

Eighth Amendment — Cruel and Unusual Punishment Clause —
City of Grants Pass v. Johnson

“Poverty and immorality are not synonymous,” the Supreme Court once observed.¹ A set of laws that would restrict where “the poor and the unpopular are permitted to” exist on public property “only at the whim of any police officer,”² is bad, the Court said.³ That kind of regime would “furnish[] a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’”⁴ Though today’s Court may superficially uphold these principles, the practical implications of a recent decision suggest otherwise. Last Term, the Supreme Court in *City of Grants Pass v. Johnson*⁵ held that a city ordinance criminalizing involuntarily unhoused people who set up encampments on public property does not violate the Eighth Amendment’s Cruel and Unusual Punishment Clause.⁶ The Court’s ruling dramatically weakened, and potentially eroded, Eighth Amendment–based substantive limits on criminal laws.⁷ Instead of the Eighth Amendment, the Court suggested this vulnerable population should turn to common law criminal defenses, and some hazy, half-hearted constitutional challenges, to protect themselves.⁸ Yet this suggestion implicitly and incorrectly conflates pre- and post-enforcement challenges. In particular, it both ignores that post-enforcement challenges are practically much weaker remedies and avoids providing clarification necessary for alternate pre-enforcement claims. Ultimately, the Court’s framing leaves the involuntarily unhoused with less clearly defined rights, blazing a trail toward a future of fines and incarceration that will perpetuate their time in poverty.

Over 600,000 people experience homelessness every day in the United States,⁹ approximately 600 of whom lived in Grants Pass, Oregon in 2019.¹⁰ Facing this national crisis, Grants Pass grappled with how to allay the concerns of its townspeople.¹¹ Grants Pass responded with three ordinances. The “anti-sleeping ordinance”¹² bars sleeping

¹ *Edwards v. California*, 314 U.S. 160, 177 (1941).

² *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)).

³ *See id.* at 171.

⁴ *Id.* at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940)).

⁵ 144 S. Ct. 2202 (2024).

⁶ *See id.* at 2224, 2226.

⁷ *See id.* at 2240–41 (Sotomayor, J., dissenting).

⁸ *See id.* at 2220 (majority opinion).

⁹ TANYA DE SOUSA ET AL., U.S. DEP’T OF HOUS. & URB. DEV., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 2 (2023).

¹⁰ *Blake v. City of Grants Pass*, No. 18-cv-01823, 2019 WL 3717800, at *3 (D. Or. Aug. 7, 2019).

¹¹ *See Blake v. City of Grants Pass*, No. 18-cv-01823, 2020 WL 4209227, at *2–3 (D. Or. July 22, 2020).

¹² *Johnson v. City of Grants Pass*, 72 F.4th 868, 876 (9th Cir. 2023).

“on public sidewalks, streets, or alleyways at any time.”¹³ The “anti-camping ordinance”¹⁴ prohibits “[c]amping” on “any sidewalk, street, alley, . . . or any other publicly-owned property,” with a “[c]ampsite” defined as “any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed . . . for the purpose of maintaining a temporary place to live,” including a vehicle.¹⁵ And the third applies the camping prohibition to Grants Pass’s parks.¹⁶ Fines for violating the anti-camping laws start at \$295.¹⁷ If a person receives two citations in a year, they can be barred from city parks for thirty days.¹⁸ A third violation would be criminal trespass,¹⁹ punishable by a \$1,250 fine and jail time capped at thirty days.²⁰

In 2018, three longtime Grants Pass residents filed a class action suit against the town.²¹ Two plaintiffs, Debra Blake and John Logan, faced housing instability and had been intermittently unsheltered for a decade; the third, Gloria Johnson, lived full-time in her van.²² Together, they sued to enjoin the ordinances on behalf of themselves and a class of involuntarily unsheltered people in Grants Pass, challenging their constitutionality under the Eighth Amendment.²³

Two key cases informed their challenge. Just one month earlier, in *Martin v. City of Boise*,²⁴ the Ninth Circuit held that a similar pair of anti-camping ordinances were cruel and unusual under the Eighth Amendment when enforced against people with no access to alternative shelter.²⁵ In turn, *Martin* rested on *Robinson v. California*,²⁶ a 1962 case finding that the Eighth Amendment precludes the criminalization of someone based on their status (in this case an addiction to narcotics).²⁷ Applying *Robinson*,²⁸ the *Martin* court held that sleeping outdoors was an “unavoidable consequence” of one’s status as involuntarily homeless

¹³ GRANTS PASS, OR., MUN. CODE § 5.61.020(A) (2024).

¹⁴ *Johnson*, 72 F.4th at 876.

¹⁵ GRANTS PASS, OR., MUN. CODE §§ 5.61.010(B), 5.61.030.

¹⁶ *Id.* § 6.46.090 (2019).

¹⁷ *Johnson*, 72 F.4th at 876.

¹⁸ GRANTS PASS, OR., MUN. CODE § 6.46.350.

¹⁹ *See Johnson*, 72 F.4th at 876.

²⁰ OR. REV. STAT. §§ 161.615(3), 161.635(1)(c), 164.245 (2023).

²¹ *Blake v. City of Grants Pass*, No. 18-cv-01823, 2019 WL 3717800, at *1 (D. Or. Aug. 7, 2019); *see Jeremiah Hayden, Grants Pass v. Johnson: Here’s What Led to Key Homelessness Case Before High Court*, OPB (Apr. 4, 2024, 9:00 AM), <https://www.opb.org/article/2024/04/04/grants-pass-oregon-homeless-parks-josephine-county-public-spaces-camping-shelter> [<https://perma.cc/Z7P7-M9EG>].

²² *Blake*, 2019 WL 3717800, at *1.

²³ *Id.* at *1–2, 4.

²⁴ 902 F.3d 1031 (9th Cir. 2018), *amended and superseded on denial of reh’g*, 920 F.3d 584 (9th Cir. 2019); *see Hayden, supra* note 21.

²⁵ *Martin*, 902 F.3d at 1035.

²⁶ 370 U.S. 660 (1962).

²⁷ *Id.* at 666.

²⁸ *See, e.g., Martin*, 902 F.3d at 1046–47 (invoking *Robinson* as the “seminal case,” *id.* at 1047, for considering the Cruel and Unusual Punishment Clause of the Eighth Amendment).

and nullified the anti-camping laws.²⁹ Given the factual similarity, the *Grants Pass* plaintiffs argued these precedents made the city's ordinances unconstitutional.³⁰ A class was certified.³¹

The district court granted summary judgment in part and an injunction for the plaintiffs.³² Finding *Martin* to be controlling, the court deemed the ordinances cruel and unusual based on the unavailability of shelter beds.³³ It also held that the ordinances violated the Excessive Fines Clause of the Eighth Amendment: The fees were both punitive and “grossly disproportionate to the gravity of the offense”³⁴ of “engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry.”³⁵ The subsequent injunction struck down parts of the laws while preserving significant regulatory powers for the city.³⁶ Time and place restrictions, the court ordered, could be set by Grants Pass for when involuntarily unsheltered people “may use their belongings to keep warm and dry”; tents could be banned so long as sleeping material wasn't; and the city could “enforce laws that actually further public health and safety,” like those related to violence, harassment, or public urination or defecation.³⁷ The city appealed.³⁸

The Ninth Circuit largely affirmed.³⁹ Hewing closely to *Martin*, the appellate court agreed with the district court that criminalizing involuntarily unhoused people violated the Eighth Amendment.⁴⁰ It opted not to reach “the potential excessiveness of the fines.”⁴¹ The court then remanded the case to the district court, requiring it “to craft a narrower injunction recognizing Plaintiffs' limited right to protection against the elements, as well as limitations when a shelter bed is available.”⁴² In the interim, Ms. Blake passed away; Ms. Johnson and Mr. Logan became the sole class representatives.⁴³ A contentious bid for rehearing

²⁹ *Id.* at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1137 (9th Cir. 2006)).

³⁰ Plaintiffs' Motion for Summary Judgment at 26, *Blake v. City of Grants Pass*, No. 18-cv-01823 (D. Or. July 22, 2020).

³¹ *Blake v. City of Grants Pass*, No. 18-cv-01823, 2019 WL 3717800, at *1 (D. Or. Aug. 7, 2019).

³² *Blake*, 2020 WL 4209227, at *17.

³³ *Id.* at *8.

³⁴ *Id.* at *11 (quoting *United States v. Bajakajian*, 524 U.S. 321, 324, 334 (1998)).

³⁵ *Id.*

³⁶ *See id.* at *15.

³⁷ *Id.*

³⁸ *Johnson v. City of Grants Pass*, 50 F.4th 787, 793 (9th Cir. 2022).

³⁹ *Id.* at 798.

⁴⁰ *Id.*; *Johnson v. City of Grants Pass*, 72 F.4th 868, 891, 894 (9th Cir. 2023).

⁴¹ *Johnson*, 50 F.4th at 798.

⁴² *Id.* at 812.

⁴³ *See* Tracy Rosenthal, *The New Sundown Towns*, NEW REPUBLIC (Apr. 30, 2024), <https://newrepublic.com/article/181036/new-sundown-towns-grants-pass-v-johnson> [<https://perma.cc/D3M9-2FU7>].

en banc failed.⁴⁴ The city then appealed to the Supreme Court, which granted certiorari.⁴⁵

The Court reversed and remanded.⁴⁶ Writing for the majority, Justice Gorsuch first opined at length about the homelessness crisis facing America and the bind that local governments and states face,⁴⁷ citing various amicus briefs written by local officials to suggest the heft of the problem and the need to regulate this behavior through criminal laws.⁴⁸ Having explored the practical benefits of upholding the ordinances, the Court then turned to the doctrine, specifically *Robinson*.⁴⁹ After a lengthy musing that *Robinson* was a “surpris[ing]” interpretation that the Eighth Amendment could not sustain, the Court determined *Robinson* irrelevant to the ordinances at hand.⁵⁰ The Court argued that while *Robinson* barred statutes that criminalized status, the Grants Pass ordinances forbade certain *actions*, like “occupy[ing] a campsite.”⁵¹ Thus, *Robinson* was inapposite.⁵²

The Court then declined to apply *Robinson* to cases where enforcement *effectively* criminalizes status,⁵³ arguing that *Powell v. Texas*⁵⁴ prevented such a reading. In *Powell*, the plurality held that *Robinson* did not bar a law criminalizing public intoxication; it was the act of being drunk in public, not the “mere status” of addiction to alcohol, that was the law’s target, even if, as plaintiffs argued, the law effectively criminalized status.⁵⁵ For the majority, the same was true for the Grants Pass ordinances.⁵⁶ To the Court, this also made good policy sense: Such an application of *Robinson* would chill a “‘productive’ democratic ‘dialogue’” of local government innovations addressing homelessness and

⁴⁴ *Johnson*, 72 F.4th at 874.

⁴⁵ *City of Grants Pass v. Johnson*, 144 S. Ct. 679 (2024) (mem.).

⁴⁶ *Grants Pass*, 144 S. Ct. at 2226.

⁴⁷ *See id.* at 2207–11.

⁴⁸ *See id.* at 2214 n.3.

⁴⁹ *See id.* at 2217.

⁵⁰ *Id.* at 2217–18.

⁵¹ *Id.* at 2218 (alteration in original) (quoting GRANTS PASS, OR., MUN. CODE § 5.61.030 (2024)).

⁵² *Id.* The person violating the ordinance, the Court suggested, could be an involuntarily unsheltered person, or a backpacker, or a “student who abandon[ed] his dorm room to camp out in protest on the lawn of a municipal building,” thus relying on actions rather than conduct. *Id.* But this in part muddled the question at hand, which was about the ordinance being enforced specifically against a class of people involuntarily unhoused, not students or backpackers.

⁵³ *See id.* at 2219–20.

⁵⁴ 392 U.S. 514 (1968). There was considerable dispute as to whether the *Powell* plurality’s decision was indeed controlling. *Compare* Brief of Amicus Curiae District Attorney of Sacramento County in Support of Petitioner City of Grants Pass at 6–10, *Grants Pass*, 144 S. Ct. 2202 (No. 23–175), *with* Brief of Amici Curiae Center for Constitutional Rights, Transgender Law Center, National Center for Lesbian Rights, Make the Road New York et al. in Support of Respondents at 29–30, *Grants Pass*, 144 S. Ct. 2202 (No. 23–175).

⁵⁵ *Grants Pass*, 144 S. Ct. at 2219 (quoting *Powell*, 392 U.S. at 532).

⁵⁶ *See id.* at 2220.

instead place this power in the hands of unelected judges.⁵⁷ *Martin* illustrated this issue; the Court expressed concerns with the calculations that judges would need to make to determine who are the “involuntarily” unhoused.⁵⁸ Preferring the “experimentation” of municipal laws to the Ninth Circuit’s “*Martin* experiment,” and the unwieldy “back-of-the-envelope arithmetic” it required, the Court overruled *Martin*.⁵⁹

Rejecting *Robinson* as irrelevant and *Martin* as wrongly decided, the Court found no reason to deem the Grants Pass ordinances cruel or unusual.⁶⁰ Under a historical analysis of the punishment imposed, the ordinances were neither cruel, because they did not “superad[d]” “terror, pain, or disgrace,”⁶¹ nor unusual because fines are quite common punishments.⁶² At last, the Court offered that if people are truly involuntarily in violation of these ordinances, there are still “legion protections our society affords a presumptively free individual from a criminal conviction,” citing post-enforcement protections such as necessity, “[i]nsanity, diminished-capacity, and duress defenses.”⁶³ Still, other avenues such as “limits on state prosecutorial power, promising fair notice of the laws and equal treatment under them, forbidding selective prosecutions, and much more”⁶⁴ might provide opportunities to curtail these ordinances — just not the Eighth Amendment as construed by the majority.

Justice Thomas concurred.⁶⁵ In a terse aside, he praised the Court’s focus in the Eighth Amendment inquiry on sentence alone.⁶⁶ He then argued that *Robinson*’s substantive limits, and other similar Eighth Amendment cases, injected too much “[m]odern public opinion” into the analysis.⁶⁷ The enforcement of these laws against the involuntarily unhoused via civil fines and exclusion orders was not suitable for Eighth Amendment analysis in the first place, in his view.⁶⁸

Justice Sotomayor, along with Justice Kagan and Justice Jackson, dissented.⁶⁹ *Robinson*, the dissent argued, cleanly resolved this case.⁷⁰

⁵⁷ See *id.* at 2221, 2223 (quoting *Powell*, 392 U.S. at 537).

⁵⁸ *Id.* at 2221 (quoting *Johnson v. City of Grants Pass*, 72 F.4th 868, 877 (9th Cir. 2023)).

⁵⁹ See *id.* at 2221–22 (quoting *Powell*, 392 U.S. at 537).

⁶⁰ See *id.* at 2216.

⁶¹ *Id.* (alteration in original) (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019)).

⁶² *Id.* (citing *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475, 480 (1867); 4 WILLIAM BLACKSTONE, COMMENTARIES *370; *Timbs v. Indiana*, 139 S. Ct. 682, 695 (2019) (Thomas, J., concurring in the judgment)).

⁶³ *Id.* at 2220.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2226 (Thomas, J., concurring).

⁶⁶ See *id.* at 2226–27. Since at least *Hudson v. McMillian*, 503 U.S. 1 (1992), Justice Thomas has long expressed his opinion that the Eighth Amendment should not be used to regulate use-of-force or conditions-of-confinement cases, but only the sentence imposed by the government. *Id.* at 18–20 (Thomas, J., dissenting).

⁶⁷ *Grants Pass*, 144 S. Ct. at 2227 (Thomas, J., concurring).

⁶⁸ *Id.*

⁶⁹ *Id.* at 2228 (Sotomayor, J., dissenting).

⁷⁰ *Id.* at 2237.

Contra the majority's policy concerns, the dissent viewed the *Martin*-based injunctions issued by the Ninth Circuit as narrow; cities could utilize their police powers and regulate encampments while respecting *Robinson's* grant.⁷¹ But the majority complicated the issue; it overstated the difficulties of applying *Martin*, "spar[red] with a [*Powell*] strawman,"⁷² and painted local governments as monolithically in favor of these ordinances — all of which wrongly pointed them away from *Robinson*.⁷³ To mitigate the impact on advocates for the involuntarily homeless, the dissent listed potentially viable pre-enforcement challenges that remained untouched, including challenges under the Excessive Fines Clause (as argued below), due process, vagueness, and banishment.⁷⁴ The dissent closed by rebuking the Court for "abdicat[ing]" "its role in safeguarding constitutional liberties for the most vulnerable among us" by subjecting involuntarily unsheltered people in Grants Pass to enforcement under these ordinances.⁷⁵

While expressing sympathy for the plight facing the involuntarily unhoused, the Court's reasoning, both practically and doctrinally, papered over the great harm its decision imposes. After dismissing *Robinson* as inapplicable and finding that the Eighth Amendment doesn't prohibit these laws, the majority intimated that the unhoused shouldn't be overly worried by this holding, for they still have access to a plethora of post-enforcement defenses.⁷⁶ But this framing contains two interconnected flaws. First, it ignores critical differences between pre-enforcement challenges and post-enforcement defenses, specifically that the latter are worse for the involuntarily unhoused. Second, by focusing on the post-enforcement remedies still available, the Court created a policy cover that allowed it to dodge doctrinal questions critical to the pre-enforcement options that do remain for the unhoused. At base, while the Court might express sympathy for the unsheltered, its approach seems to leave this population without effective recourse before or after anti-camping laws are enforced.

The Court's missteps began with a neglect of the differences between post-enforcement defenses — substantive criminal law defenses raised in the context of a prosecution — and pre-enforcement challenges — constitutional challenges to a statute. Specifically, it ignored that post-enforcement defenses are often much worse for vulnerable populations; this is because much of the harm is in the enforcement itself.⁷⁷ Laws like Grants Pass's force people who have no other

⁷¹ See *id.* at 2238–39.

⁷² See *id.* at 2239.

⁷³ See *id.* at 2238–41.

⁷⁴ *Id.* at 2242–43.

⁷⁵ *Id.* at 2244.

⁷⁶ See *id.* at 2220 (majority opinion).

⁷⁷ See, e.g., FORREST STUART, DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW 133 (2016).

available shelter into more dangerous environments, such as highways and train tracks or abandoned, hazardous industrial lots, that raise the risk of physical harm.⁷⁸ Fines and fees further impoverish involuntarily unhoused people, which may perversely impede their ability to exit homelessness.⁷⁹ Receiving a criminal charge also affects their ability to secure employment, housing, social services, and bail.⁸⁰ And to even vindicate these post-enforcement rights, unhoused individuals need to secure legal representation, which itself poses logistical obstacles.⁸¹

Post-enforcement defenses also have a low likelihood of success. The Court portended that “legion protections” would be available to involuntarily unsheltered people.⁸² But even its prior language betrayed this promise, with the Court acknowledging that only “some . . . jurisdictions” have necessity defenses to “certain criminal charges.”⁸³ Yet, necessity isn’t generally extended to these cases; in fact, a number of states reject the defense in cases of economic need, such as homelessness.⁸⁴

⁷⁸ Brief of 57 Social Scientists with Published Research on Homelessness as Amici Curiae in Support of Respondents at 8, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) [hereinafter Brief of 57 Social Scientists] (citing Jamie Suki Chang et al., *Harms of Encampment Abatements on the Health of Unhoused People*, SSM-QUALITATIVE RSCH. HEALTH, Dec. 2022, at 1, 4; C.J. Gabbe et al., *Reducing Heat Risk for People Experiencing Unsheltered Homelessness*, INT’L J. DISASTER RISK REDUCTION, Oct. 2023, at 1, 5–7; Erin Goodling, *Intersecting Hazards, Intersectional Identities: A Baseline Critical Environmental Justice Analysis of US Homelessness*, 3 ENV’T & PLAN. E 833, 833 (2020); Shawn Flanigan & Megan Welsh, *Unmet Needs of Individuals Experiencing Homelessness near San Diego Waterways: The Roles of Displacement and Overburdened Service Systems*, 43 J. HEALTH & HUM. SERVS. ADMIN. 105, 109 (2020); Chris Herring, *The New Logics of Homeless Seclusion: Homeless Encampments in America’s West Coast Cities*, 13 CITY & CMTY. 285, 291 (2014)).

⁷⁹ See Hannah Kieschnick, Note, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1575 (2018); cf. KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 104 (2010).

⁸⁰ See Brief of 57 Social Scientists, *supra* note 78, at 14–15 (citing, inter alia, Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 88 (2012)); Meghan Sacks et al., *Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes*, 40 AM. J. CRIM. JUST. 661, 666 (2015) (noting that those “who had prior criminal records were more likely to be denied bail or have a high amount of bail set”).

⁸¹ See ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 184 (2018) (“[P]rocedural hassles are the rituals by which the people brought into misdemeanorland are initiated into a denigrated status vis-à-vis the coercive powers of the police and courts.”); Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1245–47 (2003) (discussing the difficulties with providing legal representation for the unhoused).

⁸² *Grants Pass*, 144 S. Ct. at 2220.

⁸³ *Id.*

⁸⁴ See ANDREW MANUEL CRESPO & JOHN RAPPAPORT, CRIMINAL LAW AND THE AMERICAN PENAL SYSTEM (forthcoming 2025) (manuscript at 412–29) (on file with the Harvard Law School Library) (comparing the rare grant of necessity for involuntary homelessness in *Commonwealth v. Magadini*, 52 N.E.3d 1041 (Mass. 2016), to more frequent denials); see also *id.* at 832 n.14 (“[R]eported cases in which a defendant charged with theft or trespass was acquitted by virtue of the necessity defense are virtually nonexistent, at least in modern times.” (alteration in original) (quoting Stuart P. Green, *Looting, Law, and Lawlessness*, 81 TUL. L. REV. 1129, 1154 (2007))); *id.*

Even more troubling is the defense's success rate: "The history of the necessity defense in American criminal law indicates that whatever the scenario . . . and whatever the context . . . the law's response has generally been the same: *no*."⁸⁵ The same rings true for other defenses listed. The insanity defense is notoriously fact intensive, difficult to prove, and rarely successful.⁸⁶ So too for duress: "[T]he defense traditionally requires the offender's coercive circumstance to be the unlawful threats of another person," making it a difficult fit for the unhoused.⁸⁷ There's also a paucity of cases representing involuntarily unsheltered people that could act as guideposts for applying these defenses.⁸⁸ Finally, even if a post-enforcement defense were viable, the costs of representation, acquiring records, and effective expert testimony may be prohibitive for the unhoused and impoverished.⁸⁹ In short: The Court's implication that involuntarily unsheltered people's rights would be well protected post-enforcement is far-fetched.

Given these difficulties, understanding the landscape of remaining pre-enforcement challenges outside of the now-inapplicable Eighth Amendment is all the more important for the involuntarily unhoused. Yet, the majority's focus on post-enforcement defenses makes it easier for the Court to evade commenting clearly on the other pre-enforcement challenges discussed in its opinion. Two specific pre-enforcement challenges discussed by the Court — Eighth Amendment cruel and unusual punishment and due process claims — exemplify the Court's haziness on the path forward.

In many regards, the Eighth Amendment's cruel and unusual punishment test going forward is uncertain. Traditionally, the clause has had three potential modes of analysis: (1) whether the sentence imposed by the government itself is cruel and unusual; (2) a proportionality

("[S]everal courts [] have held that, as a categorical matter, the doctrine is not available when the evil the defendant seeks to avoid is caused by economic forces alone." (quoting Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1173 (2007))).

⁸⁵ Michele Cotton, *The Necessity Defense and the Moral Limits of Law*, 18 NEW CRIM. L. REV. 35, 45 (2015).

⁸⁶ See Louis Kachulis, Note, *Insane in the Mens Rea: Why Insanity Defense Reform Is Long Overdue*, 26 S. CAL. REV. L. & SOC. JUST. 245, 252 (2017) ("Ultimately, a successful insanity defense is raised in approximately one in every 20,000 criminal cases.").

⁸⁷ David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487, 503 n.109 (1994); see *id.* at 501 ("Traditional duress . . . contains certain limitations that would bar a typical homeless duress claim.").

⁸⁸ See, e.g., *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) ("Because the arrested plaintiffs are released without further official process . . . plaintiffs never have the opportunity to raise such valid defenses as necessity or duress.").

⁸⁹ See, e.g., Nicholas Miller, *You Have the Right to an Attorney, But It Might Cost You*, THE NATION (Oct. 30, 2023), <https://www.thenation.com/article/society/public-defender-fees> [<https://perma.cc/2GXA-WCL8>] (explaining that there are approximately forty states where defendants can be charged varying fees by the state for representation by a public defender); Eve Brensike Primus, *Defense Counsel and Public Defense*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 121 (Erik Luna ed., 2017) (noting the difficulties public defender offices have in securing funding for experts and investigation tools).

analysis — whether a punishment is “grossly disproportionate to the severity of the crime”; and (3) *Robinson*’s substantive limit on criminal laws.⁹⁰ The majority’s diatribe against *Robinson*, while dictum, sent a strong signal that the third mode of analysis could be on the way out.⁹¹ But there is also a second, more subtle point of uncertainty: The majority reviewed the Grants Pass ordinances under only the first mode of analysis, but not the second.⁹² This is especially notable given that the Court was presented with an argument, both in Ms. Johnson’s brief and by amici, that the Grants Pass ordinances were cruel and unusual because they were grossly disproportionate.⁹³ While the Court may not have intended this ambiguity, its decision creates uncertainty for the proportionality analysis going forward. To be sure, the Court didn’t go as far as to embrace Justice Thomas’s view that the Eighth Amendment should extend only to sentencing.⁹⁴ Nor has the Court shown an appetite for undoing the proportionality analysis as of late.⁹⁵ But as the dissent implicitly acknowledged, the majority’s lack of a clear statement on the Court’s “firmly rooted” proportionality analysis leaves room for interpretation.⁹⁶ For lower courts that share Justice Thomas’s perspective, the majority’s lack of clarity on proportionality analysis leaves it in a potentially subvertible state.

The majority was similarly unclear about pre-enforcement due process challenges to anti-camping laws post *Grants Pass*. Admittedly, a due process question was not before the Court;⁹⁷ but it curiously spoke at length about the potential success of this claim. Both the majority and dissent signaled that *Robinson*’s understanding, that “[e]ven one

⁹⁰ See *Grants Pass*, 144 S. Ct. at 2233 (Sotomayor, J., dissenting) (quoting *Ingraham v. Wright*, 430 U.S. 651, 667 (1977)).

⁹¹ See *id.* at 2217–18 (majority opinion); *id.* at 2234 (Sotomayor, J., dissenting). Of course, while it is dictum, there’s a strong chance that other courts will use the Court’s language as heralding the end of *Robinson* and will put *Robinson* to bed. See generally David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021 (2013) (exploring the “holding-dictum distinction,” e.g., *id.* at 2022, and noting that lower courts often treat Supreme Court dicta with due deference and sometimes use them to justify their decisions, even in anticipation of the higher court potentially overruling a precedent).

⁹² See *Grants Pass*, 144 S. Ct. at 2215–17.

⁹³ See Brief for Respondents at 26–34, *Grants Pass*, 144 S. Ct. 2202 (No. 23–175). See generally Brief of the American Civil Liberties Union and Nineteen Affiliates as Amici Curiae in Support of Respondents, *Grants Pass*, 144 S. Ct. 2202 (No. 23–175) (arguing the Eighth Amendment’s proportionality jurisprudence demonstrates that Grants Pass’s ordinances were unconstitutional).

⁹⁴ See *Grants Pass*, 144 S. Ct. at 2227 (Thomas, J., concurring).

⁹⁵ In 2010, the Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), recognized that “proportionality is central to the Eighth Amendment.” *Id.* at 59.

⁹⁶ The dissent interpreted the majority’s silence on proportionality as not “cast[ing] doubt” on the principle. *Grants Pass*, 144 S. Ct. at 2234 (Sotomayor, J., dissenting) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 & n.7 (1976)).

⁹⁷ It was, however, a part of the argument before the trial court. See Third Amended Complaint at 17, *Blake v. City of Grants Pass*, No. 18-cv-01823 (D. Or. July 22, 2020). While the due process argument featured in the respondent’s brief to the Court, it was not brought directly before the Court. See Brief for Respondents, *supra* note 93, at 24.

day in prison would be . . . cruel and unusual” punishment, fits more comfortably under the Fifth and Fourteenth Amendment’s Due Process Clauses.⁹⁸ Indeed, the majority noted that the original argument in the appellant’s briefing in *Robinson* was a state due process claim.⁹⁹ In keeping with the history-and-tradition analysis popular with the Roberts Court,¹⁰⁰ both the majority and the dissent made inroads into the lack of historical roots for *Robinson*’s ordinance, implying that the same could be true for the Grants Pass ordinances.¹⁰¹ But the Court stopped short of vindicating the right altogether.¹⁰² This begs the question of why the Court engaged in the analysis at all. If the Court sees itself as “safeguarding constitutional liberties for the most vulnerable,”¹⁰³ it’s unclear why the Court identified a threat to a constitutional liberty and yet chose to leave safeguarding it for another day.

Despite the Court gesturing to all the rights involuntarily unsheltered people may have — be it pre-enforcement rights to shield, or post-enforcement rights to remedy — it neglected to interrogate the practical and doctrinal remains of these rights. Advocates may still have some pre-enforcement tools at their disposal to try and keep harm at bay.¹⁰⁴ But for now, the Court’s decision leaves this vulnerable population exposed to real harm today.

⁹⁸ See *Grants Pass*, 144 S. Ct. at 2217 (alteration in original) (quoting *Robinson v. California*, 370 U.S. 660, 667 (1962)); *id.* at 2242 (Sotomayor, J., dissenting) (“The majority notes that due process arguments in *Robinson* ‘may have made some sense.’ On that score, I agree. ‘[H]istorically, crimes in England and this country have usually required proof of some act (or *actus reus*) undertaken with some measure of volition (*mens rea*).’” (alteration in original) (citation omitted) (quoting *id.* at 2217 (majority opinion))).

⁹⁹ *Id.* at 2217 (majority opinion). It “remains a mystery why the Court chose the Eighth Amendment as the vehicle to address the problem posed in *Robinson*” instead of the Due Process Clause before it. Martin R. Gardner, *Rethinking Robinson v. California in the Wake of Jones v. Los Angeles: Avoiding the “Demise of the Criminal Law” by Attending to “Punishment,”* 98 J. CRIM. L. & CRIMINOLOGY 429, 461 (2008).

¹⁰⁰ See, e.g., Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs’s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 110 (2023).

¹⁰¹ See *Grants Pass*, 144 S. Ct. at 2217; *id.* at 2242 (Sotomayor, J., dissenting).

¹⁰² Certainly, there is a strong and reasonable abuse-of-power concern to keep in mind should the Court sua sponte reach a decision on a constitutional analysis not squarely before it. See generally Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002) (critiquing sua sponte decisions by appellate courts for violating principles of due process, interrupting the adversarial process, and aggrandizing and abusing judicial power).

¹⁰³ *Grants Pass*, 144 S. Ct. at 2244 (Sotomayor, J., dissenting).

¹⁰⁴ The dissent pointed to Eighth Amendment excessive fines, Fourth Amendment search and seizure, void-for-vagueness, and banishment claims as potential paths forward. *Id.* at 2241–43. Advocates have also pursued First Amendment claims against panhandling laws, which have been used against the unhoused. See Press Release, ACLU of Mass., ACLU of Massachusetts Challenges Unconstitutional Ban on “Panhandling” (Mar. 28, 2019), <https://www.aclum.org/en/press-releases/aclu-massachusetts-challenges-unconstitutional-ban-panhandling> [<https://perma.cc/9HES-QF3Z>].