NOTE

Homelessness: The Status of the Status Doctrine

Ryan P. Isola[*]

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INTRODUCTION

Each year, the United States Department of Housing and Urban Development conducts its Point-in-Time count to estimate the number of homeless individuals in America.[1] In 2018, the count estimated that on a single night, approximately 553,000 individuals were homeless.[2] The report further found that about 195,000, or 35%, of those individuals were in unsheltered[3] conditions.[4] The count revealed that California has the largest number of unsheltered homeless individuals of any state.[5] California had nearly 90,000 individuals, or 47% of the nation's total unsheltered homeless population at the time of the count.[6]

Many cities have tried to address homelessness by enacting laws and policies that criminalize the homeless.[7] For example, the National Law Center on Homelessness and Poverty found laws in 187 cities that criminalize activities associated with homelessness.[8] The study found that 34% of those cities impose city-wide bans on public camping while 57% of those cities prohibit camping only in certain public spaces.[9] Additionally, 18% of cities impose a blanket ban on sleeping in public while 27% of cities prohibit sleeping only in certain public places, like parks.[10]

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[1] *See* MEGHAN HENRY, ANNA MAHATHEY, TYLER MORRILL, ANNA ROBINSON, AZIM SHIVJI & RIAN WATT, U.S. DEP'T OF HOUS. & URBAN DEV., THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 6 (2018), https://www.huduser.gov/portal/sites/default/files/pdf/2018-AHAR-Part-1.pdf [https://perma.cc/BK7H-W3NV]. The report defines a homeless individual as "a person who lacks a fixed, regular, and adequate nighttime residence." *Id.* at 2.

[2] *Id.* at 1.

[3] *Id.* The report defines unsheltered homelessness as "people whose primary nighttime location is a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for people." *Id.* at 3.

[4] *Id.* at 10.

[5] *See id.* at 14.

[6] *Id.*

[7] *See, e.g.*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8, 17 (2014), https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf [https://perma.cc/W8RN-UZCM] [hereinafter NO SAFE PLACE] ("Data collected . . . reveals that, since 2011, there has been a marked increase in laws criminalizing homelessness."). The report found that between 2011 and 2014, there was a 60% increase in the number of U.S. cities that imposed a city-wide camping ban. *Id.* at 18. There was also a 35% increase in city-wide bans on "vagrancy in public." *See id.* at 21.

[8] *Id.* at 7.

[9] *Id.*

[10] *Id.*

This state of affairs contextualizes the Ninth Circuit's decision in *Martin v. City of Boise*[11] in April of 2019. In *Martin*, the court held that cities cannot enforce ordinances that prohibit sleeping in public when local homeless shelters are at capacity.[12] This is a significant ruling because the five states with the highest rates of homelessness are within the Ninth Circuit's jurisdiction.[13]

The *Martin* court reasoned that enforcing these ordinances without sufficient shelter space violates the Eighth Amendment of the Constitution because the ordinances, in effect, punish individuals for their status as homeless people.[14] This ruling is anchored by two landmark Supreme Court decisions that forbid criminal sanctions based on one's status as opposed to one's conduct.[15] In the 1960s, the Supreme Court decided two seminal Eighth Amendment cases: *Robinson v. California*[16] and *Powell v. State of Texas*.[17] In *Robinson*, the Court struck down a statute that made it illegal to be addicted to narcotics.[18] The Court found that the Eighth Amendment forbade the state from punishing an individual purely on the basis of their status.[19] A few years after *Robinson*, the Court decided *Powell v. State of Texas*.[20] Following the "status doctrine" created in *Robinson* (hereinafter "status crimes doctrine"), a plurality of the Court upheld a Texas law prohibiting public intoxication.[21] The Court believed the law was constitutional, even when enforced against a chronic alcoholic, because the law punished conduct, not status.[22] The Court's decision was heavily fractured.[23] Justice Marshall wrote for the four-justice plurality, Justice

[11] *See* Martin v. City of Boise, 920 F.3d 584, 618 (9th Cir. 2019).

[12] *Id.*

[13] *See* HENRY ET AL., *supra* note 1, at 15.

[14] *Martin*, 920 F.3d at 616.

[15] *See id.* at 615-16; *see also* Powell v. Texas, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting) (arguing that it is unconstitutional to punish an individual for a condition that they are powerless to change); Robinson v. California, 370 U.S. 660, 666 (1962) (explaining that punishment of one's status is "an infliction of cruel and unusual punishment in violation of the Eighth Amendment").

[16] *Robinson*, 370 U.S. at 660.

[17] *Powell*, 392 U.S. at 514.

[18] *Robinson*, 370 U.S. at 660.

[19] *See id.* at 666.

[20] *See Powell*, 392 U.S. at 514.

[21] *See id.* at 532.

[22] *See id.* at 532-33.

[23] *See id.* at 514; discussion *infra* Part I.B.

White concurred with the judgement, and Justice Fortas wrote for the four dissenting justices.[24]

Since *Powell*, the Supreme Court has not clarified the constitutional underpinnings of the status crimes doctrine announced in *Robinson*.[25] In the wake of the *Robinson* decision, an influential Note that has since garnered widespread scholarly attention offered three plausible theories to explain the Court's constitutional rationale of the status crimes doctrine: (1) the "pure status" rationale; (2) the "status one cannot change" rationale; and (3) the "involuntariness" rationale.[26] The "pure status" rationale posits that "the law may not punish a mere condition; only acts may be made the subject of criminal legislation."[27] The "status one cannot change" rationale suggests that a person cannot be punished for a condition they cannot help.[28] For example, punishing someone for an illness contracted involuntarily would be "morally repugnant."[29] Lastly, the "involuntariness" approach looks to whether the individual was responsible for acquiring their condition.[30] If the individual acquired their condition involuntarily, the state cannot punish the individual.[31] In the years since the fractured decision handed down by the *Powell* Court, none of these three competing rationales has garnered majority support.[32] Accordingly, lower courts have struggled with the question of which guiding principle to apply in cases involving the status crimes doctrine.[33]

The lack of clarity caused by the Court's silence since *Powell* has led to confusion among the lower courts when deciding the

[24] *Powell*, 392 U.S. at 516-17, 548, 554.

[25] Hannah Kieschnik, Note, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1578 (2018).

[26] *See* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 650-55 (1966) [hereinafter *Cruel and Unusual Punishment Clause*]; *see also* Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the* Robinson *Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 312 (1996) (explaining the three articulations of the *Robinson* doctrine presented by the Harvard Law Review); Kieschnik, *supra* note 25, at 1579 (referencing the three rationales offered by the Harvard Law Review to explain the status crimes doctrine).

[27] *Cruel and Unusual Punishment Clause*, *supra* note 26, at 646-47.

[28] *See id.* at 648.

[29] *Id.*

[30] *Id.* at 654.

[31] *Id.*

[32] *See* Smith, *supra* note 26, at 317; Kieschnik, *supra* note 25, at 1582, 1594-95.

[33] Smith, *supra* note 26, at 317.

constitutionality of "anti-homeless" ordinances.[34] Some courts have refused to extend the holding of *Robinson* and only invalidate laws that punish "pure status."[35] Other courts have expanded the status crimes doctrine to apply to actions that are inextricably intertwined with an individual's status.[36]

This Note analyzes the different interpretations of the status crimes doctrine that courts adopt when deciding the constitutionality of anti-homeless ordinances. In December 2019, the Supreme Court denied the city of Boise's petition to review *Martin v. City of Boise*.[37] In light of the Court denying certiorari, this Note argues that other circuits should follow the Ninth Circuit's interpretation of the status crimes doctrine.[38] This interpretation is most in line with the evolution of the Supreme Court's Eighth Amendment jurisprudence,[39] which ensures that punishment does not tread on human dignity and is in accordance with society's evolving standards of decency.[40] Part I provides a deeper analysis of *Robinson* and *Powell*.[41] It then illustrates how courts have split in their interpretation of *Robinson*, culminating with the Ninth Circuit's opinion in *Martin*. Part II then canvases the evolution of Eighth Amendment jurisprudence,[42] proceeding next to argue that the evolutionary trends of Eighth Amendment jurisprudence support adopting the Ninth Circuit's interpretation of *Robinson*.[43] Part III shows how adopting such an interpretation helps homeless individuals escape

[34] *See* NO SAFE PLACE, *supra* note 7, at 7-8 (listing laws which prohibit "camping" in public, sleeping in public, and sitting or lying down in public as examples of ordnances that punish homelessness); Smith, *supra* note 26, at 317; Benno Weisberg, *When Punishing Innocent Conduct Violated the Eighth Amendment: Applying the* Robinson *Doctrine to Homelessness and Other Contextual "Crimes*," 96 J. CRIM. L. & CRIMINOLOGY 329, 330-31 (2005).

[35] *See, e.g.*, Joyce v. City & County of San Francisco, 846 F. Supp. 843, 856 (N.D. Cal. 1994) ("Depicting homelessness as [a] 'status' is by no means self-evident . . . .").

[36] *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992) (explaining that the record in the case "supports plaintiffs' claim that their homeless condition compels them to perform certain life-sustaining activities in public").

[37] *Supreme Court Lets* Martin v. Boise *Stand: Homeless Persons Cannot Be Punished for Sleeping in Absence of Alternatives*, NAT'L HOMELESSNESS L. CTR. (Dec. 16, 2019), https://nlchp.org/supreme-court-martin-v-boise/ [https://perma.cc/KF6C-ZCB9] [hereinafter *Supreme Court Lets* Martin v. Boise *Stand*].

[38] *See* discussion *infra* Part II.

[39] *See* discussion *infra* Part II.B.1.

[40] *See* discussion *infra* Part II.B.1.

[41] *See* discussion *infra* Part I.

[42] *See* discussion *infra* Part II.A.

[43] *See* discussion *infra* Part II.B.

the cycle of homelessness.[44] Accordingly, this interpretation advances the standards of human decency and follows the principles espoused by Eighth Amendment jurisprudence.

I. BACKGROUND

The Eighth Amendment proscribes the infliction of cruel and unusual punishments.[45] This amendment affords protection against "inherently barbaric punishments."[46] The government must respect the "human attributes" of its citizenry, even those accused of crimes.[47] Early Supreme Court jurisprudence established the guiding principle that punishment for a crime must be proportional to the offense.[48] This principle provides the framework that guides the Supreme Court's analysis in Eighth Amendment cases.

A. Robinson v. California

The Supreme Court began to distinguish between crimes that punish conduct and crimes that punish status in the 1962 case *Robinson v. California*.[49] In this case, a police officer arrested Lawrence Robinson after the officer noticed scar tissue, skin discoloration, and apparent needle marks on Robinson's arm.[50] Robinson was convicted for the "crime" of being addicted to narcotics and sentenced to ninety days in jail.[51] The Supreme Court decided the law that led to Robinson's conviction was unconstitutional under the Eighth Amendment.[52] The Court found that the law was unconstitutional because a person could theoretically be punished despite never having touched drugs or committed any unlawful act in California.[53] With this holding, the Court articulated the principle that states cannot use criminal law to punish morally blameless conduct.[54]

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[44] *See* discussion *infra* Part III.

[45] U.S. CONST. amend. VIII.

[46] Graham v. Florida, 560 U.S. 48, 59 (2010).

[47] *Id.*

[48] *See* Weems v. United States, 217 U.S. 349, 367, 402 (1910).

[49] Robinson v. California, 370 U.S. 660 (1962).

[50] *Id.* at 661.

[51] *See id.* at 661, 667.

[52] *Id.* at 661, 666.

[53] *Id.* at 666.

[54] Dale W. Broeder & Robert Wade Merson, Robinson v. California*: An Abbreviated Study*, 3 AM. CRIM. L.Q. 203, 203 (1965).

To reach its decision, the Court analogized a person afflicted with drug addiction to someone who is mentally ill or has contracted a venereal disease.[55] The majority reasoned that, like illness, addiction can be contracted "innocently or involuntarily."[56] Upon his conviction for being an addict, Robinson was sentenced to ninety days in jail.[57] The Court did not believe, of course, that the punishment of imprisonment was in and of itself cruel or unusual.[58] However, given the circumstances of Robinson's "crime," the punishment violated the Eighth Amendment.[59] Justice Stewart explained the Court's rationale by saying "[e]ven one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."[60] Thus, the Court held that punishing an individual because of their status as an addict constituted cruel and unusual punishment.[61]

B. Understanding the Constitutional Rationale of Robinson

Four years after the *Robinson* decision, a piece called *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law* attempted to explain the constitutional underpinnings that guided the *Robinson* Court.[62] The piece suggested three possible rationales: (1) the "pure status" rationale; (2) the "status one cannot change" rationale; and (3) the "involuntariness" rationale.[63]

The "simplest" explanation of *Robinson* is the "pure status" rationale.[64] The piece explains the notion "that the law may not punish a mere condition; only acts may be made the subject of criminal legislation."[65] This understanding would explain why the Court thought that punishing an individual merely for their addiction, and not any specific conduct, was morally repugnant.[66] The constitutional principle guiding this rationale is that there must be some culpable act before an individual may be punished.[67] However, the piece notes that

[55] *Robinson*, 370 U.S. at 666.
[56] *Id.* at 667.
[57] *See id.*
[58] *Id.*
[59] *Id.* at 666.
[60] *Id.* at 667.
[61] *Id.*
[62] *See Cruel and Unusual Punishment Clause*, *supra* note 26, at 646.
[63] *Id.* at 646-49.
[64] *Id.* at 646; *see* Smith, *supra* note 26, at 312.
[65] *Cruel and Unusual Punishment Clause*, *supra* note 26, at 646-47.
[66] *Id.* at 648.
[67] *See id.* at 646-47.

the "pure status" rationale may reach beyond the Court's language in *Robinson* since the Court was focused on "the relatively narrow fact that addiction is an *illness*, a type of status that may be innocently acquired . . . ."[68]

The piece then suggests the "status one cannot change" rationale.[69] Under this rationale, the *Robinson* Court believed that illness could not be punished because "once an individual has acquired a sickness, he is not free to voluntarily quit his condition."[70] Thus, this line of reasoning supports the principle that the state cannot punish individuals when they are not at fault. The piece notes, however, that there is some level of voluntariness in acquiring certain conditions like addiction.[71] Accordingly, the piece concludes that the "status one cannot change" rationale does not justify the *Robinson* opinion.[72]

The piece lastly explains the "involuntariness" rationale. Under this justification, what matters is how the defendant acquired their condition.[73] The piece articulates that if an individual acquires their condition involuntarily, the state cannot punish that person.[74] On the other hand, if the individual voluntarily obtains the condition, the state can punish the individual without violating the Constitution.[75] It is unlikely the court relied upon this rationale in *Robinson* because drug and alcohol addiction can be traced back to at least some voluntary conduct.[76] Thus, since there was voluntary conduct, "punishment would in most cases be permissible . . . ."[77]

The piece does not definitively conclude which principle guided the Supreme Court in *Robinson*.[78] Instead, the piece suggested that the Supreme Court needed to further clarify the constitutional principles undergirding the status crimes doctrine.[79] Six years after the *Robinson*

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[68] *Id.* at 647-48.

[69] *Id.* at 648.

[70] *Id.*

[71] *See id.* ("Although he may not have believed affirmatively that he would become an addict, the individual at least initially made a choice to use drugs, despite an awareness that a great many other persons had become addicted through just such actions.").

[72] *Id.*

[73] *Id.* at 654.

[74] Smith, *supra* note 26, at 313; *Cruel and Unusual Punishment Clause*, *supra* note 26, at 654.

[75] *Cruel and Unusual Punishment Clause*, *supra* note 26, at 654.

[76] *See id.*

[77] *Id.*

[78] *See id.* at 655.

[79] *See id.*

decision, the Court had the opportunity to clarify the status crimes doctrine in *Powell v. State of Texas*.[80]

C. Powell v. State of Texas

In 1968, the Supreme Court had the opportunity to explain the constitutional underpinnings of the status crimes doctrine in *Powell v. State of Texas*.[81] In *Powell,* law enforcement officers arrested the defendant, Leroy Powell, pursuant to a Texas statute which prohibited public intoxication.[82] Powell argued that, as a chronic alcoholic, his public intoxication was an involuntary consequence of his condition.[83] Therefore, pursuant to the status crimes doctrine, the defendant argued that any punishment would be unconstitutional since the state of Texas, in effect, would be punishing him based on his status as an alcoholic.[84]

However, unlike the six-justice majority in *Robinson*, the Court was fractured in *Powell* and different justices used different rationales to arrive at their conclusions.[85] Justice Marshall wrote for the plurality, Justice Black, joined by Justice Harlan, wrote in concurrence, and Justice Fortas wrote for the four dissenting justices.[86] The plurality may have feared that extending *Robinson* without clear limiting principles would lead to disastrous outcomes.[87] For example, the plurality opinion noted that if "[someone] cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual . . . suffers from a 'compulsion' to kill."[88] Because of the Justices' differing opinions, no clear guiding principle of the status crimes doctrine emerged from *Powell*.[89]

Justice Marshall, writing for the four-justice plurality, argued that reliance on *Robinson* was inapposite.[90] The Texas statute punished

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[80] *See* Powell v. State of Texas, 392 U.S. 514, 533-34 (1968).

[81] *See id.*

[82] *Id.* at 517.

[83] *See id.* at 532.

[84] *See id.* at 517.

[85] *See id.* at 516 (majority opinion); *id.* at 537 (Black, J., concurring); *id.* at 554 (Fortas, J., dissenting); *see also* Smith, *supra* note 26, at 314-15 (discussing how the Powell Justices "differed significantly in their interpretations of *Robinson*").

[86] *See Powell*, 392 U.S. at 516, 537, 554.

[87] *See* Kieschnik, *supra* note 25, at 1581; *see also* Smith, *supra* note 26, at 316.

[88] *Powell*, 392 U.S. at 534; *see also* Smith, *supra* note 26, at 316-17; Kieschnik, *supra* note 25, at 1581.

[89] Smith, *supra* note 26, at 317; Kieschnik, *supra* note 25, at 1580.

[90] *Powell*, 392 U.S. at 532.

conduct that presented a public health and safety issue.[91] In reaching this conclusion, Justice Marshall refused to categorize alcoholism as a disease.[92] Accordingly, the plurality affirmed Powell's conviction and held that the statute did not punish Powell for his status as an alcoholic, but rather for his conduct.[93] The *Powell* plurality interpreted *Robinson* most closely in line with the "pure status" rationale since they concluded that the Texas statute punished the defendant for his conduct, and not merely his status.[94]

Justice Fortas wrote for the four dissenting justices in *Powell*.[95] In the dissent's view, "[c]riminal penalties may not be inflicted on a person for being in a condition [they are] powerless to change."[96] Accordingly, the dissenting justices believed that the Texas statute violated the Eighth Amendment.[97] Further, the dissent also viewed alcoholism as a disease.[98] In their opinion, the defendant's disease urged him to excessively consume alcohol.[99] Echoing the sentiment of *Robinson*, the dissent argued that the state cannot punish the individual if the prohibited conduct essential to a crime is "part of the pattern of [their] disease and is occasioned by a compulsion symptomatic of the disease."[100] This reasoning reflects the "status one cannot change" rationale since the dissent believed that no individual can be punished for a condition they are powerless to change.[101]

In Justice White's concurrence, writing only for himself, he agreed with the plurality that Powell's conviction should be upheld.[102] However, Justice White largely agreed with the principles pronounced in the dissent. In fact, Justice White took the language of *Robinson* even further: he argued that if it is unconstitutional to criminalize narcotics addiction, then it is equally as unconstitutional to criminalize an addict yielding to their addiction.[103] In the case at bar, however, Justice White did not believe that the record supported the finding that Powell had a

[91] *Id.*

[92] *See id.* at 522. *But see* Robinson v. California, 370 U.S. 660, 666 (1962) (suggesting that addiction is akin to mental illness or venereal disease).

[93] *See Powell*, 392 U.S. at 537.

[94] Smith, *supra* note 26, at 315; Kieschnik, *supra* note 25, at 1581.

[95] *Powell*, 392 U.S. at 554 (Fortas, J., dissenting).

[96] *Id.* at 567.

[97] *Id.* at 570.

[98] *See id.*

[99] *Id.*

[100] *Id.* at 569.

[101] Kieschnik, *supra* note 25, at 1581; *see Powell*, 392 U.S. at 569.

[102] *Powell*, 392 U.S. at 554 (White, J., concurring).

[103] *Id.* at 548.

compulsion to be in public while he was intoxicated.[104] The statute punished *public* intoxication, not merely intoxication.[105] Accordingly, because Powell failed to show that he was unable to avoid being in public on the night of his arrest, Justice White did not think Powell's conviction violated the Eighth Amendment.[106]

D. Application of Robinson *and* Powell *to Homeless Litigation*

Following *Robinson* and *Powell*, lower courts soon began to use the Supreme Court's jurisprudence to strike down statutes that targeted the homeless.[107] However, because the Court failed to reach a rationale supported by the majority in *Powell*, lower courts continue to lack sufficient guidance on what principles undergird the status crimes doctrine.[108] As explained by Justice Powell in *Marks v. U.S.*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[109] Consequently, courts have split in determining how to apply the status doctrine to statutes that effect the homeless.[110] Some courts have adopted the "pure status" rationale while others have relied upon a combination of the "status one cannot change" and "involuntariness" rationales.[111]

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104 *Id.* at 549.

105 *Id.*

106 *Id.* at 553-54.

107 *See, e.g.*, Goldman v. Knecht, 295 F. Supp. 897, 908 (D. Colo. 1969) ("If addiction to narcotics is a status which the legislature cannot validly declare to be a crime under *Robinson*, it follows that the Colorado attempt to declare idleness or indigency coupled with being able-bodied must also (indeed even more) be held beyond the power of the state legislative body.").

108 *See* Smith, *supra* note 26, at 317. In plurality opinions, a majority of Justices agree upon the proper disposition of the case, but "no single rationale explaining the result enjoys the assent of five justices." Marks v. United States, 430 U.S. 188, 193 (1977) (Powell, J., plurality). When analyzing a plurality opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.*

109 *Marks*, 430 U.S. at 193.

110 Kieschnik, *supra* note 25, at 1582-83.

111 *Id.* at 1583.

1. Courts Implementing the "Pure Status" Rationale

Where courts have followed the "pure status" rationale, which posits that that the law may not punish a mere condition,[112] the homeless litigants' arguments hinge on whether homelessness is a cognizable "status."[113] For example, in *Joyce v. City and County of San Francisco*,[114] the District Court for the Northern District of California decided a case where a class of homeless people sought a preliminary injunction against San Francisco's Matrix Program.[115] Under the program, law enforcement cracked down on violations committed predominantly by homeless people, such as sleeping in parks and panhandling.[116] The plaintiffs specifically challenged aspects of the program they felt penalized certain "life sustaining activities," including sitting and sleeping.[117] Plaintiffs argued that the city's failure to provide adequate housing compels the conclusion that homelessness is a cognizable status.[118] The *Joyce* court, however, refused to classify homelessness as a status.[119] Relying on *Robinson* and the plurality's logic in *Powell*, the *Joyce* court determined that to classify homelessness as a status "is to deny the efficacy of acts of social intervention to change the condition of those currently homeless."[120] Accordingly, the claimants' Eighth Amendment argument failed.[121]

The *Joyce* court was hesitant to expand the status crimes doctrine to acts derivative of status without explicit guidance from the Supreme Court.[122] They believed that such a ruling would extend the status crimes doctrine to "any condition over which a showing could be made

112 *See* discussion *supra* Part I.B.

113 *See* Joyce v. City & County of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994).

114 *Id.* at 843.

115 *Id.* at 845.

116 *See id.* at 846; *see also* Heather Mac Donald, *San Francisco Gets Tough with the Homeless*, CITY J. (1994), https://www.city-journal.org/html/san-francisco-gets-tough-homeless-12527.html [https://perma.cc/5446-S6BU] (describing increased enforcement for public urination, trespassing, and camping).

117 *Joyce*, 846 F. Supp. at 851. In this context, Plaintiffs argued that "life sustaining activities" include sitting, sleeping, or remaining in a public place. *Id.*

118 *Id.* at 857.

119 *Id.* at 858.

120 *Id.* at 857.

121 *Id.*

122 *See* Kieschnik, *supra* note 25, at 1589-90; *see also* Smith, *supra* note 26, at 327-28 (describing the jurisprudential difficulty courts have had on classifying homelessness as a status).

that the defendant had no control."[123] Thus, absent clear instructions from the Supreme Court, the *Joyce* court opted to implement the narrow "pure status" reading of *Robinson*.[124] Since the Matrix Program did not punish the homeless because of their status, but instead for conduct, the district court denied the plaintiff's request for injunctive relief.[125]

2. Courts that Expanded the Status Crimes Doctrine

Some courts have implemented a more expansive reading of *Robinson* by extending the status crimes doctrine to apply to acts derivative of status.[126] In 1992, the district court for the Southern District of Florida decided *Pottinger v. City of Miami*.[127] Here, a class of homeless plaintiffs sought injunctive relief against the City of Miami for the "practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily life — including sleeping and eating — in the public places where they are forced to live."[128] The plaintiffs alleged that pursuant to 42 U.S.C. § 1983, the City's policies violated their constitutional rights.[129] The district court analyzed the plaintiff's claims through the lens of the status crimes doctrine.[130] Noting the shortcomings of the doctrine, the court explained that "[while] the law is well-established that a person may not be punished for [their] involuntary status, it is less settled whether involuntary conduct that is inextricably related to that status may be punished."[131]

[123] *Joyce*, 846 F. Supp. at 858; *see also* Kieschnik, *supra* note 25, at 1589-90 (explaining the *Joyce* court's hesitation to expand the *Robinson* doctrine).

[124] *See Joyce*, 846 F. Supp. at 857-58; *see* Smith, *supra* note 26, at 327 ("Using this strict standard, Judge Jensen found little significant connection between homelessness and drug addiction, the status which the Supreme Court explicitly protected in Robinson."); Kieschnik, *supra* note 25, at 1588-90.

[125] *Joyce*, 846 F. Supp. at 864.

[126] *See, e.g.*, Jones v. City of L.A., 444 F.3d 1118 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007) ("Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless."); Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992) ("[A]rresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual.").

[127] 810 F. Supp. at 1551.

[128] *Id.* at 1554.

[129] *Id.*

[130] *See id.* at 1562.

[131] *Id.* at 1563.

The *Pottinger* court distinguished *Powell* and *Robinson* from the case before them, noting that the Supreme Court did not face the "unique" issue that homeless people have no choice but to live in public places.[132] The district court found ample evidence to support the notion that the plaintiffs had no choice but to perform certain life-sustaining activities[133] in public. Specifically, the court relied on lack of shelter space, as well as unavailability of low income housing, to conclude that many homeless people have no choice but to live in public.[134] The court reasoned that because of the unavailability of housing or shelter space, "[t]he harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless."[135] As a result, arresting plaintiffs for such conduct "effectively punishes them for being homeless."[136] This reasoning led the district court to conclude that "arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual."[137] With this ruling, the district court extended the scope of *Robinson* to *conduct* inseparable from the status of being homeless.[138]

Following *Pottinger*, the Ninth Circuit heard *Jones v. City of Los Angeles*.[139] This was the first time a federal court of appeals reached the merits of whether the status crimes doctrine extends to conduct inextricable from one's status.[140] In this case, homeless individuals challenged a Los Angeles ordinance that prohibited sitting, lying, or sleeping in public at all times.[141] To decide the case, the Ninth Circuit "distilled the Eighth Amendment inquiry under *Robinson* and *Powell* down to 'two considerations.'"[142] First, the court noted the distinction between punishing "pure status" and pure conduct.[143] The court then

[132] *Id.*

[133] *See id.* at 1555 (defining the scope of life-sustaining activities as sleeping, eating, standing, and congregating).

[134] *Id.* at 1564.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *See* Smith, *supra* note 26, at 319 (explaining that the *Pottinger* court "upheld the proposition that, under Robinson and Powell, the anti-sleeping ordinance unconstitutionally criminalized the status of being homeless"); Kieschnik, *supra* note 25, at 1583-85.

[139] Jones v. City of L.A., 444 F.3d 1118 (9th Cir. 2006), *vacated pursuant to settlement*, 505 F.3d 1006 (9th Cir. 2007).

[140] Kieschnik, *supra* note 25, at 1584-85.

[141] *Jones*, 444 F.3d at 1120.

[142] *Id.* at 1136; Kieschnik, *supra* note 25, at 1585.

[143] Kieschnik, *supra* note 25, at 1585; *see Jones*, 444 F.3d at 1136.

recognized that "between those poles" exists an inquiry into conduct inextricably intertwined with status.[144] The court believed conduct such as sitting, lying, or sleeping on the streets was an "unavoidable consequence" of being homeless.[145] Second, the court found it important to distinguish between the voluntariness (or lack thereof) of an act or condition.[146] Hannah Kieschnik notes that these considerations establish a helpful rubric "based on two spectrums: the sliding scale between status and conduct and the sliding scale between involuntariness and voluntariness."[147]

With these considerations in mind, the *Jones* court held that enforcement of the Los Angeles ordinance against homeless individuals violated the Eighth Amendment.[148] The court reasoned that the homeless "are in a chronic state that may have been acquired 'innocently or involuntarily.'"[149] Further, acts such as sitting, lying, or sleeping are "universal and unavoidable consequences of being human."[150] When a homeless person does not have access to a private space, they necessarily must live in public.[151] Therefore, the homeless individual's conduct at issue is "inseparable" from their status of being homeless.[152] This ruling demonstrates the logic used to extend the status crimes doctrine to conduct derivative of status.[153]

E. Ninth Circuit's Approach in Martin

In *Martin v. City of Boise*,[154] the Ninth Circuit relied heavily on the analysis from *Jones*.[155] Six homeless individuals filed suit against the City of Boise for enforcing ordinances that prohibit sleeping in public.[156] The claimants argued that the city's policies violated their

144 Kieschnik, *supra* note 25, at 1585.

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

146 *Id.* at 1136; Kieschnik, *supra* note 25, at 1585.

147 Kieschnik, *supra* note 25, at 1585.

148 *Jones*, 444 F.3d at 1138.

149 *Id.* at 1136.

150 *Id.*

151 *Id.*

152 *Id.*

153 *See* Kieschnik, *supra* note 25, at 1583-88.

154 Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019).

155 *See id.* at 604; *see also* Statement of Interest of the United States at 8-9, Bell v. City of Boise, No. 1:09-cv-540 (D. Idaho Aug. 6, 2015).

156 *Martin*, 920 F.3d at 603.

Eighth Amendment rights.[157] Boise had three homeless shelters at the time plaintiffs brought suit.[158] However, due to the shelters' policies, the plaintiffs were unable to obtain shelter on some nights, which resulted in their citations.[159] Accordingly, the plaintiffs argued that enforcement of the ordinances when there was no available shelter space was cruel and unusual punishment.[160]

The *Martin* court extensively relied on the reasoning of the dissent in *Powell* to decide this case.[161] The opinion began by noting that the plurality in *Powell* interpreted *Robinson* to preclude punishment for one's status, not involuntary conduct.[162] They also emphasized that four Justices dissented in *Powell* and that Justice White concurred in the judgement alone.[163] The court underscored Justice White's view that the Eighth Amendment would prohibit punishment if it were impossible for someone to avoid being in public while they are drunk.[164] The Ninth Circuit found this sufficiently analogous to the facts of the case before them because the plaintiffs demonstrated they had nowhere else to go.[165] This supports the principle that the law may not punish an individual for a condition they are powerless to change.[166]

The *Martin* court combined Justice White's and the dissenting Justices' reasoning to conclude that "five Justices gleaned from *Robinson* the principle that 'that the Eighth Amendment prohibits the state from

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[157] *Id.* at 603-04. Specifically, the plaintiffs challenged Boise City Code § 9-10-02, which prohibits public camping at all times, and Boise City Code § 6-01-05, which bans occupying any public or private place without the permission of the owner, or person entitled to possession and control thereof. *Id.*

[158] *Id.* at 605.

[159] *Id.* at 608. At least one of the shelters required homeless individuals to check-in by a certain time in order to receive shelter for the night. *Id.* at 605. Another shelter allowed homeless individuals to stay for seventeen consecutive nights, after which the individual had a choice of either participating in a religious-oriented recovery program or not returning to the shelter for thirty days. *Id.* at 605-06.

[160] *Id.* at 615.

[161] *See id.* at 616.

[162] *Id.*

[163] *Id.*

[164] *Id.* "For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking . . . . For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment — the act of getting drunk." Powell v. Texas, 392 U.S. 514, 551 (1968) (White, J., concurring).

[165] *See Martin*, 920 F.3d at 616.

[166] *Id.*

punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'"[167] With this interpretation of *Powell*, the Ninth Circuit went on to hold that the Eighth Amendment prohibits criminalization of sitting, sleeping, or lying outside on public property if homeless individuals have nowhere else to go.[168] This holding adopts the broader interpretation of *Robinson* embodied in *Pottinger* and *Joyce* since the Ninth Circuit effectively expanded the status crimes doctrine to apply to conduct inextricably intertwined with an individual's status.[169]

Without an explicit ruling from the Supreme Court explaining the scope of the status crimes doctrine, lower courts still lack clear guidance on how to apply *Robinson*. Some courts have adopted a narrow version of the doctrine and refuse to classify homelessness as a status.[170] Other courts, like the Ninth Circuit in *Martin*, have extended the status crimes doctrine to prohibit punishment in situations where conduct is derivative of an individual's status.[171] Given the confusion among the courts, the Supreme Court should affirm the Ninth Circuit's interpretation of the status crimes doctrine for the reasons discussed in Part II.

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[167] *Id.* Judge Smith explained in his dissenting opinion what allowed the majority to combine the dissenting and concurring opinion in *Powell*: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgments on the narrowest grounds.'" *Id.* at 591 (Smith, J., dissenting) (emphasis added) (quoting Marks v. United States, 430 U.S. 188, 193 (1977)); *see supra* note 109 and accompanying text.

[168] *Martin*, 920 F.3d at 616.

[169] Since the Ninth Circuit used a similar analysis as *Pottinger* and *Joyce*, I make the inferential step that the *Martin* holding also takes an expansive view of the *Robinson* doctrine. *See* Smith, *supra* note 26, at 319-31; Kieschnik, *supra* note 25, at 1583-91.

[170] *See, e.g.*, Joyce v. City & County of San Francisco, 846 F. Supp. 843, 857-58 (N.D. Cal. 1994) (showing that the court narrowed the status doctrine); Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 1105 (1995) ("[F]undamentally, homelessness is not readily classified as a 'status.'"); *see also* Kieschnik, *supra* note 25, at 1589; Maya Nordberg, Note, *Jails Not Homes: Quality of Life on the Streets of San Francisco*, 13 HASTINGS WOMEN'S L.J. 261, 272 (2002) ("Many courts have distinguished a person's homeless status from the acts committed because a person is homeless.").

[171] *See, e.g.*, *Martin*, 920 F.3d at 616 (concluding that cities criminalizing sleeping in public when no shelter space is available violates the Eighth Amendment); Pottinger v. City of Miami, 810 F. Supp. 1551, 1563-65 (S.D. Fla. 1992) (holding that arresting the homeless for life-sustaining activities like sleeping or sitting violates the Eighth Amendment).

II. RESOLVING CONFUSION OVER THE SCOPE OF THE STATUS CRIMES DOCTRINE

On December 16, 2019, the Supreme Court denied the City of Boise's petition to review *Martin v. City of Boise*.[172] Because the Supreme Court denied review without comment,[173] the Court still has not provided explicit guidance on how to apply the status crimes doctrine in situations where the punished conduct is inseparable from an individual's status.[174] As discussed above, this lack of guidance has led to split interpretations of *Robinson* and *Powell* amongst the lower courts.[175] This Note argues that the Ninth Circuit's interpretation of the status crimes doctrine is most in line with the evolution of Eighth Amendment jurisprudence. As such, the Supreme Court should adopt the view expressed by the Ninth Circuit.

A. Evolution of Eighth Amendment Jurisprudence

The Eighth Amendment of the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[176] In the 1950s, the Supreme Court observed that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[177]

However, in the early history of Eighth Amendment jurisprudence, the Supreme Court interpreted the amendment quite narrowly.[178] In the 1878 case *Wilkerson v. Utah*,[179] the defendant was convicted of first degree murder and was sentenced to death by firing squad.[180] He appealed his conviction to the Supreme Court, arguing that his death sentence violated the Eighth Amendment.[181] The Court affirmed the defendant's conviction.[182] The Court held that while it would be

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172 *Supreme Court Lets* Martin v. Boise *Stand*, *supra* note 37.

173 *Id.*

174 *See id.*

175 *See* discussion *supra* Parts I.B.1, I.B.2.

176 U.S. CONST. amend. VIII.

177 Trop v. Dulles, 356 U.S. 86, 101 (1958); *see also* Zachary Baron Shemtob, *From* Weems *to* Graham*: The Curious Evolution of Evolving Standards of Decency*, 49 CRIM. JUST. BULL. 1, 5 (2013).

178 *See* Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

179 *Id.*

180 *Id.* at 131.

181 *See id.*

182 *Id.* at 137.

difficult "to define with exactness the extent of [the Cruel and Unusual Punishment Clause] . . . it is safe to affirm that punishments of torture . . . are forbidden by the [Eighth Amendment]."[183]

Under this reading, the Constitution prohibited torture as a punishment. In 1878, the Supreme Court further defined torture in *In re Kemmler*.[184] The Court explained that "[p]unishments are cruel when they involve torture or a lingering death."[185] However, death alone was not considered a cruel punishment.[186] In the Court's view, torture implies something "inhuman or barbarous," which must be more serious than "the mere extinguishment of life."[187] This implies the Court would consider only the most egregious of punishments as cruel and unusual.

In 1910, the Supreme Court officially began to broaden the scope of the Eighth Amendment with *Weems v. United States*.[188] In *Weems*, the defendant was a public official who was convicted of intentionally falsifying official documents.[189] The defendant appealed his conviction, arguing that his sentence of fifteen years was cruel and unusual punishment.[190] The Supreme Court held that Weem's conviction was cruel and unusual because the term of the sentence was "cruel in its excess of imprisonment."[191] *Weems* is a landmark case because the Supreme Court acknowledged that the Eighth Amendment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[192]

In 1958, the Supreme Court expanded the meaning of the Cruel and Unusual Punishment Clause even further in *Trop v. Dulles*.[193] In *Trop*, the petitioner was stripped of his American citizenship for wartime desertion.[194] He appealed to the Supreme Court, seeking a declaratory

183 *Id.* at 135-36.

184 136 U.S. 436 (1890).

185 *Id.* at 447.

186 *See id.*

187 *Id.*

188 Weems v. United States, 217 U.S. 349 (1910); *see* Shemtob, *supra* note 177, at 3; Bethany Siena, Note, Kennedy v. Louisiana *Reaffirms the Necessity of Revising the Eighth Amendment's Evolving Standards of Decency Analysis*, 22 REGENT U. L. REV. 259, 262 (2009).

189 *Weems*, 217 U.S. at 357.

190 *See id.* at 358-59.

191 *Id.* at 377.

192 *Id.* at 378.

193 Trop v. Dulles, 356 U.S. 86 (1958); *see* Shemtob, *supra* note 177, at 3-4; Siena, *supra* note 188, at 262.

194 *Trop*, 356 U.S. at 88.

judgement that forfeiture of his citizenship was cruel and unusual punishment.[195] In its opinion, the Court continued to commit itself to a progressive reading of the Eighth Amendment.[196] The Court noted that while "[t]he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court," the underlying concept of "the Eighth Amendment is nothing less than the dignity of [all persons]."[197] Indeed, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[198] The Court used this logic to hold that punishment of denationalization violates the Eighth Amendment because it levies the "total destruction of the individual's status in organized society."[199] With this judgement, the Court definitively expanded the meaning of the Eighth Amendment to better reflect the values of society.[200]

The Supreme Court was wary of imputing its personal values to define "evolving standards of decency."[201] Many of the Justices believed that the states should ultimately decide what punishments are appropriate for criminal offenses.[202] As a result, the Court developed its "evolving standards of decency" test to provide guidelines for assessing punishment under the Eighth Amendment.[203] In applying this test, Professor William Berry explains that the Court first examines "the societal consensus with respect to the punishment at issue ('objective indicia')."[204] Such indicia includes the number of state and federal governments that implement that type of punishment.[205] If less than half of those jurisdictions authorize that punishment, the Court views this as an indication that "the societal standard might have moved away from [that] punishment."[206]

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195 *See id.* at 87-88.

196 *See* Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 408 (2011).

197 *Trop*, 356 U.S. at 99-100.

198 *Id.* at 101; *see also* Sigler, *supra* note 196, at 408 (explaining the reasoning of the *Trop* Court).

199 *Trop*, 356 U.S. at 101.

200 *See* Shemtob, *supra* note 177, at 4.

201 *See* William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 116 (2018).

202 *See id.*

203 *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311-12 (2002) (explaining how the Supreme Court determines whether a punishment is excessive); *see also* Berry III, *supra* note 201, at 116.

204 Berry III, *supra* note 201, at 117.

205 *Id.*

206 *Id.*; *see* Roper v. Simmons, 543 U.S. 551, 564 (2005); *Atkins*, 536 U.S. at 311-12.

Next, the Court ascribes its "own judgement," or "subjective indicia," to the type of punishment.[207] This component of the analysis especially considers the proportionality of the punishment — whether the punishment is excessive given the circumstances and nature of the crime.[208] For example, this analysis has led the Supreme Court to prohibit the death penalty for juvenile and intellectually disabled offenders.[209] This highlights the Court's trend of promoting the "evolving standards of decency" via the Eighth Amendment.

From *Weems* to *Trop*, the Supreme Court has expanded the scope of the Eighth Amendment.[210] The Court anchors its understanding of cruel and unusual by looking to what is acceptable in modern society.[211] The progression of the Eighth Amendment provides insight into how to resolve confusion caused by the status crimes doctrine.

B. Resolving Court Confusion by Following Martin*'s Precedent*

The evolution of the Supreme Court's jurisprudence supports the Ninth Circuit's interpretation of the status crimes doctrine. As established in *Trop*, the underlying principle of the Eighth Amendment is to uphold the "evolving standards of decency that mark the progress of a maturing society."[212] Accordingly, extending the status crimes doctrine to prevent criminal punishment for conduct intertwined with the status of being homeless can help preserve the dignity of one of the most vulnerable populations in society.

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[207] *See* Berry III, *supra* note 201, at 117.

[208] *See, e.g.*, Berry III, *supra* note 201, at 117-18 (explaining how the Supreme Court uses the proportionality principle in its Eighth Amendment analyses); William Hughes Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 FORDHAM L. REV. 639, 639 (1979) (providing an in-depth explanation of the proportionality principle).

[209] *See Roper*, 543 U.S. at 578 (holding that the Eighth Amendment forbids the death penalty for juvenile offenders where the offender was under the age of 18 when the crime was committed); *Atkins*, 536 U.S. at 321 (holding that execution of intellectually disabled offenders is unconstitutional); Berry III, *supra* note 201, at 118.

[210] *See generally* discussion *supra* Part II.A (describing the evolution of Eighth Amendment jurisprudence).

[211] *See* Berry III, *supra* note 201, at 109-10.

[212] Trop v. Dulles, 356 U.S. 86, 101 (1958).

1. The Evolution of the Eighth Amendment Supports the Ninth Circuit's Interpretation

Traditionally, American society characterized the homeless as lazy, immoral, and drunk.[213] The "dominant ideology" was that everyone in society "has an equal opportunity to succeed," so a homeless person's failure to stay housed was their own fault.[214] Even former President Ronald Reagan expressed this sentiment, saying "one problem that we've had . . . is the people who are sleeping on the grates, the homeless who are homeless, you might say, by choice."[215] President Reagan defended his position by claiming that numerous ads published by employers showed that the homeless were choosing to avoid gainful employment.[216] These attitudes have also been reflected in judicial opinions, with some courts going as far as to describe the homeless as "derelicts,"[217] "inebriates and transients."[218]

In recent decades, society has evolved its understanding and begun to recognize that most cases of homelessness are involuntary.[219] Recent scholarly literature identifies numerous factors that contribute to

[213] *See* Barrett A. Lee, Sue Hinze Jones & David W. Lewis, *Public Beliefs About the Causes of Homelessness*, 69 SOC. FORCES 253, 254 (1990). *See generally* Casey Garth Jarvis, *Homelessness: Critical Solutions to a Dire Problem; Escaping Punitive Approaches by Using a Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation*, 35 W. ST. U. L. REV. 407, 414-18 (2008) (presenting a comprehensive historical perspective on homelessness).

[214] Lee et al., *supra* note 213, at 254 (citing JOAN HUBER & WILLIAM H. FORM, INCOME AND IDEOLOGY: AN ANALYSIS OF THE AMERICAN POLITICAL FORMULA (1973)).

[215] Television Interview by David Hartman, Host, ABC's *Good Morning America*, with President Ronald Reagan in Washington D.C. (Jan. 30, 1984); Reagan Library, *President Reagan Interviewed by ABCs Good Morning America's David Hartman in Oval Office on January 30, 1984*, YOUTUBE (Aug. 15, 2018), https://www.youtube.com/watch?v=8lSuc6_i79Q [https://perma.cc/2VJT-ZUH2].

[216] *See* Steven V. Roberts, *Reagan on Homelessness: Many Choose to Live in the Streets*, N.Y. TIMES (Dec. 23, 1988), https://www.nytimes.com/1988/12/23/us/reagan-on-homelessness-many-choose-to-live-in-the-streets.html [https://perma.cc/2JLV-TA38].

[217] *Ensuring the Right to Shelter: The First Court Decision in* Callahan v. Carey *Requiring the Provision of Shelter for Homeless Men in New York City*, COALITION FOR HOMELESS (Dec. 5, 1979), https://www.coalitionforthehomeless.org/wp-content/uploads/2014/08/CallahanFirstDecision.pdf [https://perma.cc/L2S5-E4U6]; *see* Wes Daniels, *"Derelicts," Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 698 (1997).

[218] Seeley v. State, 655 P.2d 803, 807 (Ariz. Ct. App. 1982); *see also* Daniels, *supra* note 217, at 697-98 (discussing how courts have portrayed homeless people).

[219] *See* Farida Ali, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL'Y 197, 202-03 (2014); *see, e.g.*, Kieschnik, *supra* note 25, at 1591-92.

homelessness, such as shortages of affordable housing, unemployment, and absence of social support.[220] Further, the National Law Center on Homelessness and Poverty identifies "insufficient income and lack of affordable housing [as] the leading causes of homelessness."[221] For example, in 2012, there were only 5.8 million affordable rental units for the ten million people with "extremely low incomes."[222] While there are certainly instances where "personal deficiencies"[223] can contribute to homelessness, "[t]he important lesson to take from the literature is simple: homelessness is rarely, if ever, a choice."[224] In light of research showing that homelessness is not a choice, the Ninth Circuit's application of the status crimes doctrine in *Martin* furthers the principles undergirding the Eighth Amendment. Changes in societal attitudes towards the homeless reflect the growing standards of decency in American society.[225]

From a historical perspective, social stigmatization of the poor has persisted since the Middle Ages.[226] Wealthier citizens ostracized the poor from society and significantly diminished their rights.[227] Many in society blamed the poor for their situation.[228] Indeed, some policies even required individuals that received public assistance to wear distinctive clothing as a public "mark of shame."[229]

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220 *See* Ali, *supra* note 219, at 202.

221 NAT'L HOMELESSNESS LAW CTR., HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES (2015), https://nlchp.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf [https://perma.cc/Q665-TUQ8].

222 *Id.*

223 Elizabeth M. M. O'Connor, Note, *The Cruel and Unusual Criminalization of Homelessness: Factoring Individual Accountability into the Proportionality Principle*, 12 TEX. J. ON C.L. & C.R. 233, 239 (2007) ("Mental illness and substance abuse are two personal deficiencies most associated with homelessness.").

224 *Id.*

225 *See* Jack Tsai, Crystal Y.S. Lee, Jianxun Shen, Steven M. Southwick & Robert H. Pietrzak, *Public Exposure and Attitudes About Homelessness*, 47 WILEY J. CMTY. PSYCHOL. 76, 76 (2018).

226 Jo Phelan, Bruce G. Link, Robert E. Moore & Ann Stueve, *The Stigma of Homelessness: The Impact of the Label "Homeless" on Attitudes Toward Poor Persons*, 60 SOC. PSYCHOL. Q. 323, 323 (1997); *see* Jarvis, *supra* note 213, at 412.

227 *See* Phelan et al., *supra* note 226, at 323.

228 *Id.*

228 *Id.*

229 *Id.* For example, under the Poor Act 1697, any person who received welfare had to wear a red or blue cloth with the letter "P" on their right shoulder. *See* Ruthann Robson, *Beyond Sumptuary: Constitutionalism, Clothes, and Bodies in Anglo-American Law, 1215–1789*, 2 BRIT. J. AM. LEGAL. STUD. 477, 483 (2013).

Generally speaking, society's attitude toward the poor has come a long way.[230] For example, Jack Tsai and his colleagues found that in 2018, Americans were generally concerned about homeless individuals.[231] In fact, 90% of those surveyed reported that they feel sad and compassionate for homeless people.[232] Additionally, 70% of respondents indicated that homeless people should have the right to sleep in public places overnight.[233] Another study found that 62% of those surveyed were angry that there are so many homeless people in a wealthy country such as the United States.[234] These statistics illustrate America's clear social mores with respect to homelessness. By extending protections afforded to the homeless, the Ninth Circuit's ruling in *Martin* follows the trajectory of the Supreme Court's Eighth Amendment jurisprudence.[235]

The *Martin* court explained that there are certain "life-sustaining" activities that are unavoidable.[236] As human beings, it is inevitable that we all must sit, rest, and sleep. Accordingly, punishing an individual for acts that are "unavoidable consequences of being homeless" surely must violate the Eighth Amendment.[237] Such punishment treads on the dignity of mankind, which clearly violates the principles espoused in *Trop*.[238] The Supreme Court should adopt the *Martin* court's interpretation of the status crimes doctrine to not only reflect society's beliefs, but also to protect the dignity of homeless individuals in the United States. Further, this interpretation follows the evolutionary principles of the Supreme Court's Eighth Amendment jurisprudence.[239]

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230 *See* Phelan et al., *supra* note 226, at 324; *see also* Tsai et al., *supra* note 225, at 76.

231 *See* Tsai et al., *supra* note 225, at 76.

232 *See id.* at 82.

233 *See id.*

234 *See* Caroline J. Tompsett, Paul A. Toro, Melissa Guzicki, Manuel Manrique & Jigna Zatakia, *Homelessness in the United States: Assessing Changes in Prevalence and Public Opinion 1993–2001*, 37 AM. J. CMTY. PSYCHOL. 47, 50 (2006).

235 *Cf.* Trop v. Dulles, 356 U.S. 86, 101 (1958) (articulating that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

236 *See* Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019).

237 *See id.*

238 *See Trop*, 356 U.S. at 100.

239 *See* discussion *supra* Part II.A.

2. International Treatment of the Homeless

International law and policies are also instructive on how the United States should evolve its treatment of the homeless.[240] Many European countries, such as Belgium, Denmark, and Finland, do not have, or have repealed, laws similar to the one at issue in *Martin*.[241] For example, in Finland, the dominant belief is that every person has the right to temporarily camp on land so long as the use is harmless.[242] While there are some areas in Helsinki that do not permit unauthorized camping, the city does provide designated areas where the homeless can stay.[243] Further, in England, sleeping in public is only a criminal offense if a person has been offered "free" shelter, but refuses the accommodation.[244] The fact that there are limitations on when sleeping in public constitutes an offense implicitly demonstrates restraint in policing the homeless.

[240] For example, the Council of Europe, the continent's leading human rights organization, introduced a provision in the Revised European Social Charter that explicitly states that "[e]veryone has the right to housing." *See* European Social Charter (Revised) art. 31, May 3, 1996, C.E.T.S. No. 163; *see also* GUILLEM FERNÀNDEZ EVANGELISTA, MEAN STREETS: A REPORT ON THE CRIMINALISATION OF HOMELESSNESS IN EUROPE 163-64 (2013) (providing additional background information about the Revised European Social Charter). *See generally Chart of Signatures and Ratifications of Treaty 163, European Social Charter (Revised)*, COUNCIL EUR., https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p_auth=Czvqos5a (last updated Sept. 13, 2020) [https://perma.cc/92FW-CME8] (identifying the thirty-four European States that have signed and ratified this Charter).

[241] *See* LATHAM & WATKINS LLP, CRIMINALIZATION OF HOMELESSNESS IN DENMARK 3-4 (2012), http://www.housingrightswatch.org/sites/default/files/2012-12-11_RPT_DENMARK_anti_soc_laws_en.pdf [https://perma.cc/YM3W-NSPE]; WHITE & CASE LLP, CRIMINALIZATION OF HOMELESSNESS IN BELGIUM 1-2 (2012), http://www.housingrightswatch.org/sites/default/files/BELGIUM%20-%20Report%20on%20criminalization%202012-2013_0.pdf [https://perma.cc/D222-PPNK]; WHITE & CASE LLP, CRIMINALIZATION OF HOMELESSNESS IN FINLAND 3-4 (2012), http://www.housingrightswatch.org/sites/default/files/2012-12-11_RPT_FINLAND_anti_soc_laws_en.pdf [https://perma.cc/E7C3-64G3].

[242] *See* CRIMINALIZATION OF HOMELESSNESS IN FINLAND, *supra* note 241, at 3; YMPÄRISTÖMINSTERIÖ MILJÖMINISTERIET (MINISTRY ENV'T.), EVERYMAN'S RIGHT: LEGISLATION AND PRACTICE 1, 5 (2019), https://www.ym.fi/en-US/Latest_News/Publications/Everymans_right_in_Finland(4484) [https://perma.cc/9ES4-N6E7].

[243] *See* CRIMINALIZATION OF HOMELESSNESS IN FINLAND, *supra* note 241, at 3-4.

[244] *See* Vagrancy Act 1935, 25 & 26 Geo. 5 c. 20, § 1 (Eng.); ARNOLD & PORTER LLP, CRIMINALIZATION OF HOMELESSNESS IN ENGLAND AND WALES 2 (2012), http://www.housingrightswatch.org/sites/default/files/2012-12-11_RPT_ENGLANDWALES_anti_soc_laws_en_sj_edits_2.pdf [https://perma.cc/YK4N-A9RT].

Moreover, European countries have achieved success by implementing policies that do not criminalize the homeless.[245] For example, Finland is one the world's leading models in reducing homelessness.[246] In recent years, "Finland has been the only country in Europe where homelessness has decreased."[247] Finland achieved this success through its "Housing First" program.[248] This program rethinks society's approach to solving homelessness by immediately providing permanent housing for the homeless.[249] The belief is that resolving underlying health and social problems is easier if an individual has a permanent home.[250] Finland also offers social support services in conjunction with permanent housing.[251] These services help those with mental health and substance abuse issues,[252] while also counseling individuals on financial literacy.[253] This program has been very successful.[254] Thirty years ago, there were nearly 18,000 homeless people in Finland.[255] In 2018, there were 6,500 homeless individuals.[256]

[245] *See, e.g.*, Jon Henley, *'It's a Miracle': Helsinki's Radical Solution to Homelessness*, GUARDIAN (June 3, 2019, 3:00 AM), https://www.theguardian.com/cities/2019/jun/03/its-a-miracle-helsinkis-radical-solution-to-homelessness [https://perma.cc/5RMN-55YY] (detailing the social policy that led to Finland's success in reducing homelessness).

[246] *See* Fanny Malinen, *Finland's 'Housing First' Policy Proves that Homelessness Is Avoidable*, EQUAL TIMES (Sept. 4, 2019), https://www.equaltimes.org/finland-s-housing-first-policy#.Xx4M2R17mmk [https://perma.cc/Q94N-XTHB]; Mat Trewern, *The City with No Homeless on Its Streets*, BBC NEWS (Jan. 31, 2019), https://www.bbc.com/news/uk-england-46891392 [https://perma.cc/2V9E-V6WA]; *Finland*, HOUS. FIRST EUR. HUB, https://housingfirsteurope.eu/countries/finland/ (last visited Jan. 20, 2020) [https://perma.cc/3FVT-5FRA] [hereinafter *Finland*].

[247] *Finland*, *supra* note 246.

[248] *See* Alex Gray, *Here's How Finland Solved Its Homelessness Problem*, WORLD ECON. FORUM (Feb. 13, 2018), https://www.weforum.org/agenda/2018/02/how-finland-solved-homelessness/ [https://perma.cc/76TF-ZLGJ].

[249] *See id.*

[250] *Id.*; *see* Malinen, *supra* note 246 ("The idea is simple: everyone is entitled to somewhere to live, even people with complex psychosocial, health and financial issues such as addiction or poor credit ratings. The theory is that it is easier to tackle the multiple issues often faced by a person experiencing homelessness if that person has a stable home.").

[251] Gray, *supra* note 248.

[252] Henley, *supra* note 245.

[253] Gray, *supra* note 248.

[254] *Finland Only EU Country to Reduce Homelessness as Problem Grows Across Europe*, YLE (Apr. 12, 2018, 4:07 PM), https://yle.fi/uutiset/osasto/news/finland_only_eu_country_to_reduce_homelessness_as_problem_grows_across_europe/10156623 [https://perma.cc/EW3S-NC2Y].

[255] *Id.*

[256] *See id.*

Without a doubt, government sponsored permanent housing is an expensive solution to homelessness. However, Finland's success illustrates the effectiveness of taking a more humanitarian approach toward solving this crisis.[257] This helps to rebut the presumption that criminalizing the homeless is a viable solution to resolving the homelessness cycle.[258]

Poignantly, the Commissioner for Fundamental Rights in Hungary initiated procedures to annul laws that criminalize "habitual residence in public places."[259] The Commissioner argued that "such provisions unnecessarily and disproportionately restrict the rights of the affected persons without any justifiable reason."[260] Accordingly, such a law violates "the right to life and human dignity."[261] These examples demonstrate ways in which other Western countries grapple with homelessness. Importantly, these countries attempt to address the issue while trying to uphold fundamental principles similar to those advocated by the Supreme Court in its Eighth Amendment jurisprudence.[262]

C. Counterargument: Concerns for Public Health and Safety

A common counterargument to expanding the status crimes doctrine to the homeless is that it will ultimately prevent cities from enforcing

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[257] *See* Gray, *supra* note 248.

[258] *See* discussion *infra* Part III.

[259] *See* WHITE & CASE LLP, CRIMINALIZATION OF HOMELESSNESS IN HUNGARY 4 (2012), http://www.housingrightswatch.org/sites/default/files/2012-12-11_RPT_HUNGARY_anti_soc_laws_en.pdf [https://perma.cc/2C3K-DLSF] [hereinafter CRIMINALIZATION OF HOMELESSNESS IN HUNGARY]. Interestingly, the laws in question contained an exception that prevented local governments from enforcing the regulation if they did not provide appropriate shelter for the homeless. *See* Rita Bence & Éva Tessza Udvarhelyi, *The Growing Criminalization of Homelessness in Hungary – A Brief Overview*, 7 EUR. J. HOMELESSNESS 133, 137-38 (2013).

[260] CRIMINALIZATION OF HOMELESSNESS IN HUNGARY, *supra* note 259, at 4.

[261] Article XV of the Hungarian Constitution guarantees fundamental rights without discrimination on the basis of one's status. MAGYARORSZÁG ALPATÖREVÉNY [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖREVÉNY; *see* CRIMINALIZATION OF HOMELESSNESS IN HUNGARY, *supra* note 259, at 4; EVANGELISTA, *supra* note 240. On November 14, 2012, the Hungarian Constitutional Court annulled legislation that made it an offence to live in public areas. *See* Alkotmánybíróság (AB) [Constitutional Court] Nov. 14, 2012, 38/2012. (XI. 14.); Bence & Udvarhelyi, *supra* note 259, at 138.

[262] *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100 (1958) (holding "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man"); Weems v. United States, 217 U.S. 349, 377 (1910) (holding a Philippine law is cruel and unusual, and therefore its "punishments come under the condemnation of the Bill of Rights"); *see also* Shemtob, *supra* note 177, at 5.

public health and safety ordinances.[263] In fact, the dissent in *Martin* espoused this point of view.[264] Judge Smith argued that the majority's holding goes beyond preventing local governments from enforcing public sleeping laws until they provide beds for every homeless person.[265] The dissenting judge believed that *Martin* would prevent cities from enforcing more serious public safety laws like those prohibiting public defecation and urination.[266]

Proponents of extending the status crimes doctrine, however, primarily argue that the doctrine should only apply to "harmless" conduct.[267] For example, the *Pottinger* court argued that "arresting homeless people for *harmless* acts . . . punishes them for being homeless."[268] As Hanna Kieschnik argues, the *Pottinger* court found it compelling that the homeless plaintiffs were conducting "harmless" or "inoffensive" behavior when they were arrested.[269] Further, the *Martin* court emphasized the fact that their holding is narrow since cities are only prohibited from enforcing sleeping ordinances when there is not enough space in shelters.[270] The Ninth Circuit defined unavoidable consequences of being homeless as "sitting, lying, or sleeping in the streets."[271] The court conspicuously left out any other conduct, such as public urination, that the dissent argued would now be permissible.[272] This suggests that the status crimes doctrine only extends to the innocuous conduct associated with homelessness.

Critics also argue that the *Martin* decision will prevent cities from enforcing basic health and safety ordinances against homeless individuals.[273] In the wake of the *Martin* decision, however, the city of Sacramento has changed its approach to keeping areas of the city

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[263] *See, e.g.*, Scott Greenstone, *How a Federal Court Ruling on Boise's Homeless Camping Ban Has Rippled Across the West*, IDAHO STATESMEN (Sept. 16, 2019, 5:00 AM), https://www.idahostatesman.com/news/local/community/boise/article235065002.html [https://perma.cc/UGK3-UB37] (explaining how *Martin* makes it harder for cities to enforce criminal laws against homeless people).

[264] *See* Martin v. City of Boise, 920 F.3d 584, 590 (9th Cir. 2019) (Smith, J., dissenting).

[265] *See id.*

[266] *See id.*

[267] *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992); Kieschnik, *supra* note 25, at 1584.

[268] *Pottinger*, 810 F. Supp. at 1564 (emphasis added).

[269] Kieschnik, *supra* note 25, at 1584.

[270] *See Martin*, 920 F.3d at 617.

[271] *Id.*

[272] *See id.* at 590 (Smith, J., dissenting).

[273] *See* discussion *supra* Part II.C.

clean.[274] On the American River Parkway, a recreational area located in Sacramento, California, law enforcement significantly increased citations for offenses like littering.[275] This action presumably still falls within the spirit of *Martin* since trash disposal is arguably not a "life-sustaining activity" in the way that sleeping or eating is.[276] Correspondingly, *Martin* has also encouraged park rangers, as well as citizens, to clean up abandoned camp sites.[277] This response is still within the spirit of *Martin* because it does not punish harmless conduct derivative of status.[278] It also allows cities, like Sacramento, to maintain efforts to keep their cities safe and clean.

Further, whether the Ninth Circuit's interpretation of the status crimes doctrine applies is highly fact specific.[279] This means that cities can still enforce ordinances aimed at promoting public health and safety so long as homeless individuals have the opportunity to comply with such ordinances.[280] For example, in 2000, the Eleventh Circuit upheld an ordinance that prohibited camping in public in *Joel v. City of Orlando*.[281] A homeless person filed suit alleging that the Orlando ordinance violated his Eighth Amendment rights.[282] The Eleventh Circuit emphasized that there was "unrefuted" evidence that local homeless shelters had adequate space when police cited the plaintiff.[283] This compelled the court to hold that the ordinance did not punish involuntary behavior because the plaintiff "had an opportunity to comply with the ordinance."[284] The Eleventh Circuit's holding demonstrates that cities are still able to constitutionally regulate where camping occurs so long as there is adequate shelter space.[285]

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[274] *See* Alexandra Yoon-Hendricks, *Citations Soar for Homeless on American River Parkway After Ruling Halts Bans on Camping*, SACRAMENTO BEE (Apr. 8, 2019, 2:42 PM), https://www.sacbee.com/news/local/homeless/article228738554.html [https://perma.cc/MJ7B-SP6X].

[275] *Id.*

[276] *Cf. Martin*, 920 F.3d at 617 (explaining that eating and sleeping are life-sustaining activities).

[277] *See* Yoon-Hendricks, *supra* note 274.

[278] *Cf. Martin*, 920 F.3d at 617 (explaining that laws punishing the "state of being 'homeless in public spaces'" punish conduct that is inseparable from status).

[279] *Cf. id.* (explaining that the holding of the court is "narrow" because it only applies to specific activities in which the homeless engage).

[280] *See, e.g.*, Kieschnik, *supra* note 25, at 1595.

[281] *See* Joel v. City of Orlando, 232 F.3d 1353, 1355 (11th Cir. 2000).

[282] *Id.*

[283] *See id.* at 1362.

[284] *Id.*

[285] *See id.*

The *Martin* court used similar language in its opinion nearly twenty years later, holding that city ordinances cannot be enforced when there are an insufficient number of beds.[286] This implies that cities may still enforce public health and safety ordinances for "harmless" conduct so long as homeless individuals can reasonably comply with the ordinance.[287]

III. POLICY IMPLICATIONS OF THE NINTH CIRCUIT'S INTERPRETATION OF *ROBINSON*

The Ninth Circuit's ruling in *Martin v. City of Boise* expanded the status crimes doctrine to include protections for conduct derivative of status.[288] This ruling utilizes the principle that cities cannot punish homeless individuals for involuntary conduct that is derivative of their status.[289] By protecting the fundamental dignity of homeless people, the Ninth Circuit's ruling could help many in society break free from the cycle of homelessness.[290]

Sociologists describe the cycle of homelessness as the result of economic hardship, isolation, and social dislocation.[291] Robert Coates explains the cycle of homelessness by using individuals in the city of San Diego as an example.[292] Coates focused on how criminalizing the homeless perpetuates their dire condition.[293] In his words, homeless people are on the streets because they are either mentally ill, addicted to substances, or are poverty-stricken.[294] Cities like San Diego try to solve the homelessness crisis by punishing behaviors caused by homelessness.[295] When a homeless person is arrested, Coates argues

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[286] Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019).

[287] *Cf. Joel*, 232 F.3d at 1362 (explaining that the Orlando's ordinance is constitutional as applied to the homeless when there is adequate shelter space available).

[288] *See* discussion *supra* Part II.C.

[289] *See* discussion *supra* Part II.C. For a deeper discussion of "quality of life crimes" that criminalize the homeless and fuel the cycle of homelessness, see John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion*, 44 ST. LOUIS U. L.J. 811, 812-15 (2000).

[290] *See* Jennifer R. Wolch, Michael Dear & Andrea Akitaw, *Explaining Homelessness*, 54 J. AM. PLAN. ASS'N 443, 443 (1988); Nordberg, *supra* note 170, at 275.

[291] Wolch et al., *supra* note 290.

[292] Robert C. Coates, *Ending Chronic Homelessness in America's Major Cities — The Justice Systems' Duty*, 42 U.S.F. L. REV. 427, 442 (2007).

[293] *Id.* at 441.

[294] *Id.*

[295] *See id.* at 441-42.

that homeless individuals do not have the capacity to appear in court.[296] In turn, this "precludes the court from helping them access desperately needed services such as employment, housing, public assistance, and treatment programs."[297]

Coates then provides a more detailed illustration of how criminalizing the homeless traps them in an inescapable cycle.[298] Once a homeless person is cited for an offense, such as illegal camping, they must pay a fine.[299] If the individual does not pay the fine, which many homeless individuals financially cannot do, they are faced with the possibility of a jail sentence and an even steeper fine.[300] Often times, because many homeless individuals fail to pay the fine or otherwise appear in court to address the citation, the court will issue a bench warrant authorizing the homeless individual's arrest to be brought in front of the judge.[301] For those who do appear, the court typically sentences these individuals to work off their fines through public service "with the vain expectation that this will resolve their homelessness."[302] Since there is no meaningful intervention to address the root cause of an individual's homelessness, the "grisly" cycle continues.[303]

Further, once an individual has an arrest on their record, it can be even more difficult for that person to find gainful employment, housing, or access to other social services.[304] For those who do manage to find

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[296] *Id.* at 441.

[297] *Id.* California has established the homeless court program ("HCP"), which "leverage[s] the authority of courts and the work of homeless service agencies to both intervene and help prevent the revolving-door syndrome that often leads indigent, mentally ill, and/or substance-abusing homeless people into a vicious cycle from the street, to jail, and back into the courts." JUDICIAL COUNCIL OF CAL., HOMELESS AND COMMUNITY COURT BLUEPRINT 2 (2020), https://www.courts.ca.gov/documents/homeless-community-court-blueprint.pdf [https://perma.cc/J2LM-NBBE]. "Providing community outreach and assistance to homeless individuals with outstanding court cases is a primary focus because these types of cases tend to escalate when homeless defendants fail to appear in court." *Id.* at 4.

[298] *See* Coates, *supra* note 292, at 441-42.

[299] *See id.* at 442.

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Id.*; *see* Ali, *supra* note 219, at 230.

[304] ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, "FORCED INTO BREAKING THE LAW": THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 2 (2016), https://law.yale.edu/sites/default/files/area/center/schell/criminalization_of_homelessness_report_for_web_full_report.pdf [https://perma.cc/P4PS-4DU6] [hereinafter CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT].

employment, an arrest can cost them their job.[305] This continues the cycle of homelessness by forcing those trapped in the cycle to again break the law in order to survive.[306] For example, after being arrested for sleeping in public, an individual released from jail still does not have adequate shelter, so they must once again break the law by sleeping outside.[307] This cycle continues absent an intervening cause, which makes it harder and harder for a homeless individual to overcome the obstacles that initially placed them in the cycle.[308]

In light of the Supreme Court denying certiorari for *Martin*, the Ninth Circuit's analysis of the status crimes doctrine should serve as an example to the other Circuits for preventing individuals from becoming trapped in the cycle of homelessness.[309] Further, adopting this interpretation will help advance the standards of human decency embedded within the principles of the Eighth Amendment.[310] *Martin* extends the interpretation of the status crimes doctrine to prohibit the state from punishing involuntary conduct that is derivative of an individual's status.[311] Although the *Martin* court's holding is "narrow,"[312] future court opinions that follow the Ninth Circuit's precedent can add further protections to the homeless for their "harmless" conduct.[313]

Many American cities continue to punish homeless individuals for doing what they need to do in order to survive.[314] The National Law Center on Homelessness and Poverty found that 65% of surveyed cities prohibit loitering, or "loafing," in public places.[315] Further, in October

[305] MARINA FISHER, NATHANIEL MILLER & LINDSAY WALTER, CALIFORNIA'S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE 28 (2015).

[306] CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT, *supra* note 304, at 15.

[307] *Id.*; *see* Terry Skolnik, *Homelessness and the Impossibility to Obey the Law*, 43 FORDHAM URB. L.J. 741, 750-51 (2016).

[308] *See* CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT, *supra* note 304, at 18.

[309] *Cf.* Martin v. City of Boise, 920 F.3d 584, 615 (9th Cir. 2019) (describing the substantive limits on what the government can criminalize).

[310] *See* discussion *supra* Part II.B.1.

[311] *See Martin*, 920 F.3d at 616. For further discussion on foreign countries' restraint in criminalizing homelessness, see *supra* Parts II.B.2, II.C.

[312] *See Martin*, 920 F.3d at 617.

[313] For a discussion of "harmless" conduct, see Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992); Kieschnik, *supra* note 25, at 1582.

[314] NO SAFE PLACE, *supra* note 7, at 7; *see* NAT'L COAL. FOR THE HOMELESS & NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 16-18 (2006), https://www.nationalhomeless.org/publications/crimreport/report.pdf [https://perma.cc/JRQ5-5VYW].

[315] NO SAFE PLACE, *supra* note 7, at 8.

2014, the National Coalition for the Homeless reported that twenty-one cities had passed legislation prohibiting people from giving food to the homeless.[316] Laws like these are counterproductive, and serve to further dehumanize an already vulnerable population.[317]

Extending *Martin* could help to protect homeless individuals from being targeted for doing what they need to do in order to survive.[318] This can help homeless people break free from the cycle of poverty. The Policy Advocacy Clinic at Berkeley Law explains that an arrest record can restrict a homeless person's access to public assistance.[319] Individuals who are incarcerated can have their Supplemental Security Income[320] suspended.[321] Additionally, public housing authorities[322] can deny a person's application based on arrest records.[323] The effect of punishing a homeless person for the "crime" of sitting not only diminishes their trust in society, but prolongs the cycle of homelessness.[324] Application of *Martin* to laws of this sort can help prevent this cycle from beginning in the first place. By extending *Martin*, the Eighth Amendment can ensure that no homeless individual will be

316 NAT'L COAL. FOR THE HOMELESS, SHARE NO MORE: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE IN NEED 4 (2014), https://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf [https://perma.cc/3VWW-54RL].

317 *See* AM. CIVIL LIBERTIES UNION OF OR., DECRIMINALIZING HOMELESSNESS: WHY RIGHT TO REST LEGISLATION IS THE HIGH ROAD FOR OREGON 19 (2017), https://aclu-or.org/sites/default/files/field_documents/aclu-decriminalizing-homelessness_full-report_web_final.pdf [https://perma.cc/5LBP-QF8J]; Ali, *supra* note 219, at 230 ("Criminalization measures also *increase criminality among homeless persons*.").

318 *Cf.* Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019) (arguing that for homeless people, "[a]voiding public places when engaging in this otherwise innocent conduct is . . . impossible").

319 FISHER ET AL., *supra* note 305.

320 Supplemental Security Income ("SSI") is a federal income supplement program "designed to help aged, blind, and disabled people, who have little or no income . . . [by] provid[ing] cash to meet basic needs for food, clothing, and shelter." *Social Security Program Rules*, SOC. SECURITY ADMIN., https://www.ssa.gov/ssi/ (last visited Sept. 19, 2020) [https://perma.cc/EEM2-V4ME].

321 FISHER ET AL., *supra* note 305.

322 The U.S. Department of Housing and Urban Development ("HUD") administers federal funds that help provided decent and affordable housing for low-income families, the elderly, and persons living with disabilities. Public housing authorities are local agencies that manage these housing programs. *See Public Housing Authorities*, U.S. DEP'T HOUSING & URB. DEV., http://hudgis-hud.opendata.arcgis.com/datasets/public-housing-authorities (last updated Sept. 18, 2020) [https://perma.cc/5F8A-SHMN].

323 FISHER ET AL., *supra* note 305.

324 *Id.* at 29.

punished for their involuntary, innocent conduct.[325] By preventing homeless individuals from accumulating an arrest record, these individuals stand a better chance of retaining employment and having access to public services.[326] Ultimately, the *Martin* decision has the potential to help break the cycle of poverty and homelessness. This outcome would surely help promote human dignity within the spirit of the Eighth Amendment.[327]

Many critics argue that increasing protections and assistance to the homeless might actually do more harm than good.[328] Cities often use criminalization methods in order to demonstrate a zero-tolerance policy towards the homeless.[329] Advocates of this position argue that well-intentioned policies to support the homeless actually enable the homeless to remain unsheltered.[330] For example, a contributor to Business Insider argues there are "homeless people who will change their [ways] and get off the streets real quick" if people simply stopped giving money to the homeless.[331]

Further, Robert Marbut, a "homelessness consultant," argues that for "moral and fiscal reasons, homelessness must become an unacceptable

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[325] *Cf.* Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019) (holding that the Eighth Amendment prohibits criminalizing sleeping in public when an individual has no place else to go).

[326] *See* FISHER ET AL., *supra* note 305, at 28.

[327] *See* Trop v. Dulles, 356 U.S. 86, 100 (1958).

[328] *See* Amy Taxin & Geoff Mulvihill, *Don't Help the Homeless, Critics Say - It Hurts Them*, RENO GAZETTE J. (Dec. 28, 2017, 1:28 PM), https://www.rgj.com/story/news/2017/12/28/dont-help-homeless-critics-say-hurts-them/988504001/ [https://perma.cc/2FVD-M7P9] [hereinafter *Don't Help the Homeless*] (arguing that providing homeless individuals with basic supplies enables the homeless to remain unsheltered); Austin Westfall, *Bakersfield Officials Discourage Homeless Handouts*, 23ABC NEWS BAKERSFIELD (Sept. 6, 2019, 11:28 PM), https://www.turnto23.com/news/local-news/bakersfield-officials-discourage-homeless-handouts [https://perma.cc/GQ5J-HBBR] (reporting that the mayor of Bakersfield, California, claimed that "[h]andouts don't help"); Opinion, *Homeless Rights Bill is Wrong*, L.A. TIMES (Jan. 11, 2013, 12:00 AM), https://www.latimes.com/opinion/editorials/la-xpm-2013-jan-11-la-ed-homeless-bill-of-rights-20130111-story.html [https://perma.cc/R9YS-QHKS] (criticizing a proposed California bill that would afford greater protections to individuals experiencing homelessness).

[329] *Decriminalizing Homelessness*, HUD EXCHANGE, https://www.hudexchange.info/homelessness-assistance/alternatives-to-criminalizing-homelessness (last visited Sept. 23, 2020) [https://perma.cc/SHA6-BGJZ].

[330] *See* Taxin & Mulvihill, *Don't Help the Homeless*, *supra* note 328.

[331] Charlie Pabst, *Why I Don't Give Money to Homeless People*, BUS. INSIDER (Oct. 2, 2014, 9:05 AM), https://www.businessinsider.com/why-i-dont-give-money-to-homeless-people-2014-10 [https://perma.cc/8D4Y-BH64].

condition that is not tolerated in [America]."[332] He believes that there are not enough consequences for the "negative" behaviors of homelessness.[333] In his view, activities like pan-handling and "street feeding" need to be stopped because these activities "increase and promote homelessness."[334] In short, supporters of criminalization tactics believe that such measures can actually help resolve the homelessness crisis.[335]

As scholars have pointed out, current criminalization policies, which are now likely unenforceable under the *Martin* ruling, are likely doing more harm than good.[336] Often times, the premise behind criminalizing the homeless is that one must resolve their underlying issues before they can achieve permanent housing.[337] However, studies indicate that policies seeking to solve homelessness through criminalization actually end up keeping individuals trapped in the cycle of poverty.[338] Accordingly, using the status crimes doctrine to decriminalize aspects of homelessness can help the homeless break free from this cycle. Finland, as discussed previously, is an idyllic model of this achievable goal.[339]

CONCLUSION

In 1962, the Supreme Court announced the status crimes doctrine, declaring that an individual cannot be punished purely on the basis of

[332] ROBERT MARBUT, HOMELESS SERVICES GAP ANALYSIS OF KEY WEST AND MONROE COUNTY 24-26, (2013) http://shalkw.org/wp-content/uploads/2013/08/KeyWestPhaseIFindingsRportJuly152013-4.pdf.

[333] *See id.*

[334] *See id.*

[335] *See Decriminalizing Homelessness*, *supra* note 329 (noting how city officials use criminalization measures to broadcast a "zero-tolerance approach" towards homelessness); *cf.* Trevor Bach, *Will Fines and Jail Time Fix the Homelessness Crisis?*, U.S. NEWS (Oct. 7, 2019, 1:25 PM), https://www.usnews.com/news/cities/articles/2019-10-07/us-cities-are-increasingly-cracking-down-on-homelessness [https://perma.cc/E4JK-ZRZF] ("Research shows that in recent years the criminalization [of the homeless] trend has mostly intensified . . . .").

[336] *See, e.g.*, FISHER ET AL., *supra* note 305, at 29 ("By prolonging the cycle of poverty, the criminalization of homelessness ensures that many people remain homeless."); CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT, *supra* note 304, at 15 (explaining many homeless individuals are forced into breaking the law just to survive).

[337] Alex Gray, *Here's How Finland Solved Its Homelessness Problem*, WORLD ECON. FORUM (Feb. 13, 2018), https://www.weforum.org/agenda/2018/02/how-finland-solved-homelessness/ [https://perma.cc/AJZ8-XVUQ].

[338] *See supra* note 336.

[339] *See supra* Part II.B.2.

their status.[340] Following this ruling, lack of clear guidance in the application of the status crimes doctrine has led to confusion amongst many lower courts.[341] Out of the different interpretations of the status crimes doctrine that emerged since the status crimes doctrine was first declared, the Ninth Circuit's approach in *Martin v. City of Boise* most closely follows the Supreme Court's Eighth Amendment jurisprudence.[342]

By denying review of *Martin*, the Supreme Court has allowed the Ninth Circuit to continue to provide protection for a large portion of America's homeless population. However, this also means that the Supreme Court has not clarified any of the uncertainty surrounding the status crimes doctrine. Affirmation of the Ninth Circuit's application of the status crimes doctrine could ultimately be the springboard to help free many people trapped within the cycle of homelessness. By making this the law of the land, the Supreme Court would ultimately help to progress our ever-evolving societal mores towards an increasing ideal of human dignity.

340 *See* Robinson v. California, 370 U.S. 660, 666-67 (1962).

341 *See* discussion *supra* Part I.D.

342 *See* Martin v. City of Boise, 920 F.3d 584, 616-17 (9th Cir. 2019).