulations already prohibit camping on federal public property and, as the Court noted in *Grants Pass*, the federal government has in the past exercised its authority to clear "dangerous" encampments. The Court also suggested that jurisdictions may add "additional substantive protections" for defendants charged under criminal laws. For example, the Court cited an Oregon law that specifically addresses "how far its municipalities may go in regulating public camping." These protections may inform congressional and federal regulatory activities with respect to homelessness on federal public lands.

More broadly, *Grants Pass* provides guidance on the Eighth Amendment's reach by appearing to limit *Robinson's* holding to laws that criminalize "mere status." The Court seemed to suggest that status offenses are those that lack *actus reus* and *mens rea* elements. This guidance may inform Congress as it considers any new federal criminal prohibitions or changes to existing ones.

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