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AGAINST THE STATUS CRIMES DOCTRINE

*West Menefee Bakke**

The Eighth Amendment prohibits the infliction of “cruel and unusual punishments.”¹ In the 1962 case *Robinson v. California*, the U.S. Supreme Court applied this provision to invalidate a state law making it a crime to be addicted to narcotics.² By punishing drug addiction itself, the state had criminalized a person’s status rather than any conduct.³ Asserting that addiction is an illness, the Court proclaimed that “a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment.”⁴ The Court therefore held the statute unconstitutional,⁵ and this operation of the Eighth Amendment came to be known as the “status crimes doctrine.”⁶

Six years later in *Powell v. Texas*, the Supreme Court held that a state statute criminalizing public intoxication did not violate the Constitution’s ban on cruel and usual punishments.⁷ The plurality recognized that the “[defendant] was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion.”⁸ The plurality attempted to hamstring *Robinson*’s status crimes doctrine: “[The Eighth Amendment] does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, ‘involuntary’”⁹

Nevertheless, as a recent decision in the U.S. Court of Appeals for the Ninth

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1. U.S. CONST. amend. VIII.
2. *Robinson v. California*, 370 U.S. 660, 667 (1962).
3. *Id.* at 666.
4. *Id.*
5. *Id.* at 667.
6. See, e.g., Hannah Kieschnick, Note, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1578–79 (2018).
7. *Powell v. Texas*, 392 U.S. 514, 532 (1968) (plurality opinion).
8. *Id.*
9. *Id.* at 533.

Circuit illustrates, the status crimes doctrine still lingers.¹⁰ In *Martin v. City of Boise*, the Ninth Circuit considered a challenge to a pair of Boise ordinances banning camping on public land or occupying public places without permission.¹¹ In that case, six individuals experiencing homelessness were convicted for violating the ordinances.¹² Five of them were sentenced to time served and the sixth to an additional day in jail.¹³ The individuals brought suit in federal court, alleging their convictions violated the Cruel and Unusual Punishments Clause and seeking in part a prospective injunction against the City's enforcement of the ordinances.¹⁴ The Ninth Circuit sided against the City, holding that so long as the homeless are not provided with housing, Boise must abandon enforcement of the ordinances.¹⁵ The court reasoned that, so long as there are no available beds in shelters, prosecuting the homeless for "sitting, lying, [or] sleeping in public" constitutes an impermissible criminalization of their status.¹⁶

The Ninth Circuit is the only circuit court to invalidate an anti-camping ordinance under the Eighth Amendment.¹⁷ *Martin* highlights the insufficiency of Supreme Court guidance on the scope of the Amendment, as well as the corresponding confusion among the lower courts¹⁸ as to the effect of the status crimes doctrine. While only two other circuits have addressed whether to apply the doctrine to homelessness,¹⁹ it will likely become necessary for courts to fully address this issue in the coming years. After all, cities' efforts to deal with homelessness have become increasingly politicized,²⁰ and ordinances banning camping or sleeping in public places exist throughout the country.²¹

10. See *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 674 (2019).

11. *Id.* at 1035.

12. *Id.* at 1037.

13. *Id.*

14. *Id.* at 1038.

15. See *id.* at 1048.

16. *Id.* (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)).

17. See, e.g., *Joel v. City of Orlando*, 232 F.3d 1353, 1361–62 (11th Cir. 2000) (holding that an ordinance prohibiting sleeping on public property did not run afoul of the Eighth Amendment); *cf. Tobe v. City of Santa Ana*, 892 P.2d 1145, 1166 (Cal. 1995) (rejecting an Eighth Amendment challenge to an ordinance nearly identical to Boise's in *Martin*). *But cf. Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) (holding that Miami's practice of "arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless," violating the Eighth Amendment).

18. See Juliette Smith, Comment, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 317 (1996) ("Because there was not a majority in *Powell* . . . , the case has left lower courts without clear guidance as to whether or not to apply Robinson to 'acts' derivative of status.").

19. See *Manning v. Caldwell*, 900 F.3d 139, 152–53 (4th Cir. 2018) (rejecting an Eighth Amendment challenge to Virginia's interdiction statute, which plaintiffs claimed criminalized their status as homeless alcoholics), *rev'd*, 930 F.3d 264, 284 (4th Cir. 2019) (sustaining the challenge but only on the basis that the plaintiffs' status as alcoholics—not homeless persons—was criminalized); *Joel*, 232 F.3d at 1361–62.

20. See, e.g., Jack Healy, *Rights Battles Emerge in Cities Where Homelessness Can Be a Crime*, N.Y. TIMES (Jan. 9, 2017), <https://www.nytimes.com/2017/01/09/us/rights-battles-emerge-in-cities-where-homelessness-can-be-a-crime.html> [perma.cc/EVT3-R83J].

21. TRISTIA BAUMAN, NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 38, 41 (2019),

This Case Note argues that the status crimes doctrine ought to be abandoned in its entirety. This would restore the Eighth Amendment to its proper meaning, which is to provide limits on only the method of punishment, not on the substantive criminal law itself. By discarding the status crimes doctrine altogether—or, at least, limiting it to the realm of medical conditions as the defendant had in *Robinson*—courts can shut the door on judicial activism and foreclose a troublesome line of argumentation by which the defendant casts their offense as flowing inevitably from their being.

Part I of this Case Note briefly traces the development of the status crimes doctrine through the Supreme Court's decisions in *Robinson* and *Powell*. Part II describes the Ninth Circuit's panel decision in *Martin* and the Ninth Circuit's subsequent denial of rehearing en banc. Part III argues that the decision in *Martin* was incorrect and that the status crimes doctrine ought to be abandoned.

I. LEGAL BACKGROUND

In *Robinson v. California*, the Supreme Court addressed the constitutionality of a portion of a California statute making it a crime to “be addicted to the use of narcotics.”²² Convictions under this provision did not require a showing that the defendant actually used narcotics—the statute thus proscribed addiction as such, regardless of any use thereof.²³ Justice Stewart, authoring the majority opinion, found that the offense was “based upon a condition or status”—i.e., addiction—not an act.²⁴ He likened the statute to one that imposed penalties for the “crime” of being afflicted with leprosy, a mental illness, or a venereal disease.²⁵ Such a law that punishes “an illness which may be contracted innocently or involuntarily,” Justice Stewart claimed, “would doubtless be universally thought to be an infliction of cruel and unusual punishment.”²⁶ Therefore, the Court held, the defendant's conviction constituted an impermissible criminalization of his status in violation of the Eighth Amendment.²⁷ “To be sure,” Justice Stewart wrote, “imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”²⁸

The Court's decision in *Robinson* garnered dissents from Justices Clark and White. Justice Clark observed that in order to convict the defendant for his status as a drug addict, the jury was required to find that he used drugs “habitually.”²⁹

<http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [perma.cc/X5CQ-FU5T]. Of the 187 American cities surveyed by a homeless advocacy organization in 2019, 37% prohibited camping in public, 21% prohibited sleeping in public, and 55% prohibited sitting or lying down in public. *Id.* at 38, 41-42.

22. *Robinson v. California*, 370 U.S. 660, 660-61 (1962).

23. *Id.* at 665-66.

24. *Id.* at 662.

25. *Id.* at 666-67.

26. *Id.* at 667.

27. *Id.* at 666-67.

28. *Id.* at 667.

29. *Id.* at 679-80 (Clark, J., dissenting).

Moreover, Justice Clark noted, to the extent that California's statutory scheme targeted addicts, the State's aim was preventative and rehabilitative in nature, not punitive, and thus lay well within its power.³⁰ Justice White argued similarly that the defendant was punished not for his status as an addict but for his habitual drug use.³¹

Six years later in *Powell v. Texas*, the Court considered the constitutionality of a Texas statute providing that "[w]hoever shall get drunk or be found in a state of intoxication in any public place . . . shall be fined not exceeding one hundred dollars."³² The defendant challenged it as an impermissible criminalization of his status as a chronic alcoholic.³³ At trial, a psychiatrist offered expert testimony that the defendant lacked "the willpower to resist the constant excessive consumption of alcohol," but indicated that the defendant could control whether to take the first drink.³⁴ The trial court found that the defendant was "afflicted with the disease of chronic alcoholism" and "[did] not appear in public by his own volition but under a compulsion symptomatic of the disease."³⁵ Even so, the trial court concluded, the defendant was guilty of the offense charged—"chronic alcoholism" was no excuse for public intoxication.³⁶

The Supreme Court affirmed.³⁷ Justice Marshall, writing for a plurality of four Justices, cited widespread disagreement among the medical profession about the symptoms of alcoholism and whether it is a disease at all.³⁸ In any event, Justice Marshall distinguished *Robinson*, observing that the defendant was punished "not for being a chronic alcoholic, but for being in public while drunk on a particular occasion."³⁹ For the plurality, the status crimes doctrine meant only that criminal laws must require the commission of some act.⁴⁰ "[U]nless *Robinson* is so viewed," Justice Marshall warned, "it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."⁴¹

Justice White wrote a separate concurrence.⁴² To him, the defendant had failed to show that he could not simply do his compulsive drinking in private.⁴³ Justice White therefore agreed that, on these facts, the conviction for public intoxication was constitutional, but he suggested that the Eighth Amendment might forbid punishing "the chronic alcoholic who begins drinking in private [and] at some

30. *Id.* at 683.

31. *Id.* at 686 (White, J., dissenting).

32. *Powell v. Texas*, 392 U.S. 514, 517 (1968) (plurality opinion).

33. *Id.*

34. *Id.* at 517-18.

35. *Id.* at 521.

36. *Id.* at 521-22.

37. *Id.* at 537.

38. *Id.* at 522-24 (Marshall, J., joined by Warren, C.J., and Black and Harlan, JJ.) (plurality opinion).

39. *Id.* at 532.

40. *Id.* at 533.

41. *Id.*

42. *Id.* at 548 (White, J., concurring).

43. *Id.* at 553.

point becomes so drunk that he loses the power to control his movements and for that reason appears in public.”⁴⁴

The *Powell* opinion garnered a four-Justice dissent.⁴⁵ Justice Fortas, writing the dissenting opinion, understood *Robinson* to stand for the broad principle that “[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.”⁴⁶ Justice Fortas accepted the trial court’s finding that the defendant was a chronic alcoholic who did not appear in public on his own volition.⁴⁷ He acknowledged that the state’s public intoxication statute required an act—intoxicating oneself and appearing in a public place—but nevertheless considered the case indistinguishable from *Robinson*: “in both cases,” Justice Fortas contended, “the particular defendant was accused of being in a condition which he had no capacity to change or avoid.”⁴⁸

The Supreme Court has left the status crimes doctrine untouched since *Powell*.⁴⁹

II. MARTIN V. CITY OF BOISE

Two Boise ordinances were at issue in *Martin*.⁵⁰ The first ordinance made it a misdemeanor to use “any of the streets, sidewalks, parks, or public places as a camping place at any time,” with “camping” defined as “the use of public property as a temporary or permanent place of dwelling, lodging, or residence.”⁵¹ The second prohibited “[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof.”⁵² The plaintiffs in *Martin* were six homeless individuals, all of whom alleged citations between 2007 and 2009 for violating at least one of the ordinances.⁵³ In the state court proceedings that ensued, five of the plaintiffs were sentenced to time served, with the sixth sentenced to one additional day in jail.⁵⁴

The plaintiffs sued the City in federal court in late 2009 variously seeking damages and a prospective injunction against the ordinances’ enforcement.⁵⁵ All

44. *Id.* at 551–52.

45. *Id.* at 554 (Fortas, J., dissenting, joined by Douglas, Brennan, and Stewart, JJ.).

46. *Id.* at 567.

47. *Id.* at 568.

48. *Id.* at 567–68.

49. Some Justices, however, have expressed interest in extending it to cover more than mere addiction. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 202 n.2 (1986) (Blackmun, J., dissenting) (“[U]nder Justice White’s analysis in *Powell*, the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on [same sex] attraction regardless of the circumstances.”).

50. See *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018), amended by 920 F.3d 584 (9th Cir. 2019), cert. denied, 140 S. Ct. 674 (2019).

51. *Id.* (quoting BOISE, IDAHO, CITY CODE § 9-10-02 (2014) (current version at BOISE, IDAHO, CITY CODE § 7-3A-2(A))).

52. *Id.* (alteration in original) (quoting BOISE, IDAHO, CITY CODE § 6-01-05 (2014) (current version at BOISE, IDAHO, CITY CODE § 5-2-3(A)(1))).

53. *Id.*

54. *Id.* at 1037.

55. *Id.* at 1038. All plaintiffs sought damages under 42 U.S.C. § 1983, and some plaintiffs

six argued that their citations under the ordinances violated the Eighth Amendment.⁵⁶ The district court granted summary judgment to the City on procedural grounds, believing that it lacked jurisdiction and that the claims were mooted by the police department's announcement that it would not enforce the ordinances when homeless shelters in the city were at capacity.⁵⁷ On appeal, the Ninth Circuit reversed and remanded, instructing the district court to reevaluate its jurisdiction and holding that the City failed to show that enforcement of the ordinances "could not reasonably be expected to recur."⁵⁸ The Ninth Circuit therefore held that the claims were not moot because the policy could theoretically be rescinded at any time at the behest of the chief of police.⁵⁹ On remand, the district court once more granted summary judgment to the City, again on procedural grounds, and the plaintiffs subsequently appealed.⁶⁰ The Ninth Circuit concluded that the plaintiffs' claim for prospective injunctive relief against enforcement of the ordinances was ripe for review.⁶¹

additionally sought prospective injunctive relief against enforcement of the ordinances under § 1983 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. *Id.*

56. *Id.*

57. *Id.* According to the district court, because the validity of the plaintiffs' convictions had already been litigated in state court, seeking retrospective relief in federal court "would serve as an end-run around the state court appellate process" and thereby violate the *Rooker-Feldman* doctrine. *Bell v. City of Boise*, 834 F. Supp. 2d 1103, 1110 (D. Idaho 2011), *rev'd*, 709 F.3d 890 (9th Cir. 2013); *see generally* *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 415-16 (1923); D.C. Ct. of Appeals v. *Feldman*, 460 U.S. 462, 482-86 (1983) (preventing lower federal courts from exercising appellate review over final state court judgments).

58. *Martin*, 902 F.3d at 1038-39 (quoting *Bell*, 709 F.3d at 898). On the jurisdictional issue, the Ninth Circuit reasoned that the plaintiffs' suit in federal court was not an "appeal" forbidden under *Rooker-Feldman*, because the alleged legal wrong lay in the City's acts, not the state court's. *Bell*, 709 F.3d at 897.

59. *Martin*, 902 F.3d at 1039.

60. *Id.* at 1039-40. Specifically, the district court held that the plaintiffs' claims for both retrospective and prospective relief under § 1983 were barred by *Heck v. Humphrey*. *Id.* at 1039; *see generally* *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) ("[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."). Moreover, the district court held that, although the plaintiffs' claim for prospective relief under the Declaratory Judgment Act was not barred by *Heck*, the plaintiffs lacked standing to bring such a claim because the City had by then amended the ordinances in 2014 to permit camping or sleeping in a public place when no shelter space was available. *Martin*, 902 F.3d at 1039. Indeed, the district court found that the record "suggest[ed] there [wa]s no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity," and "there ha[d] not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families." *Id.* at 1039-40.

61. *Martin*, 902 F.3d at 1040-46. First, the Ninth Circuit addressed the dismissal of plaintiffs' claims for lack of standing. *Id.* at 1040-42. The court held that the plaintiffs indeed had standing to seek prospective relief because even though the City had amended both ordinances to provide for non-enforcement when the shelters were at full capacity, the City still wholly relied on the homeless shelters themselves for reporting whether they were full. *Id.* at 1040. Moreover, the plaintiffs had adduced sufficient evidence that the shelters do turn away individuals who had stayed there for too many days in a row. *Id.* at 1041. Thus, the court held that the plaintiffs had standing to seek prospective relief because they "ha[d] demonstrated a genuine issue of material fact regarding whether they face a credible risk of prosecution under the ordinances in the future on a night when they have been denied access to Boise's homeless shelters." *Id.* at 1042. Second, the Ninth Circuit addressed

The Ninth Circuit then turned to the merits.⁶² The court looked to the Supreme Court's status crimes cases for guidance.⁶³ The Ninth Circuit, dissecting the *Powell* decision, drew on Justice White's concurrence and the four-Justice dissent to fashion the principle that "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being."⁶⁴

Applying this principle to the homeless plaintiffs' Eighth Amendment challenge in *Martin*, the Ninth Circuit held the Boise ordinances unconstitutional because they "criminalize[d] conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets."⁶⁵ Thus, the Ninth Circuit extended the status crimes doctrine to cover "the state of being 'homeless in public.'"⁶⁶ The court declared that "in no way" should its holding be taken to mean that the City must provide shelter to homeless individuals, but merely that the City cannot prosecute them when the number of available beds in shelters is insufficient.⁶⁷

The City petitioned for a rehearing en banc.⁶⁸ The petition was denied over two vigorous dissents.⁶⁹ The principal dissent, authored by Judge Milan Smith and joined by five others, criticized the original panel for "badly misconstru[ing] . . . Supreme Court precedent, and craft[ing] a holding that has begun wreaking havoc on local governments, residents, and businesses throughout our circuit."⁷⁰ Judge Smith's primary criticism was that the panel drew the wrong principle from *Powell*—the views of dissenting Justices in a fragmented court such as the one in *Powell*, he contended, do not constitute the holding.⁷¹ Judge Smith would have upheld the constitutionality of the Boise ordinances on the ground that *Robinson* and *Powell* stand for the narrow proposition that, under the Cruel and Unusual Punishments Clause, a conviction requires the commission of some act.⁷² Moreover, Judge Smith observed, *Martin*'s holding was far from a narrow one—under the panel's decision, cities now must "either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety."⁷³ And "the panel's decision,"

the district court's holding that the plaintiffs' claims were barred by *Heck*. *Id.* at 1042, 1044-46. The court's analysis led it to conclude that only the plaintiffs' claims for retrospective relief were properly dismissed under *Heck*—their claims for prospective relief ought not to have been barred. *Id.* at 1046.

62. *Id.* at 1046.

63. *Id.* at 1046-48.

64. *Id.* at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007)).

65. *Id.* (quoting *Jones*, 444 F.3d at 1137).

66. *Id.* (quoting *Jones*, 444 F.3d at 1137).

67. *Id.* (quoting *Jones*, 444 F.3d at 1138).

68. See *Martin v. City of Boise*, 920 F.3d 584, 588 (9th Cir. 2019), cert. denied, 140 S. Ct. 674 (2019).

69. See *id.* at 590-99 (M. Smith, J., dissenting); *id.* at 599-603 (Bennett, J., dissenting).

70. *Id.* at 590 (M. Smith, J., dissenting, joined by Callahan, Bea, Ikuta, Bennett, and R. Nelson, JJ.).

71. *Id.* at 591 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

72. *Id.*

73. *Id.* at 594.

Judge Smith wrote, “will inevitably result in the striking down of laws that prohibit public defecation and urination.”⁷⁴

III. CASE ANALYSIS

The Ninth Circuit’s decision in *Martin* was incorrect. Instead of relegating the status crimes doctrine to the limited context of disease, the Ninth Circuit expanded it to cover homelessness. But the doctrine ought to be restricted for two reasons: (1) it betrays a proper understanding of the Eighth Amendment by eliding the distinction between the method of punishment and the substantive prohibition itself; and (2) it opens the door for judicial activism by licensing the judge as moral arbiter, striking down democratically adopted legislation to the extent that defendants can simply characterize their offensive conduct as an inevitable consequence of their being.

First, the status crimes doctrine misinterprets the text and history of the Eighth Amendment, which does not place limitations on the content of the criminal law itself. By its terms, the Amendment speaks to procedure, not substance.⁷⁵ The drafters of the Bill of Rights inserted the Cruel and Unusual Punishments Clause to circumscribe permissible methods of punishment, not the elements of an offense.⁷⁶ In other words, the Clause does not place substantive limits on *what* may be punished. Instead, the Amendment merely functions as a limitation on *how* a crime may be punished.⁷⁷ In outlawing “cruel and unusual punishments,” the Founders had in mind torturous methods of punishment.⁷⁸ But the plaintiffs in *Martin* were not drawn and quartered—they merely spent time in jail.⁷⁹ If constitutional provisions ought to be interpreted in accordance with original intent, the status crimes doctrine represents an impermissible divergence from a proper understanding of the Eighth Amendment.

But even assuming the Founders’ intent is irrelevant, any substantive limitations on the criminal law itself arising from the Amendment should at least flow from the text. The Clause forbids “cruel and unusual punishments”—not just “cruel punishments.”⁸⁰ But when the Supreme Court formulated the doctrine in

74. *Id.* at 596; see generally Kate Reilly, *San Francisco to Launch ‘Poop Patrol’ to Clean Up Streets Amid Homelessness Crisis*, TIME (Aug. 15, 2018, 8:41 PM), <https://time.com/5368610/san-francisco-poop-patrol-problem/> [perma.cc/VM95-FFJX].

75. See U.S. CONST. AMEND. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

76. See generally Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636–39 (1966).

77. See *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting) (“It is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous ‘methods of punishment’”) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 (1991) (plurality opinion)).

78. See BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 186 (1832) (the Eighth Amendment prohibits such “barbarous and cruel punishments” as “[b]reaking on the wheel, flaying alive, rending asunder with horses, . . . maiming, mutilating and scourging to death”).

79. See *Martin v. City of Boise*, 902 F.3d 1031, 1037 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 674 (2019). Of the six plaintiffs, five were sentenced to time served, and one was sentenced to one additional day in jail. *Id.*

80. U.S. CONST. AMEND. VIII.

Robinson, it skirted half the analysis: in his opinion for the Court, Justice Stewart did not attempt to investigate whether other states criminalized addiction.⁸¹ Similarly, the Ninth Circuit in *Martin* glossed over the “unusual” prong⁸²—had it not done so, it would have discovered that ordinances such as Boise’s are commonplace: of 187 American cities surveyed in 2019, 37% prohibited camping in public, 21% prohibited sleeping in public, and 55% prohibited sitting or lying down in public.⁸³ Punishing violators of these ordinances can hardly be deemed “unusual.”

Second, the status crimes doctrine’s lack of a coherent limiting principle opens the door for judicial activism.⁸⁴ It takes the Eighth Amendment’s relatively straightforward punishment inquiry and replaces it with a freewheeling assessment in which an unelected judge decides whether the prohibited conduct itself is morally blameworthy.⁸⁵ In this respect, the doctrine evokes the *Lochner* era, where unelected judges took it upon themselves to determine whether a particular law befitted the people.⁸⁶ To the extent that the status crimes doctrine operates to place substantive limits on local communities’ abilities to regulate certain undesirable behavior—such as “sitting, sleeping, or lying” in public areas⁸⁷—it erroneously allows judges to substitute their personal predilections for the judgments of the legislature.⁸⁸

Some sort of limiting principle to the status crimes doctrine could perhaps serve to constrain this sort of judicial activism. Such a limiting principle would most naturally lie in the Eighth Amendment’s text, which suggests that the judge must first find that a particular criminalization of status is unusual.⁸⁹ But the *Martin* court did not deign to investigate whether the homeless individuals’ convictions were actually unusual; instead, the court sufficed itself to find the laws per se “cruel and unusual” under *Robinson*.⁹⁰ By contrast, the *Powell* plurality understood the necessity of a limiting principle and attempted to restrain the

81. Cf. *Robinson v. California*, 370 U.S. 660, 666 (1962) (making a bare assertion that such a law “would doubtless be universally thought to be an infliction of cruel and unusual punishment”).

82. See *Martin*, 902 F.3d at 1048.

83. BAUMAN, *supra* note 21, at 38, 41–42.

84. *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion) (“[I]t is difficult to see any limiting principle [in the status crimes doctrine] that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . .”).

85. Cf. *Kahler v. Kansas*, 140 S. Ct. 1021, 1031 n.7 (2020) (“[C]ourts do not get to make such judgments [of moral blameworthiness]. Instead, the States have broad discretion to decide wh[at] counts as blameworthy . . .”) (citation omitted).

86. See *Lochner v. New York*, 198 U.S. 45, 58 (1905) (striking down New York law setting maximum hours for bakers under the Fourteenth Amendment); ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 44–46 (1990) (characterizing *Lochner* doctrine as judicial usurpation of power).

87. *Martin*, 902 F.3d at 1048.

88. See, e.g., *id.* at 1035. The panel in *Martin*, for example, prefaced its invalidation of Boise’s ordinances with a lofty quote from Anatole France’s *The Red Lily*: “The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” *Id.*; cf. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).

89. See U.S. CONST. AMEND. VIII.

90. See *Martin*, 902 F.3d at 1048.

status crimes doctrine to merely require that criminal offenses involve the commission of some act.⁹¹ But that view failed to garner a majority—the five other Justices in *Powell* refused to so restrict *Robinson*.⁹²

As a result, the primary limitation on the judge's discretion to strike down democratically adopted legislation under the doctrine appears to hinge upon the defendant's ability to cast their offense as an unavoidable consequence of their being. But it is not difficult to argue that one has no control over their undesirable actions. For example, an individual convicted of a violent crime might claim that their anti-social actions resulted as an inevitable consequence of upbringing or an inherent propensity toward aggressive behavior.⁹³ Such rationalizations may well be correct—after all, recent advances in neuroscience suggest that individuals have less control over their actions than previously thought,⁹⁴ and many contemporary philosophers contend that humans lack free will altogether.⁹⁵ Nevertheless, the law must remain steadfast in its belief that individuals are accountable for their actions.⁹⁶ The more the law lends credence to deterministic argumentation, the more it loses force as a tool to regulate standards of conduct.⁹⁷

IV. CONCLUSION

The Ninth Circuit's decision in *Martin* was incorrect. By holding as it did, the Ninth Circuit defied the *Powell* plurality's limits on *Robinson*, extending the status crimes doctrine to cover a person's homeless status. But in doing so, the Ninth Circuit flouted the real meaning of the Cruel and Unusual Punishments Clause, opening the door for judicial activism to the extent that defendants can characterize their unlawful behavior as a consequence of their status.

And in light of the Supreme Court's refusal to review the Ninth Circuit's

91. See *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion); cf. Benno Weisberg, Comment, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual "Crimes"*, 96 J. CRIM. L. & CRIMINOLOGY 329, 359–64 (2005) (proposing a limiting principle to *Robinson*'s status crimes doctrine whereby courts simply distinguish between innocent and culpable conduct by asking whether the targeted conduct is only unlawful in a particular context).

92. See *Powell*, 392 U.S. at 551–52 (White, J., concurring); *id.* at 567 (Fortas, J., dissenting, joined by Douglas, Brennan, and Stewart, JJ.).

93. Cf. *id.* at 534 (1968) (plurality opinion) (“If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a ‘compulsion’ to kill . . .”).

94. See, e.g., David Eagleman, *The Brain on Trial*, THE ATLANTIC (July 2011), <https://www.theatlantic.com/magazine/archive/2011/07/the-brain-on-trial/308520/> [perma.cc/U83S-3YUN] (“[W]e now understand that there is no meaningful distinction between a person's biology and his decision-making.”).

95. See, e.g., Galen Strawson, *The Impossibility of Moral Responsibility*, 75 PHIL. STUD. 5, 7 (1994).

96. See *Powell*, 392 U.S. at 535–36 (plurality opinion) (“[The] [t]raditional common-law concept[] of personal accountability . . . lead[s] us to [avoid the status crimes doctrine] We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds.”).

97. See *Smith v. Follette*, 445 F.2d 955, 961 (2d Cir. 1971) (“[I]f every criminal act which was the result in some degree of a socially developed compulsion was beyond society's control, the interests and safety of the public would be seriously threatened.”).

decision,⁹⁸ the resulting circuit split on the constitutionality of anti-camping ordinances will stand for the time being. Nevertheless, given the resurgence of textualism in the Supreme Court's jurisprudence,⁹⁹ it remains possible that the Court may overturn the status crimes doctrine in the near future. But until the Court does so, the best circuit courts can do is to limit *Robinson* and *Powell* to their facts, as cases dealing only with the criminalization of addiction. In this way, courts can steer clear of expanding the status crimes doctrine and adhere as closely as possible to a sound interpretation of the Eighth Amendment.

98. *City of Boise v. Martin*, 140 S. Ct. 674 (2019).

99. See, e.g., Interview by John Manning with Elena Kagan, Associate Justice, U.S. Supreme Court, in Cambridge, Mass. at 8:28 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [perma.cc/BE5Z-D8S3] (“[W]e’re all textualists now.”); see generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).