

The Miserly Message of *Grants Pass*

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I. INTRODUCTION

In January 2024, the U.S. Supreme Court granted certiorari in *Grants Pass v. Johnson*¹ to examine the question of whether the Eighth Amendment prohibits—and to what extent—the government from policing homeless encampments. The case received significant media attention, and homelessness advocates considered it the biggest case on homelessness in nearly a half-century.² From a legal perspective, though, the individual case was not particularly interesting. It was a sure loser, as the Ninth Circuit’s analysis, as well as that of other courts reaching similar conclusions, almost certainly stretched the Eighth Amendment too far under existing doctrine—especially when considered in light of the current Supreme Court’s proclivities.³ From a broader perspective, though, the case had the potential to offer the Court a vehicle with which to further hammer home its seeming mission of turning away from precedent and charting a new, more conservative, course for the Eighth Amendment. And that is exactly what the *Grants Pass* Court did, although more quietly than in other cases such as *Dobbs v. Jackson Women’s Health Organization*.⁴

This Essay outlines how the *Grants Pass* Court has continued quietly narrowing the Eighth Amendment and excavates the new bones on which this narrower Amendment is built. Part I provides a synopsis of *Grants Pass* and its complicated history, diving into the reasoning the district and circuit courts employed in the case and its Ninth Circuit predecessors. Part II explains that the result in *Grants Pass* was

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¹ City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

² See, e.g., *SCOTUS Takes Up Johnson v. Grants Pass, the Most Significant Case about Homelessness in 40+ Years*, NAT’L HOMELESSNESS L. CTR. (Jan. 12, 2024), <https://homelesslaw.org/statement-johnsonvgrantspass/> [<https://perma.cc/KKZ8-VUBS>] (“This sets the stage for the most significant Supreme Court case about the rights of homeless people in decades.”).

³ I had little doubt that the Supreme Court would reverse the Ninth Circuit’s opinions, but not all scholars agreed with me. See generally, e.g., Brief of Crim. L. & Punishment Scholars as Amici Curiae Supp. Resp., City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23–175), https://www.supremecourt.gov/DocketPDF/23/23-175/306670/20240403155348738_Grants%20Pass%20Amicus%20FINAL%204.3.2024.pdf [<https://perma.cc/XU87-MXXW>] (“The plaintiffs in this case were punished even though they did not do anything wrong. Under *Robinson*, that is the clearest example of disproportionality.”).

⁴ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

not a surprise. It is instead yet another case in which the Court is chipping away at the Eighth Amendment, abandoning its longstanding evolving-standards-of-decency jurisprudence and replacing it with a historical analysis. Part III shows how the Court has used *Grants Pass* to send a message that the Eighth Amendment as we know it is in jeopardy. This Part suggests that *Grants Pass* was something of an odd case in which the Court would grant certiorari but notes that it was a convenient vehicle for the Court to employ in further limiting the Eighth Amendment. Part III also explains how the Court used the case to obliquely tinker with the meaning of “cruel and unusual” and to raise serious questions about the definition of “punishments.” While the *Grants Pass* decision raises a slim possibility that the Punishments Clause might apply more broadly to civil penalties, it primarily emphasizes the Court’s significant narrowing of “punishments” to “method[s] or kind[s],” which places fifty years of existing Eighth Amendment jurisprudence on the line. This Essay concludes by explaining how *Grants Pass*, while a significant blow to homelessness advocates, is just another case in the Court’s parade of whittling away at the Eighth Amendment.

II. *GRANTS PASS* AND ITS HISTORY

Homelessness is a significant problem in the United States. Individuals lacking permanent shelter face numerous challenges related to health, safety, job opportunities, and other matters. And homeless encampments suffer from challenges such as a lack of cleanliness, disease outbreak, and increased crime that often spill out into the surrounding communities. In response to these many challenges, numerous cities throughout the country have resorted to policing homeless populations by enacting ordinances that prohibit sleeping or camping on public property. There is significant disagreement as to the effectiveness and appropriateness of these laws, and, understandably, those advocating for this vulnerable population are generally opposed to them.

Over the years, homelessness advocates have had some significant victories on this issue. As far back as 1992, a federal district court in Florida concluded that the Eighth Amendment’s prohibition on cruel and unusual punishments barred police officers from arresting homeless persons for sleeping and engaging in other involuntary life-sustaining activities while in public spaces.⁵ In the West, where the homelessness crisis has been especially pronounced, advocates received victories in the Ninth Circuit. In *Jones v. Los Angeles*,⁶ the court found that “the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles.” The Ninth Circuit reached this

⁵ See *Pottinger v. Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992) (“As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment . . .”).

⁶ *Jones v. Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated in Jones v. Los Angeles*, 505 F.3d 1006 (9th Cir. 2007).

conclusion by examining the Supreme Court cases of *Robinson v. California* and *Powell v. Texas*.

In *Robinson*,⁷ which the Court decided in 1962, the Justices held with little analysis that criminalizing the status of being a narcotics addict violates the Eighth Amendment. The Court emphasized that the case dealt only with status, not with, for example, the sale or possession of narcotics. By way of reasoning, the Court stated only that criminalizing a disease “would doubtless be universally thought to be an infliction of cruel and unusual punishment” and that, at least in the litigation, California had recognized narcotics addiction as a disease.

Six years later, the Court decided *Powell*,⁸ which is the only Supreme Court case truly engaging with *Robinson*. In *Powell*, the Court applied *Robinson* to a conviction for public drunkenness as applied to an alcoholic, ultimately rejecting the claim in a fractured opinion. In the plurality opinion, four Justices rejected the defendant’s view that the Eighth Amendment bars punishment for “being in a condition he is powerless to change”—involuntary conduct resulting from alcoholism. It emphasized that *Robinson* held only that a status cannot be criminalized, not that criminalizing involuntary conduct flowing from that status violates the Eighth Amendment. Justice White concurred, suggesting that he would find unconstitutional involuntary conduct flowing from status but that *Powell* did not present such a question. Justice White instead pointed out that the statute under review criminalized drunkenness in a public place and that, even if being drunk was unavoidable for an alcoholic, being drunk in a public place was not. The four dissenters went further than Justice White, arguing that punishing the defendant was unconstitutional because both his drunkenness and appearing in public while drunk were involuntary.

When applying these cases in *Jones* to the question of whether it is unconstitutional to criminalize sleeping in public spaces when that act is involuntary because of one’s status, the Ninth Circuit emphasized that, even though the *Powell* plurality indicated that *Robinson* prohibited only punishing status, five Justices in *Powell*—the four dissenters and Justice White in concurrence—believed that punishing involuntary conduct flowing from status is also inconsistent with the Eighth Amendment. Citing the *Marks* Rule,⁹ the *Jones* court found that “the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and

⁷ *Robinson v. California*, 370 U.S. 660 (1962).

⁸ *Powell v. Texas*, 392 U.S. 514 (1968).

⁹ In *Marks v. United States*, the Court explained that, “[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.” 430 U.S. 188, 193, 197 (1977).

homeless without shelter in the City of Los Angeles.” Just over a year after this decision, though, the Ninth Circuit vacated *Jones* pursuant to the parties’ joint motion following a settlement.¹⁰

Even though the *Jones* decision was vacated in 2007, the Ninth Circuit relied on the opinion when it confronted the nearly identical question in the 2019 case of *Martin v. Boise*.¹¹ As in *Jones*, the Ninth Circuit was examining whether the Eighth Amendment bars criminalizing sleeping outside in public places due to status. In doing so, the court noted *Robinson*’s distinction between status and conduct but relied on the fact that five Justices in *Powell*—the four dissenters and Justice White—agreed that the Eighth Amendment bars criminalizing not only status but also involuntary conduct flowing from that status. Echoing *Jones*, the *Martin* court held that “so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public.”

Grants Pass followed on the heels of *Jones* and *Martin*. In this case, the City of Grants Pass had passed several ordinances to address its homelessness problem. These ordinances prohibit sleeping “on public sidewalks, streets, or alleyways”; “[c]amping” on public property; and “[c]amping” and “[o]vernight parking” in the city’s parks.¹² Violating these ordinances triggers a cascade of penalties. First, a violator may be civilly fined.¹³ Someone who has violated the ordinances more than once may be barred from the city parks for thirty days.¹⁴ And, pursuant to state law, violations of this order barring individuals from the parks constitute criminal trespass, which is punishable by up to thirty days’ imprisonment and a \$1,250 fine.¹⁵

After receiving citations for violating these ordinances, several homeless individuals living in Grants Pass filed a class action on behalf of “all involuntarily homeless people living in Grants Pass,” seeking an injunction barring the city from enforcing the ordinances. Among other bases for relief, the plaintiffs argued that enforcing the ordinances violated the Eighth Amendment’s prohibition on cruel and unusual punishments. In many respects, plaintiffs’ claims mirrored those presented in *Jones* and *Martin*, although there were some differences. For example, the enforcement schemes in *Jones* and *Martin* were entirely criminal, whereas the enforcement scheme at issue in *Grants Pass* relied on a series of civil consequences before criminal punishment was issued. Relatedly, unlike *Jones* and *Martin*, *Grants*

¹⁰ See *Jones v. Los Angeles*, 505 F.3d 1006 (9th Cir. 2007).

¹¹ *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019). This decision amended the Ninth Circuit’s decision of September 4, 2018, in which it also relied on *Jones*. See *id.*; *Martin v. Boise*, 902 F.3d 1031 (9th Cir. 2018).

¹² Grants Pass Mun. Code §5.61.020(A); Grants Pass Mun. Code §5.61.030; Grants Pass Mun. Code §6.46.090(A)–(B) (repealed 2024).

¹³ See Grants Pass Mun. Code §5.61.020(A).

¹⁴ See Grants Pass Mun. Code §6.46.350.

¹⁵ See Or. Rev. Stat. §§164.245, 161.615(3), 161.635(1)(c).

Pass was a class action, and none of the lead plaintiffs had ever been criminally prosecuted for their violations of the ordinances. Further, the terms of the ordinances in each of these cases, as well as the particular conduct involved in violating the ordinances, varied.

Despite these differences, in addressing the plaintiffs' arguments in *Grants Pass*, both the district and circuit court followed the roadmap laid out first in *Jones* and then followed in *Martin*. The district court made clear that the distinction of criminal versus civil violations in *Martin* and *Grants Pass* made "no difference for Eight[h] Amendment purposes" and found that, because the number of homeless persons was greater than the number of available shelter beds, enforcing the ordinances was cruel and unusual punishment.¹⁶ The court then constructed a somewhat complicated, patchwork remedy, permanently enjoining enforcement of the anti-camping ordinances¹⁷ during the night and partially during daytime.

The city appealed to the Ninth Circuit, which, relying on *Martin*, largely affirmed. Before reaching the Eighth Amendment question, the court addressed and dismissed the city's jurisdictional arguments. The Ninth Circuit also, *sua sponte*, raised a question of whether the case could proceed because one of the class representatives—the only one who had standing to challenge the anti-sleeping ordinance—had died since the district court issued its decision. The Ninth Circuit explained that this raised a complicated and novel question of whether it had jurisdiction to address the constitutionality of enforcing the anti-sleeping ordinance and remanded this issue to the district court to determine whether a substitute class representative with sufficient standing was available.

The Ninth Circuit then reached the merits of the claim that enforcing the anti-camping ordinances is unconstitutional. First, the court addressed the city's argument that the Punishments Clause was inapplicable because, unlike in *Martin*, the enforcement scheme in *Grants Pass* involved civil citations, and none of the class representatives had been subject to criminal enforcement. The Ninth Circuit explained, however, that the government could not circumvent Eighth Amendment limitations by inserting a preliminary step of a civil citation before criminal prosecution and punishment. The city's two-step approach, the court ruled, amounted to criminalization. Second, the Ninth Circuit relied on its prior decision in *Martin* and reiterated that *Robinson* and *Powell* prohibit criminalization of involuntary conduct flowing from status. Ultimately, the court held that involuntarily homeless persons' camping on public property could not be criminalized.¹⁸

¹⁶ *Johnson v. City of Grants Pass*, 72 F.4th 868, 879 (9th Cir. 2023) (referencing the district court decision).

¹⁷ The district court did not grant injunctive relief with respect to the anti-sleeping ordinance. *See id.* at 880.

¹⁸ More specifically, the Ninth Circuit stated: "We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the

The Supreme Court granted certiorari in January 2024 to determine whether the Eighth Amendment prohibits the government from enforcing these anti-camping ordinances. Sidestepping many of the complications of the lower court opinions, the Supreme Court simplified the problem by focusing on the historical and textual meaning of the Punishments Clause. It explained that enforcing the anti-camping ordinances could not constitute cruel and unusual punishment because it did not relate to a “method or kind of punishment,” and the enforcement scheme neither “superadd[ed] terror, pain, or disgrace,” nor was an unusual mode of punishment throughout the country. As for the lower courts’ reliance on *Robinson* and *Powell*, the Supreme Court suggested that *Robinson* is of questionable precedential value; it was argued as a Due Process case and was—and remains—an Eighth Amendment outlier. But, the Court continued, even if it were to rely on *Robinson*, that case was explicit in that its holding was limited to barring the criminalization of status, not conduct. And the *Powell* plurality cemented that limitation. Finally, the Court emphasized the importance of allowing the government to experiment with different public policy approaches to the problem of homelessness and that landing on the *right* solution was not courts’ domain.

III. WHITTILING AWAY AT THE EIGHTH AMENDMENT

The outcome in *Grants Pass* was not surprising.¹⁹ While the Court could have made greater waves in its Eighth Amendment analysis, by, for example, overruling *Robinson* and *Powell*, it instead continued down a predictable path on its way to killing off the mantle of the Eighth Amendment as it has been interpreted since 1958.²⁰

Prior to 1958, the Court lacked a clear methodology for deciding Eighth Amendment cases. But, that year, it decided *Trop v. Dulles*,²¹ in which the Court explained that “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” The case has been cited more than ten thousand times, and the Court, itself, has cited *Trop* nearly one hundred times. In case after case, the Court has referred to this “evolving standards of decency” language as central to its Punishments Clause analysis. And under this evolving-standards banner, the Court has developed an Eighth Amendment methodology that examines the cruelty and unusualness of a punishment by assessing the number of states that have adopted or rejected the practice and then applying the Court’s own independent judgment to determine the constitutionality

elements, or for sleeping in their car at night, when there is no other place in the City for them to go.” *Id.* at 896. It also asked the district court to narrow its injunction. *See id.*

¹⁹ *But see supra* note 3.

²⁰ *See generally* Meghan J. Ryan, *The Death of the Evolving Standards of Decency*, 51 FLA. ST. U. L. REV. 255 (2024) (explaining that the Court has been chipping away at its Eighth Amendment evolving-standards-of-decency jurisprudence).

²¹ *Trop v. Dulles*, 356 U.S. 86 (1958).

of the punishment, generally based on whether it serves the traditional purposes of punishment such as retribution, deterrence, and rehabilitation.²² As practices change, and as perceptions of punishments advance, the meaning of the Amendment evolves as well.

Although the “evolving standards of decency” have been the centerpiece of Eighth Amendment jurisprudence for more than fifty years, this idea that a provision of the Constitution evolves over time is in stark contrast to the historical approach that has captured the Court in recent years. In the Second Amendment case of *Bruen*²³ and the *Dobbs*²⁴ abortion case, for example, the Court focused on history and tradition, including evidence from the time of the Founders, to determine the meaning of the Constitution today. And the world has noted that this is the general direction that the Court is taking.²⁵ Similarly, in Eighth Amendment cases, the Court has recently been emphasizing the importance of what the Amendment meant at the time of the Founding. But the Court has not squarely addressed how this emerging approach is in tension with its evolving-standards-of-decency jurisprudence. Neglecting to address this discord, the Court has instead steadily been chipping away at the evolving-standards-of-decency approach.²⁶ Not only has the Court neglected to mention the evolving standards of decency, but, at least in cases challenging execution techniques, it has constructed an entirely new approach of focusing on the risk of pain involved in the state’s execution protocol. And, in its 2019 case of *Bucklew v. Precythe*,²⁷ the Court explained that the petitioner’s Eighth Amendment claim failed because his argument was “inconsistent with the original and historical understanding of the Eighth Amendment.”

IV. USING *GRANTS PASS* TO FURTHER LIMIT THE AMENDMENT

Grants Pass is yet another case in which the Court has largely ignored this Eighth Amendment evolving-standards-of-decency principle. The majority again failed to mention the evolving standards of decency. Only Justice Thomas in concurrence mentioned them, referring to this long-followed Eighth Amendment approach as a “mistake.” And, although the Court perhaps alluded to its previous

²² See Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 586–91 (2010); Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 100–12, 134–35 (2010).

²³ *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022).

²⁴ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

²⁵ See, e.g., Erwin Chemerinsky, *Chemerinsky: Originalism Has Taken Over the Supreme Court*, ABA J. (Sept. 6, 2022, 8:00 AM), <https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court> [<https://perma.cc/XEB2-Q6PJ>] (“The U.S. Supreme Court term that ended on June 30 was the most originalist in American history.”).

²⁶ See Ryan, *supra* note 20, at Part II; see also William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L. J. 403, 412 (2017) (“When assessing the constitutionality of techniques, the Court has strayed from its Eighth Amendment precedents.”).

²⁷ *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

state-counting methodology by reciting that, “[b]y one count, a majority of cities have laws restricting camping in public spaces, and nearly forty percent have one or more laws prohibiting camping citywide,” it did not engage in the ordinary state-counting and independent judgment that are the hallmarks of the Court’s traditional Eighth Amendment jurisprudence. Instead, the Court relied on a historical and textual analysis to explain why enforcing the ordinances did not amount to cruel and unusual punishment.

When the Court first granted certiorari in *Grants Pass*, there was the distinct possibility that the Court could use the case to go even further and explicitly disavow its evolving-standards-of-decency approach. Those depending on Eighth Amendment protections may have let out a big sigh of relief when, instead, the Court continued down the path of just ignoring this fifty years of precedent. Perhaps the Court wanted to tread lightly and at least appear to respect its predecessors’ decisions. But in other cases, such as *Dobbs*, the Court did not shy away from overruling a half-century of established doctrine. Although it did not explicitly overrule any precedent in *Grants Pass*, the Court did send a somewhat muted message that it is cutting back on the scope of the Eighth Amendment.

A. *Why This Case?*

Perhaps because it lies at the intersection of the homelessness crisis and constitutional law, *Grants Pass* received significant media attention even before the Court granted certiorari in January 2024. Accordingly, many commentators were not surprised when the Court agreed to hear the case. But it was something of an odd case on which the Court would ask for full briefing, hear oral arguments, and issue a merits opinion.

First, although there are no hard and fast rules regarding when the Court grants certiorari, the Court often relies on whether there is a circuit split on the matter (or a split among other courts) in determining whether a case is cert-worthy.²⁸ In its petition for certiorari, the City of Grants Pass certainly argued that there was significant division among courts on this issue. It pointed out that the Eleventh Circuit and the California Supreme Court disagreed with the Ninth Circuit on the constitutionality of anti-camping ordinances. It also noted that the Fifth Circuit had upheld an anti-sleeping ordinance because the enforcement scheme did not constitute punishment. Both the petitioners and the Court itself acknowledged, though, that only the Ninth Circuit had determined that anti-camping ordinances constitute cruel and unusual punishment.²⁹ If there were a real question about the constitutionality of the ordinances, it seems that the Court could have benefited from

²⁸ See Supreme Court R. 10 [<https://perma.cc/WC5A-NW27>].

²⁹ See *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2211 (2024) (“No other circuit has followed *Martin*’s lead with respect to public-camping laws.”); Petition for Writ of Certiorari, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024), at 24 [<https://perma.cc/QWL2-SA8F>] (“The Ninth Circuit alone has upheld Eighth Amendment challenges to generally applicable public camping ordinances.”).

additional percolation among the circuits. But if this case was instead just a matter of error correction, the Court could have effected this more efficiently through summary reversal. Perhaps anticipating this reaction, the petitioners broadened the scope of their legal question to how courts should interpret *Robinson* and *Powell* as they apply to involuntary conduct flowing from status. Here, the petitioners found that twenty-four courts have upheld *Robinson*'s status/conduct distinction and that four courts view the Eighth Amendment more broadly to protect against the criminalization of involuntary conduct flowing from status. Naturally, though, the more broadly one views the question before the Court, the easier it is to establish a circuit split. Further, looming in the background is the fact that this was not the only time a petition for certiorari was before the Court on this matter. In 2019, the Court denied certiorari in *Martin* with no dissenting opinions.³⁰ Considering that there seems to have been no deepening of the court divides on this matter and that only the Ninth Circuit had found anti-camping ordinances unconstitutional, the Court's grant of certiorari should have been somewhat of a surprise.

This Eighth Amendment question may not have percolated as widely among the circuits as it perhaps could have, but the question of permissible ways to address the homelessness crisis is certainly important—another factor the Court may consider in deciding whether to grant certiorari. Still, *Grants Pass* was far from an ideal vehicle to decide this issue. Because the class representative with standing to challenge the anti-sleeping ordinance had passed away, that provision was not before the Court, narrowing the direct impact of the Court's decision in the case. Additionally, the significance of the Court's decision on the question it did reach—the constitutionality of the anti-camping ordinances—remained unclear for two additional reasons. First, before the Court granted certiorari, the Ninth Circuit remanded the case to the district court to narrow its injunction, so the applicability of any decision by the Court was murky. Second, in the summer of 2023, Oregon passed a law barring its municipalities from targeting homeless persons with these types of ordinances. It was thus questionable whether the Court's decision in *Grants Pass* would even be relevant in the case. Plaintiffs pointed out these difficulties of using *Grants Pass* as a vehicle for deciding the applicability of the Eighth Amendment in these circumstances, arguing that the Court's grant of certiorari would be a waste of resources. The Court ploughed through these arguments, though, granting certiorari and igniting headlines throughout the country. The Court could have abandoned this course and dismissed the case as improvidently granted or instead ordered a summary reversal. The Court did not take these paths, though. It seems the Court wanted to seize the opportunity to do subcutaneous work on the bones of the Eighth Amendment.

³⁰ See *Boise v. Martin*, 140 S. Ct. 674 (2019).

B. *Sending a Message in Grants Pass*

The *Grants Pass* Court sent a message about the Eighth Amendment not only by granting certiorari in the case but also by the breadth of its decision. As the Court suggested, to uphold enforcement of the ordinances under the Eighth Amendment, it needed to determine only that enforcement was not cruel, not unusual, or not punishment. Instead, throwing judicial restraint to the wind, the Court addressed all three components of the Punishments Clause and, through some subdermal reinterpretations, further narrowed the Eighth Amendment's scope.

1. Redefining "Cruel and Unusual"

On the surface, the Court seemingly did not say anything new about cruelty and unusualness in *Grants Pass*. Instead, it quoted its 2019 *Bucklew v. Precythe*³¹ opinion, where, taking what was at that time a rather new historical approach, the Court explained that "cruel" means intensifying a sentence with the "superaddition of terror, pain, or disgrace," and "unusual" means "long disused." Eagle-eyed observers will note, though, that the *Grants Pass* Court added an intent element to the *Bucklew* formulation of "cruel" by stating that cruelty means "*calculated* to superadd terror, pain or disgrace," and, elsewhere, "*designed* to superadd terror, pain or disgrace."³² It seems the Court took up Justice Thomas's view from his *Bucklew* concurrence that a punishment is cruel only if it *deliberately* superadds terror, pain, or disgrace. This further narrows the Eighth Amendment's scope, making it more difficult for challengers to establish constitutional cruelty by requiring them to make some showing of government intent. As for unusualness, although the Court has employed this "fallen into disuse" definition before, it has yet to provide an in-depth analysis of this definition in any case. In fact, this understanding of unusualness seems to be at odds with the Court's indications that it will not find particular execution procedures unconstitutional even if they have fallen into disuse. For example, could a court resurrect hanging despite it not being used to carry out an execution since 1996?³³ While the *Grants Pass* Court narrowed the meaning of "cruel and unusual," it added little detail in terms of how to apply this Eighth Amendment limit; it stated only that the city's sanctions were not "designed to superadd terror, pain, or disgrace" and that "similar punishments ha[d] been and remain[ed] among the usual modes for punishing offenses throughout the country."

³¹ *Bucklew v. Precythe*, 587 U.S. 119 (2019).

³² *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2216 (2024) (emphases added).

³³ See *Hanging*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/curriculum/high-school/about-the-death-penalty/methods-of-execution> [<https://perma.cc/FD3T-BZYK>]. Relatedly, how long in disuse is too long?

2. Unpacking “Punishments”

Grants Pass is perhaps more significant in raising questions about the scope of “punishments” under the Eighth Amendment. Ultimately, the Court found that the enforcement scheme could not constitute cruel and unusual punishment because the Clause does not address whether the government can criminalize particular behavior or how it can achieve a conviction. But the facts and circumstances of the case, as well as the Court’s opinion, bring into relief at least two important punishment issues. First, scrutinizing the facts in *Grants Pass* raises the question about whether the term “punishments” could possibly be broad enough to encompass some civil penalties. And, more plausibly, the *Grants Pass* opinion’s focus on “the method or kind of punishment a government may impose for the violation of criminal statutes” intimates a significant limit on the Eighth Amendment’s scope.

The circumstances of *Grants Pass* raise unanswered questions about whether the Punishments Clause might sweep more broadly than traditional punishments in the criminal realm. In oral arguments, Justice Thomas questioned the Respondents about whether there were criminal penalties involved in the case and, when counsel answered in the negative, whether the Eighth Amendment had ever been applied to civil penalties.³⁴ Respondents’ counsel conceded “[n]ot the Cruel and Unusual Punishments Clause, no.”³⁵ Indeed, the lead plaintiffs in the case had been subject only to civil penalties, so Justice Thomas was inquiring into the applicability of the Eighth Amendment where no criminal punishment had been imposed. Interestingly, the other Justices did not seem to be concerned about this issue, no other Justices dug into this matter, and the Court did not address the issue in its opinion. The lower court dealt with this matter by explaining that the government could not circumvent the limitations of the Punishments Clause by inserting civil steps before someone is subjected to criminal punishment. But the Court has not commented on this analysis, and it raises the question of why courts concerned about the government skirting Eighth Amendment requirements would not just focus on prohibiting the criminal penalty rather than also prohibiting the civil consequences preceding it. If the fact that the plaintiffs had suffered only civil penalties were enough to find no constitutional violation in the case, there would be no need for the Court to engage in a full Eighth Amendment analysis. But, because the Court neglected to address this issue, questions linger.

Whether “punishments” should be viewed more broadly to go beyond classically criminal penalties raises the related question of the extent to which the individual clauses of the Eighth Amendment should be siloed. Traditionally, the Excessive Bail, Excessive Fines, and Punishments Clauses have been treated individually, as they all address different subject matters. The Punishments Clause seems to specifically contemplate consequences flowing from criminal conduct, but

³⁴ See Transcript of Oral Argument at 6–7, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024) [<https://perma.cc/V7T2-WSKC>].

³⁵ *Id.* at 7.

the Excessive Bail and Excessive Fines Clauses are not textually limited to criminal contexts unless you consider them together with the Punishments Clause. In *United States v. Salerno*, the Court explained that bail determinations are ordinarily not criminal in nature, so the Bail Clause applies in the civil context. And in *Austin v. United States*,³⁶ one of the few cases the Court has decided under the Excessive Fines Clause, the Court concluded that the Excessive Fines Clause can apply outside the strictly criminal realm, as civil in rem forfeitures, for example, are not only fines but also constitute “punishment.” In other words, the Court has found that Eighth Amendment punishment can be present outside the criminal context. Considering the Punishments Clause alongside its Eighth Amendment compatriots could perhaps broaden this notion of punishment. Taking into account the Court’s messaging about limiting the Eighth Amendment, though, this seems unlikely.

Moving beyond the circumstances of *Grants Pass* to the majority’s opinion in the case, the Court stated that the Punishments Clause pertains to “the method or kind of punishment a government may impose for the violation of criminal statutes.” This definition is quite narrow. Many of the Court’s landmark Eighth Amendment cases have focused on the death penalty or prison sentences, which are pretty clearly “punishment.” Its other cases have reached more broadly, though, focusing on things such as prison conditions and execution techniques. And even further afield from methods or kinds of punishment, the Court has also held that the Eighth Amendment prohibits the gross disproportionality of punishments and sometimes bars certain classes of individuals, such as juveniles and intellectually disabled persons, from being punished in the same way as ordinary adults. With respect to prison conditions and execution techniques, the Court has accounted for the fact that the challenged “punishment” was not specifically handed down by the sentencing court. For example, in prison conditions cases, the Court has required that prison officials possess “deliberate indifference” as to the conditions to transform them from a mere condition into constitutional punishment. And in execution technique cases, the Court has developed a new framework focusing on the risk of pain to squeeze its analysis into the Punishments Clause framework. Whether these attempts to shoehorn prison conditions and execution cases into the narrower “method or kind of punishment” definition from *Grants Pass* will survive is questionable, though. Further, if the Court is going to take this punishment limitation seriously, the Court’s gross disproportionality standard and its prohibitions on executing certain categories of individuals are in serious jeopardy as they would likely not be considered methods or kinds of punishment.

Most prominently in *Grants Pass*, narrowing the Eighth Amendment to methods or kinds of punishment would eliminate *Robinson* and *Powell* from the Eighth Amendment cathedral. Since the beginning, *Grants Pass* was briefed and argued as a case interpreting *Robinson*. Court-watchers were looking for whether the Court would extend *Robinson*—however unlikely that would be—or overrule it. As the *Grants Pass* Court explained, *Robinson* itself was an odd case and one

³⁶ *Austin v. United States*, 509 U.S. 602 (1993).

perhaps better decided under the Due Process Clause rather than the Eighth Amendment. But the Court refused to overrule *Robinson* outright, stating that “no one ha[d] asked [it] to reconsider” the case. Yet the Court explained that the Punishments Clause deals with only what happens after criminalization and conviction, leaving *Robinson* out in the cold. The Court thus seemed to engage in a sub silentio overruling of *Robinson*.

The Court’s drastic narrowing of “punishments” should perhaps not be surprising considering that it is consistent with the perspective of the “Godfather of originalism”³⁷: the late Justice Scalia. He stated that “what evidence exists from debates at the state ratifying conventions that prompted the Bill of Rights as well as the floor debates in the First Congress which proposed it confirms the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment.”³⁸ Although the individual Justices on today’s Court have not been entirely clear about which brand of historical analysis they are personally embracing—if they are even adopting a particular approach—a turn to Justice Scalia’s understanding of “punishments” should not be entirely surprising with this Court.

Perhaps attempting to soften the blow of its narrow “punishments” definition and reversal in *Grants Pass*, the Court indicated that, even though the Eighth Amendment may not apply, individuals such as involuntarily homeless persons still might find relief elsewhere in the law. The Court suggested that it was just relocating possible remedies. For example, maybe these individuals have viable defenses such as necessity, duress, or insanity under state law. It remains quite questionable, though, how effective such claims would be. These persons also have potential Due Process challenges under the Fourteenth Amendment, the Court explained, but the Court has similarly been narrowing this Amendment’s scope. A case such as *Robinson* or *Grants Pass* might look something like the case of *Lawrence v. Texas*³⁹ under the Due Process Clause. Indeed, just as *Robinson* held that criminalizing narcotics addiction was, constitutionally, beyond the scope of criminal law, *Lawrence* held that criminalizing homosexual activity was unconstitutional. But *Robinson* does not fit into the privacy niche at the core of substantive due process jurisprudence. And the Court’s adjudication of a *Robinson*-like case under the Due Process Clause may be more likely to follow the pattern in *Kahler v. Kansas*,⁴⁰ where the Court rejected a Due Process challenge to the state’s absence of an insanity defense requiring a defendant’s acquittal due to his inability to distinguish right from wrong. There, as in *Grants Pass*, the Court emphasized the importance it places on deference to the states in criminal matters.

Complainants in cases such as *Robinson*, *Powell*, and *Grants Pass* are likely to be left without a remedy if the Court has doomed *Robinson* to wither on the vine.

³⁷ Ryan, *supra* note 20, at 300.

³⁸ Harmelin v. Michigan, 501 U.S. 957, 979 (1991) (Scalia, J., opinion).

³⁹ Lawrence v. Texas, 539 U.S. 558 (2003).

⁴⁰ Kahler v. Kansas, 589 U.S. 271 (2020).

After *Grants Pass*, it is possible that criminalizing status may no longer be unconstitutional unless the status constitutes a protected class under the Equal Protection Clause or the criminalization fails traditional baseline tests such as the principle that a law must be rationally related to a legitimate purpose. It seems likely that this Court would find it constitutional under the Due Process Clause to criminalize sleeping in public and perhaps even criminalize the status of homelessness itself.

The Court has thus narrowed the Eighth Amendment through its understandings of “cruel and unusual,” and, in particular, “punishments.” But instead of broadcasting these changes, the Court smuggled them in under the cover of precedent and simplicity. In doing so, the Court abandoned judicial restraint yet avoided squarely addressing *Robinson*’s continual precedential effect. And the Court’s only solace to would-be plaintiffs is simply noting other possible legal avenues that the Court itself has constrained and throwing them back to the court of public opinion.

V. CONCLUSION

During the congressional session at which the Eighth Amendment was proposed, Governor Randolph from Virginia questioned whether the Eighth Amendment was truly necessary because one “must presume corruption in the House of Representatives, Senate, and President, before we can suppose that . . . cruel punishments [can be] inflicted.” He explained that, “[b]efore these cruel punishments can be inflicted, laws must be passed, and judges must judge contrary to justice.”⁴¹ This sentiment did not carry the day, as others recognized that sometimes individuals can be overwhelmed by the pressing nature of modern problems. And sometimes legislatures need to be reminded, through the limits of the Constitution, about the importance of every individual’s rights.

In recent cases, and again in *Grants Pass*, the Court has worked to limit the scope of the Eighth Amendment and thus cut away at individual rights of the most vulnerable. As unpalatable as this might be, the Court’s determination to respect historical understandings of “cruel,” “unusual,” and “punishments,” and its preservation of federalism interests, have some merit. But it is troubling that the Court is reshaping the Eighth Amendment in real time without doing so transparently. As Justice Brandeis said, “sunlight is said to be the best of disinfectants.”⁴²

⁴¹ 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 468 (2d ed. 1881).

⁴² LOUIS BRANDEIS, OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT 92 (1914). This quotation by Justice Brandeis referenced how transparency can improve banking regulation, but the transparency principle has since been applied much more broadly to government. See Meghan J. Ryan, *Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1577 n.244 (2022).