CHALLENGING THE CRIMINALIZATION OF HOMELESSNESS WITH THE 8TH AMENDMENT: *JOHNSON*, *MARTIN*, AND THE FUTURE OF POVERTY GOVERNANCE

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ABSTRACT

In two recent cases, *Martin v. Boise* and *Johnson v. Grants Pass*, the 9th Circuit Court of Appeals affirmed that depriving homeless individuals from the innocent, life-sustaining activity of sleeping violates the prohibition on cruel and unusual punishment enshrined in the Eighth Amendment to the U.S. Constitution. In this paper, I discuss the implications of *Johnson* and *Martin* for challenging the legal and cultural project of constructing class inequalities as natural, normal, and necessary. Beginning with the Elizabethan Poor Law tradition that sorted "deserving" from "undeserving" poor, I trace the legal production of persons unable or unwilling to work and the history of state efforts to control and contain these unruly populations through coercive welfare programs and criminal punishments, with the ultimate ends of suppressing wages, disciplining the poor, and ensuring a ready supply of low-wage labor. Through this framing, I analyze the backlash to the 9th Circuit's approval of Eighth Amendment protections for homeless individuals and the rhetoric of the successful appeal of *Johnson* to the U.S. Supreme Court.

I. INTRODUCTION

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] In two recent cases, *Martin v. Boise* and *Johnson v. Grants Pass*, the Ninth Circuit Court of Appeals affirmed that depriving

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1. U.S. Const. amend. VIII.

homeless individuals of the innocent, life-sustaining activity of sleeping violates the prohibition on cruel and unusual punishment enshrined in the Eighth Amendment.[2] In this paper, I discuss the implications of *Blake* and *Martin* for challenging the legal and cultural project of constructing class inequalities as natural, normal, and necessary. Beginning with the Elizabethan Poor Law tradition that sorted "deserving" from "undeserving" poor,[3] I trace the legal production of persons unable or unwilling to work and the history of state efforts to control and contain these unruly populations through coercive welfare programs and criminal punishments, with the ultimate ends of suppressing wages, disciplining the poor, and ensuring a ready supply of low-wage labor. Through this framing, I analyze the backlash to the Ninth Circuit's approval of Eighth Amendment protections for homeless individuals and the rhetoric of the pending appeal of *Johnson* to the United States Supreme Court.

This paper proceeds in three parts. In Part II, I explain the holdings in *Martin* and *Johnson* and their implications for the homeless class members and others within the circuit. In Part III, I contextualize these rulings—and their uneasy dependence on a distinction between "voluntary" and "involuntary" homelessness—within a history of legal doctrine that constructs class, specifically poverty, as a natural and self-imposed condition. While the Ninth Circuit in *Martin* defined involuntarily homeless persons in terms of the number of available and adequate shelter beds in the defendant city,[4] this definition is more or less explicitly challenged by the City of Grants Pass and its amici.[5] As I argue, the production of class as "voluntary" can be situated within a long history of legal and cultural rhetoric that divides the poor into categories of "deserving" and "undeserving" based upon their apparent willingness and ability to work. Part IV discusses the Supreme Court appeal of *Johnson* and the rhetoric used in the appellant's petition for certiorari as a continuation of Poor Law tropes that naturalize class inequalities and appeal to Christian practices of redemption and punishment via government regulation and criminalization.

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2. Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018), amended on denial of reh'g, 920 F.3d 584 (9th Cir. 2019).

3. Majorie K. McIntosh, *Poverty, Charity, and Coercion in Elizabethan England*, 35 J. OF INTERDISC. HIST. 457, 458-59, 461 (2005).

4. *See Martin*, 903 F.3d at 1047-48.

5. *See* Johnson v. City of Grant Pass, 72 F.4th 686, 889 (9th Cir. 2023); *see* Brief for Local Gov't Legal Center et al. as Amici Curiae in Support of Petitioner at 12-13, 15, 18, City of Grant Pass v. Johnson, 144 S. Ct. 679 (2024) (No. 23-175).

II. *MARTIN*, *JOHNSON*, AND THE CRUELTY OF ANTI-CAMPING LAWS

As legal theorist Alan Hunt observed, the aggregate effects of law in modern democratic societies systematically disadvantage of the least advantaged social classes. Today, people without ownership or use rights in real estate are clearly among the most disadvantaged of social classes, as they often have nowhere to lawfully perform activities of daily living and to meet their basic needs. For those of us who have experienced homelessness, law constitutes one arena of struggle where our relative positions and advantages might be changed. In this arena, "claims capable of translation into a discourse of individual rights and those interests congruent with existing rights categories are more likely to succeed than claims not matching these characteristics."[6] There is no right to shelter or welfare in the U.S. There is, however, a constitutional right to be free from cruel and unusual punishment enshrined in the Eighth Amendment of the U.S. Constitution.

The Ninth Circuit first considered the application of the Eighth Amendment to the claims of homeless individuals to be free from police harassment and criminalization in *Jones v. City of Los Angeles*.[7] Brought on behalf of people living on Skid Row in downtown Los Angeles, *Jones* challenged a city ordinance that prohibited sitting, lying, or sleeping on streets, sidewalks, and other public ways.[8] A divided Ninth Circuit panel found that the Eighth Amendment protects "involuntary conduct" (such as sleeping on public property) that is "inseparable from [the] status" of homelessness.[9] This holding was derived from the 1962 Supreme Court decision in *Robinson v. California*, which clarified that Eighth Amendment law prohibits states from punishing status—here, being addicted to narcotics—rather than conduct.[10] In *Robinson*, the Supreme Court found that the Eighth Amendment forbids punishing the status of being a drug addict, even if it permits prosecutions for individual acts of illicit drug use.[11]

In *Johnson*'s underlying case of *Blake v. Grants Pass*, the District Court held that the City's administrative rule that assessed fines and fees to homeless individuals for sleeping outside was unconstitutional.[12] Because

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6. ALAN HUNT, "MARXIST THEORY OF LAW." IN *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 364 (Dennis Patterson, ed. Blackwell Publishers 2010).

7. Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006), *vacated on other grounds*, *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007).

8. *Id.* at 1123-1125. The district court upheld the ordinance "because it penalizes conduct, not status." *Id.* at 1125.

9. *Id.* at 1136.

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

11. *Id.*

12. Blake v. Grants Pass, 2019 WL 3717800 at *5 (D. Or. Aug. 7, 2019).

city officers had authority to issue park exclusions—which could be followed up with a criminal trespass charge—after a person has twice been cited for violating park regulations, the Court extended *Martin*'s prohibition on punishing innocent activity with criminal penalties to Grants Pass's civil enforcement scheme.[13]

The trial court's conclusion also hinged on a finding that the homeless plaintiffs were involuntarily homeless, which, in turn, was based on the finding that Grants Pass had a dearth of available shelter beds—less than ninety for an estimated homeless population of several hundred.[14] The City alleged that there were 138 beds at nearby campgrounds on federal land, a warming shelter, a sobering center, and a religious organization called the Gospel Rescue Mission.[15] The Court noted that the City's main shelter, provided by the Gospel Rescue Mission, had both work and worship requirements such that forcing a choice between criminal penalties for sleeping, on the one hand, or following the extensive rules and regulations of the Gospel Rescue Mission on the other, would violate the Establishment Clause.[16]

It is unclear if the current Supreme Court, hostile as it is to the last fifty years of Establishment Clause doctrine, will take up this theme in its pending analysis. But, if they do, as discussed further in Part IV below, it is reasonable to assume that poverty governance will take on an increasingly religious dimension. The neoliberal state's goal of creating "compliant and competent worker-citizens"[17] will arguably be expanded beyond the twin aims of suppressing wages and creating willing low-wage workers, to an evangelizing project that seeks out not just the bodies and minds of the poor but also their souls. Today, homeless shelters run by evangelical religious institutions "practice overt forms of proselytization, holding their clients in an unspoken pact whereby food and shelter are exchanged for evangelism."[18] The Salvation Army, another state-endorsed evangelical institution that runs services for the homeless, "schools its homeless clients in a militaristic regime of self-discipline that implicitly attributes social failure to personal sin."[19] A ruling that explicitly rejects this formula for involuntariness – the difference between the estimated unhoused population and the number of

13. Grants Pass Municipal Code § 6.46.350.

14. *See Blake*, 2020 WL 4209227, at *7-8.

15. *Id.*

16. *See id.* at 3, 6-8.

17. JOE SOSS ET. AL., DISCIPLINING THE POOR 9 (2011).

18. MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM 299 (2d ed. 2021).

19. *Id.*

available secular shelter beds – could force individuals to choose between forced worship and criminalization.

Class representative and plaintiff Deborah Blake sadly passed away after her victory in the district court,[20] and the case was renamed for class representatives Gloria Johnson and John Logan.[21] The Ninth Circuit's decision on review, *Johnson v. Grants Pass*, built on the Ninth Circuit's *Martin v. Boise* decision, which affirmed that handing out criminal punishments for innocent, life-sustaining activity—sleeping—to a class of homeless Idaho residents violated the Eighth Amendment prohibition on cruel and unusual punishment.[22] The Ninth Circuit issued its original opinion on September 28, 2022, and issued an amended opinion and order denying rehearing – by a fourteen to thirteen vote - on July 5, 2023.[23] In its amended opinion, the Ninth Circuit abandoned the "mathematical formula" test (the estimated homeless population minus the number of available shelter beds) for determining whether an individual was involuntarily homeless.

Besides a complete lack of low barrier shelter beds, Grants Pass have discouraged the development of multifamily housing, much less affordable housing. The latest study showed that they were now 4000 housing units short of what they needed to house their population—a lot for town of 38,000 or so. *Johnson* reasoned that the Eighth Amendment protections affirmed in *Martin* extended to civil and administrative fines for the same activity, given that they could—and did—mature into criminal penalties (for example, park exclusions ripened into citations for criminal trespass after the first two offenses).[24] But the Ninth Circuit also explicitly recognized the right of cities to clear encampments and prevent the use of tents on public property.[25] Their constitutional holding simply limited cities from prohibiting any chance of engaging in innocent, life-sustaining sleep by issuing civil fines and criminal penalties.[26]

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20. Kevin Rector & Ruben Vines, *In case out of Grant Pass, Ore., court reaffirms right of homeless to sleep outside,* L.A. TIMES, (Sept. 28, 2022, 6:21 PM), https://www.latimes.com/world-nation/story/2022-09-28/in-case-out-of-little-grants-pass-ore-federal-court-further-protects-rights-of-homeless.

21. Blake v. City of Grant Pass, Case No.1:18-cv-01823-CL, 2020 WL 4209227 (D. Or. July 22, 2020), *sub. nom.* Johnson v. City of Grant Pass, 72 F.4th 686 (9th Cir. 2023).

22. Martin v. City of Boise, 902 F.3d 1031, 1049 (9th 2018).

23. *Johnson*, 72 F.4th at 874.

24. *Id.* at 889-90.

25. Erwin Chemerinsky, *Opinion: In California, homelessness isn't a crime. Is the Supreme Court about to change that?*, L.A. TIMES, (Jan. 14, 2024, 3:34 PM), https://www.latimes.com/opinion/story/2024-01-12/supreme-court-homeless-housing-johnson-vs-grants-pass-martin-vs-boise-california-oregon-9th-circuit.

26. *Johnson*, 72 F.4th at 877, 896.

Yet, despite this clear holding, the Ninth Circuit's approval of the district court's reasoning in *Blake* garnered nationwide attention, with pundits and amici alike opining that the ruling will hamstring cities' efforts to deal with local homelessness problems. Appealing to the Constitution's "original meaning," Judge O'Scannlain, for example, argued that the *Johnson* holding "embrace[d] an Eighth Amendment doctrine that effectively requires local communities to surrender their sidewalks and other public places to homeless encampments."[27] O'Scannlain also railed against the *Martin* decision for both "paralyzing local communities from addressing the pressing issue of homelessness, and seizing policymaking authority that our federal system of government leaves to the democratic process."[28]

Indeed, this misunderstanding and misconstruction of *Johnson*'s limited holding was at the core of the City's petition for certiorari to the Supreme Court – not that the imposition of fines and criminal punishments for being homeless in public is *not* cruel and unusual, but rather, the policy argument that this constitutional ruling will stymie efforts to "deal with" the nation's growing homelessness issues. This political theology that bolsters the view that criminalization and punishment are the most appropriate and even *just* methods of poverty governance reflects a long history of policy, practice, and political rationality that can be traced to the Elizabethan Poor Law tradition of family responsibility, punitive work requirements, and religious charity—a trifecta that the current Supreme Court is likely to reimpose on America's houseless populations by reversing *Johnson*.

III. "VOLUNTARY" HOMELESSNESS AND THE UNDESERVING POOR

Beneath the controversy surrounding *Johnson* and *Martin* runs a current of antipathy to poor relief that stems from the state's unwillingness to shoulder the financial responsibility for its citizens who are unable to work. The Elizabethan Poor Law of 1601 imposed strict familial responsibility on those deemed "unable" to work (the "deserving poor"), and prison-like work requirements on those deemed "unwilling" (the "undeserving poor").[29] In general, the able-bodied poor were deemed undeserving and put in workhouses, while the relatives of all others were held accountable for the maintenance and housing of those deemed unable to work.[30] As Melinda

27. *Id.* at 930 (O'Scannlain, J., concurring except as to Part II-A).

28. *Id*. at 925.

29. COOPER, *supra* note 18, at 73-74; J.E. Hasan, *English Poor Laws: Historical Precedents of Tax-Supported Relief for the Poor*, VA. COMMONWEALTH UNIV. (last visited Mar. 31, 2024), https://socialwelfare.library.vcu.edu/programs/poor-laws/.

30. Hasan, *supra* note 29.

Cooper writes, poor laws placed strict conditions on relief and imposed family responsibility requirements that must be exhausted before the parish would offer relief.[31] The text of the original 1601 Act stipulated "that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person."[32]

As Cooper documents, this basic structure—of family responsibility and work requirements—while it has been adapted to fit changing political economy of the United States, has in one way or another been preserved in the U.S. into the 21st century by neoliberals and social conservatives alike.[33] The Poor Laws of 17th century England "were not only imported intact [into colonial North America] but were subsequently reinvented many times over as a means of disciplining new kinds of sexual and economic freedom."[34] The "impotent poor" were to be cared for in an almshouse or a poorhouse.[35] The law offered relief to people who were unable to work—mainly those who were "lame, impotent, old, [or] blind."[36] The able-bodied poor were to be sent to work in a house of industry.[37] The "idle poor" and vagrants were to be sent to a house of correction or even prison, and pauper children would become apprentices.[38] Aside from their clear economic and governance functions, these practices of controlling the poor cannot be separated from religious principles. As Cooper notes, "Christian practices of redemption were never alien to the poor-law tradition of poverty relief, which in its early nineteenth-century iteration was informed by both classical economic liberalism and evangelical theology."[39] Today, faith-based charitable organizations channel neoliberal ethics of family responsibility into "the religious conservative idiom of personal sin, immorality, and redemption."[40] The inevitable conclusion of this framing is that, if you are without private property, it is due to your own moral failings.

As Jill Quadagno noted in her sweeping history of race and welfare reforms in the late 20th century United States, *The Color of Welfare*, our

31. COOPER, *supra* note 18, at 73-74.

32. *Id.* at 73.

33. *See Id.* at 68-69, 112-14.

34. *Id.*at 75.

35. Majorie K. McIntosh, *Poverty, Charity, and Coercion in Elizabethan England*, 35 J. OF INTERDISC. HIST. 457, 477 (2005); Hasan, *supra* note 29.

36. McIntosh, *supra* note 35, at 458; Hasan, *supra* note 29.

37. Hasan, *supra* note 29.

38. McIntosh, *supra* note 35, at 465-66; Hasan, *supra* note 29.

39. COOPER, *supra* note 18, at 300.

40. *Id.*

current welfare system relies heavily on means-tested social-assistance programs.[41] While supposedly drawing "rigid class distinctions between the deserving and undeserving poor," Quadagno's work shows that "the means-tested programs of the American welfare state had less to do with maintaining class divisions than with maintaining racial segregation."[42] Under New Deal FHA-administered programs, for example, secure loans were provided for the middle-class while "the working poor, much of black America but also white families outside the industrial labor force, were left out in the cold."[43] Social security, the one social welfare program that has been able to garner the highest public approval,[44] accords with the racialized structure of wealth and welfare in the U.S. because, like the Earned Income Tax Credit, it is worker-funded and thus benefits those who perform waged work in proportion to their earning power. In this century, as in the previous one, earning power is still impacted by gender, race, and national origin.

Of course, welfare reforms—from following President Johnson's "War on Poverty" to Clinton's sweeping reforms of the mid-1990s—have never been designed to eliminate poverty.[45] Instead, programs for the poor serve a palliative function to reduce disruption to propertied society. As Soss, Fording, and Schram describe, social welfare programs "support the impoverished in ways designed to make poor communities more manageable and to shepherd the poor into the lower reaches of societal institutions" and into low-wage, precarious, and dangerous jobs; "the poor exist perennially as subjects who must be governed."[46]

Anti-homeless ordinances belong to this country's long tradition of disciplining and regulating the poor in the service of markets. Over the last fifty years, incarceration and punishment have come to play a more and more central role in state strategies of poverty governance. As Soss, Fording, and Schram write in *Discipling the Poor*, neoliberal social control relies heavily

41. JILL QUADAGNO, THE COLOR OF WELFARE*: HOW RACISM UNDERMINED THE WAR ON POVERTY* 9 (Oxford University Press, 1994)

42. *Id.*

43. *Id.* at 24.

44. *See id.* at 161-63, 172; *Public Opinions on Social Security*, NAT'L ACAD. OF SOC. INS. (last visited Mar. 31, 2024), https://www.nasi.org/learn/social-security/public-opinions-on-social-security/; Lydia Saad, *Americans Fairly Satisfied with Social Security System*, GALLUP (Feb. 24, 2023), https://news.gallup.com/poll/470894/americans-fairly-satisfied-social-security-system.aspx (Noting that Social Security is ranked in the top third of satisfaction scores in issues facing the United States amongst Americans).

45. *See* QUADAGNO, *supra* note 41, at 14-15, 175; *Soss et al., supra* note 17, at 38, 66-67; Dylan Matthews, *If the goal was to get rid of poverty we failed: the legacy of the 1996 welfare reform*, VOX (June 20, 2016, 9:10 AM), https://www.vox.com/2016/6/20/11789988/clintons-welfare-reform.

46. SOSS ET. AL.*, supra* note 17 at 2.

on policing and corrections.[47] This logic of governance through criminalization has been adopted by government and nonprofit welfare agencies, giving rise to a "double regulation of the poor" through punitive welfare requirements and criminalization. As the authors conclude, "the 'left hand' of the welfare state and the 'right hand' of the carceral state now work together as integrated elements of a single system."[48] Thus, criminal and civil penalties that punish the poor serve a broader neoliberal agenda of disciplining poor people in an effort to create "compliant and competent worker-citizens."[49] As discussed above, this encroachment of criminal logics into poverty governance has a long history, and the ordinances at issue in *Johnson v. Grants Pass* and *Martin v. Boise* can be seen as two manifestations of the carceral state's "right hand" that now overshadows state and federal programs to give aid to those living in extreme poverty.

While the Supreme Court once struck down laws criminalizing vagrancy and loitering as unconstitutionally vague in violation of the Fourteenth Amendment, today's laws that target activities of daily living done by necessity in public have their roots in these earlier attempts to regulate people who appeared in public without visible means of support.[50] Modern anti-homeless ordinances, like the civil and administrative codes at issue in the Grants Pass case, regulate behavior that must of necessity be performed in public by persons without license or ownership to private property. Relying on the "status crimes" doctrine articulated in *Robinson v. California*, legal services and poverty law advocates argued in cases like *Boise* and *Johnson* that criminalizing necessary, life-sustaining conduct like sleeping and sitting is prohibited by the Eighth Amendment ban on punishing behavior that necessarily flows from one's status.[51]

IV. STATUS, CONDUCT, AND RELIGIOUS COERCION

On January 12, 2024, the Supreme Court granted certiorari in *Johnson*,[52] in apparent agreement with the City of Grants Pass, as well as other municipal and state amici and conservative commentators, sounding an alarm that *Johnson*'s ruling would hamstring local governments in their ability to "solve" their homelessness problems. The clear question before the Supreme Court in *Johnson* is whether the Grants Pass ordinances violate the Eighth

47. *Id.* at 6, 26.

48. *Id.* at 6.

49. *Id.* at 9.

50. Hannah Kieschnick, *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).

51. *Id.* at 1573.

52. City of Grants Pass v. Johnson, 144 S. Ct. 679, 679 (U.S. 2024).

Amendment's "substantive limits on what can be made criminal and punished as such"[53] by citing and punishing unavoidable activities of daily living. With respect to the Ninth Circuit's constitutional jurisprudence, the City argues that the "primary purpose" of the Cruel and Unusual Punishments Clause "has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes . . . ."[54] While the City stresses that the Grants Pass ordinances at issue in the case are generally applicable laws implemented for public health and safety,[55] these ordinances are designed to punish persons for the crime of existing without private property. They were thus properly considered as within the ambit of the Eighth Amendment's prohibition on cruel and unusual punishment.

In its petition for certiorari, the City also invited the Court to limit their holding in *Robinson* that punishing a person based on status alone violates the Eighth Amendment.[56] They argued that "[w]ith the lone exception of *Robinson*, the Court has never held that the Eighth Amendment sets substantive limits on what can be a crime in the first place."[57] The *Robinson* holding, they argued, "should be limited to punishment for mere status, not expanded to conduct that arguably follows from a status."[58] Yet it is not clear which issues inspired the Court's grant of certiorari in *Johnson* that they did not find equally pressing in the city's certiorari petition that followed *Martin v. Boise*. The *Johnson* appellants argued that, without civil and administrative fines and sanctions, local governments will essentially become overrun with homelessness and be unable to properly govern the time, place, and manner of public camping, bathroom use, and other life-sustaining activities of social and biological reproduction that must be performed outside.[59] Yet as discussed above, this alarmist line of argument stubbornly ignores *Johnson*'s limited holding.

Indeed, as appellees pointed out in their response to the City's petition for certiorari, this argument "turns . . . on the false claim that the Ninth Circuit has deprived cities of the 'practical ability' to address the 'growth of public encampments,'[60] and the 'fires, filth, disease, and fentanyl and meth'

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

54. *Id.* (citing Powell v. Texas, 392 U.S. 514, 531-32 (1968)).

55. Petition for a Writ of Certiorari at 9, Johnson v. City of Grants Pass, 72 F.4th 868 (9th Cir. 2023) (No. 23-175), 2023 WL 5530379, at *9.

56. *Id.* at 15.

57. *Id.*

58. *Id.*

59. *Id.* at 30-35.

60. Brief in Opposition at 24, Johnson v. City of Grants Pass, 72 F.4th 868 (9th Cir. 2023) (No. 23-175), 2023 WL 8653012, at *24 (citing Petition for a Writ, *supra* note 55, at 6, 32-33).

that allegedly accompany them."[61] Another passage describes public encampments "and the drug overdoses, murders, sexual assaults, diseases, and fires that inevitably accompany them."[62] But, as advocates, scholars, and civic experience have made clear for decades, "criminalization does not reduce the number of people experiencing homelessness."[63] Punishing sleeping outside simply imposes fines and jail time that "puts jobs in jeopardy and sends people back out to the streets, where their new criminal records will only make it harder to find housing and jobs."[64] By conflating the dangers associated with attempting to live while unhoused with *Johnson*'s constitutional jurisprudence, the City employs affective techniques[65] of eliciting disgust and saviorism—evoking tropes of undeserving and deserving poor—to obscure *Johnson*'s very limited holding. It is also noteworthy that the City attempts to stoke the Court's fears of lawless sexual predators, mentioning "sexual assault," "sexual compulsion," and "sexual offender" nearly a dozen times in their certiorari petition, and mobilizing another time-honored trope, the "sex panic," to garner public support for unnecessarily punitive regulation, surveillance, and criminalization that does nothing to reduce the risks of sexual harms to vulnerable populations.[66]

The City's second argument in their Petition is perhaps more troubling and also reveals the thread linking this case with the centuries-old Elizabethan Poor Law tradition: appellants challenged the District Court's assumption that the class members comprised a group of involuntarily homeless persons, suggesting that there either is no conceptual distinction between the two, or that, at least in practice, municipalities cannot discern whether an individual chooses to be homeless and, therefore, the rulings essentially protect those "voluntary" homeless individuals that are not meant to be protected by the Ninth Circuit's ruling.[67] The challenged Ninth Circuit reasoning thus rests on its contentious answer to a question at the heart of the neoliberal welfare state and neoliberal political rationality itself: is being

61. *Id.* at 32-33 (internal quotation marks omitted).

62. Petition for a Writ, *supra* note 55, at 16.

63. Jeff Olivet, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Oct. 26, 2022), https://www.usich.gov/news-events/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address.

64. *Id.*

65. *See* China Mills & Elise Klein, *Affective Technologies of Welfare Deterrence in Australia and the United Kingdom*, 50 ECON. AND SOC'Y 397 (2021) (defining affective technologies and their use in government regulation of the poor and attitudes about poverty and assistance); Petition for a Writ, *supra* note 55, *passim*.

66. *See, e.g.*, KRISTIN BUMILLER, IN AN ABUSIVE STATE (2008); ROGER N. LANCASTER, SEX PANIC AND THE PUNITIVE STATE (2011).

67. Petition for a Writ, *supra* note 55, at 30, 31, 34.

poor a status or a choice? If homelessness is purely a choice, then the Eighth Amendment issues surrounding status criminalization never arise.

In *Jones* first decision, the Ninth Circuit sidestepped this fundamental question by adopting a simple calculation for determining voluntariness: if the count of homeless residents exceeds the number of available shelter beds, then the excess number is involuntarily homeless.[68] In other words, "a person is involuntarily homeless when 'there is a greater number of homeless individuals in [a jurisdiction] than beds available [in shelters].'"[69] In its petition for certiorari, the City of Grants Pass argued that this definition – ultimately rejected in the 9th Circuit's denial of rehearing – is untenable because, it intimated, many unhoused persons across the west coast and beyond refuse to utilize available shelters and services, rendering their situation voluntary.[70] In arguing that many unhoused people do not use shelter beds even when they are available, the City brushes aside issues of barriers to entry (such as work requirements, requirements to participate in secular religious worship, gender segregation, homo- and transphobia, and no-pet policies).[71]

This thread of argument ran through the oral arguments delivered to the Supreme Court justices on April 22, 2024.[72] Counsel for Grants Pass argued, essentially, that the City should be allowed to keep its civil and criminal schemes intact, and that each homeless defendant charged with, for example, illegal trespassing, must come to court and present a necessity defense to avoid prosecution, in order to prove that they should be protected by the Eighth Amendment. Justice Gorsuch expressed sympathy for this argument, asking whether an individual charged with illegal trespassing could raise the defense in Oregon law after being arrested. The practical barriers to this solution, especially for persons living without a phone number or home

68. Jones v. City of Los Angeles, 444 F.3d 1118, 1137, 1138 (9th Cir. 2006).

69. Blake v. City of Grants Pass, No. 18-cv-01823, 2019 WL 3717800, at *5 (D. Or. Aug. 7, 2019) (citing Martin v. City of Boise, 920 F.3d 584, 617 (2019)).

70. Petition for a Writ, *supra* note 55, at 30, 31.

71. *See generally* OR. HOUS. AND COMTY. SERVS., OREGON STATEWIDE SHELTER STUDY (2019) (detailing the results of a statewide homeless shelter survey, including statistics regarding barriers the homeless faced in gaining shelter entry); SUZANNE SKINNER & SARA RANKIN, HOMELESS RTS. ADVOC. PROJECT, SHUT OUT: HOW BARRIERS OFTEN PREVENT MEANINGFUL ACCESS TO EMERGENCY SHELTER (May 10, 2016), https://digitalcommons.law.seattleu.edu/hrap/6/?utm_source=digitalcommons.law.seattleu.edu%2Fhrap%2F6&utm_medium=PDF&utm_campaign=PDFCoverPages; Johnson v. City of Grants Pass, 72 F.4th 868, 878-79 (9th Cir. 2023).

72. Oral argument, *City of Grants Pass v. Johnson*. Available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-175_6kh7.pdf (accessed 4/22/24).

address, as well as the potential burdens on our already-overburdened state courts, were glossed over.

Counsel for the City also argued that the decision below was ultimately "unworkable" because of the existence of campsites and empty beds in Grants Pass's Gospel Rescue Mission, suggesting that the Ninth Circuit was responsible for the spread of homelessness along the West Coast that has ballooned since the beginning of the COVID-19 pandemic, when many individuals living precariously from paycheck to paycheck lost their jobs. "There's no way to count what beds are available," counsel argued, suggesting that even if we returned to the mathematical formula for determining voluntariness, the only viable constitutional "fix" for the situation was to adjudicate individual cases asserting a necessity defense. To successfully raise such a defense, moreover, a person would be required to prove that there were no available beds. What happens if someone is offered shelter and refuses? "That's a difficult policy question," counsel replied. By some counts, there are twenty-eight vacant homes for every unhoused person in America;[73] however, this fact was not raised as a policy issue by anyone.[74]

The City's counsel also took pains to make clear that she was not asking the Court to overrule *Robinson*; when asked by Justice Kagan whether *Robinson* allowed cities to criminalize homelessness, however, she responded: "I don't think homelessness is a status." The City's counsel also raised the specter of family and community harm, suggesting that these harms simply flow from the fact that jurisdictions are now forced by the Ninth Circuit's rule to allow people to sleep outside: "there's harm to people from camping." These harms, the argument went, affect the community and homeless people themselves – even if the number of homeless people in a jurisdiction exceeds the number of available shelter beds.

Wendy Bach, in her book on Tennessee's rather short-lived experiment with 'fetal assault' laws,[75] analyzes the somewhat recent phenomenon of using criminalization to force certain populations into state- or church- run services; what Bach refers to as, "creating a crime to create care." Rhetoric supporting this coercive approach to care was present in the oral argument, mainly from counsel for the city but also from the more conservative justices. Justice Roberts inquired about the relationship between individual choices and homelessness: "what if you find that person in a homeless state because

73. United Way NCA, *How Many Houses are In the Us? Homelessness Vs. Housing Availability*, UNITED WAY OF THE NAT'L CAP. AREA, https://unitedwaynca.org/blog/vacant-homes-vs-homelessness-by-city/ (accessed May 5, 2024).

74. Andrew Milne brought this point to my attention.

75. WENDY BACH, PROSECUTING POVERTY, CRIMINALIZING CARE, (Cambridge University Press, 2022).

of prior life choices? Or a refusal of future life choices?" And the City's counsel intoned that "[t]hese [anti-camping] laws are absolutely a tool for getting people the services that they need . . . [these laws] are a helpful tool in incentivizing people to accept shelter."

If the current Supreme Court—defensive as it is of a particular kind of religious privilege in flagrant opposition to the past half-century of Establishment Clause precedent—chooses to take up this latter point, it will likely find that shelters like the Gospel Rescue Mission in Grants Pass must be counted within the ambit of "available shelter beds." Consistent with constitutional attorney Andrew Seidel's argument in his recent book, *American Crusade*, that the current Catholic supermajority on the Supreme Court is on a crusade to shore up white patriarchal power through the restoration and strengthening of specific religious liberties (against the administrative state, public health, and antidiscrimination law in public accommodations and the workplace),[76] the Court could sentence our nation's homeless to a choice between criminal punishment and rigorous religious indoctrination.[77] To be clear, this is not the only area of once publicly-administered services that are now being taken over by private religious charities enabled by the "Charitable Choice" provisions introduced by Clinton in his notorious welfare reform package of 1996[78] and renewed and expanded in 2001.[79] Jails, prisons, and hospitals have, in the last thirty years, been extensively taken over by private religious charities.[80]

Today, an alarming number of homeless shelters are run by religious organizations with strict observance and work requirements like Grants Pass's Gospel Rescue Mission. As a matter of "religious freedom," these organizations are empowered to discriminate based on sexuality and gender identity. This is doubly concerning as a majority of homeless youth are queer and trans.

As the state continues to delegate essential social services to religious and evangelical service providers, "these same groups are empowered not merely to stigmatize or normalize but to banish certain practices and expressions of sexuality from the space of the social."[81] *Johnson*, then, is not just about how cities are empowered to regulate the use of public properties

76. *See* ANDREW L. SEIDEL, AMERICAN CRUSADE: HOW THE SUPREME COURT IS WEAPONIZING RELIGIOUS FREEDOM (New York: Union Square & Co. 2020).

77. *Id.*

78. H.R.3734, 104th Congress (1995-1996).

79. Robert P Weiss, *Charitable Choice As Neoliberal Social Welfare Strategy*, 28 SOC. JUST., 35, 35-53 (2001), http://www.jstor.org/stable/29768057.

80. *See* COOPER, *supra* note 18, at 259-307; Elizabeth Sepper & James D. Nelson, *Government's Religious Hospitals*, 109 VA. L. REV. 61 (2023).

81. COOPER, *supra* note 18, at 306-07.

but how the welfare retrenchments of the 1970s and beyond interact with the current Court's expansions of religious freedom for a privileged few to result in nationwide efforts to eradicate perceived sexual and gender "immorality" and other violations of the moral law—including, perhaps, the imagined crime of "choosing" to be poor.

V. CONCLUSION

Struggles between private property owners and the growing pool of persons who can't afford to even lease a home on a temporary basis are being fought out in legal and nonlegal arenas across the country. Whether or not articulated in terms of constitutional rights, unhoused individuals and homeless rights advocates will continue to fight for dignity, survival, and material resources long after the Supreme Court's decision in *Johnson*. While there is still no right to shelter, the human need to sleep is not going anywhere; and in the words of Justice Brown Jackson, "[i]t seems both cruel and unusual to punish acts that constitute basic human needs."[82] The failure of state, local, and federal governments alike to provide adequate shelter for our growing unhoused population can only be solved by a reconceptualization and redistribution of private property—not through increasingly punitive responses to survival strategies of the nation's poor.

Addendum: as this article went to print, the Supreme Court reversed the Ninth Circuit's *Johnson* opinion in a 6-3 decision, finding that the Eighth Amendment does not prohibit state and local governments from regulating outdoor sleeping. The full opinion can be found at https://www.supremecourt.gov/opinions/23pdf/23-175_19m2.pdf

82. Oral argument, *supra* note 72.