HOMELESSNESS SHOULD NOT BE A CRIME

> And Jesus said to him, "Foxes have holes, and birds of the air have nests, but the Son of Man has nowhere to lay his head." Luke 9:58

According to the National Alliance to End Homelessness[1]:

1. Between 2019 and 2020, nationwide homelessness increased by two percent. This change marks the fourth straight year of incremental population growth. Previously, homelessness had primarily been on the decline, decreasing in eight of the nine years before the current trend began.
2. Total homeless in Wisconsin count in 2020: 4,515. That is about 8 per 10,000 people
3. In January 2020, there were 580,466 people experiencing homelessness in America. Most were individuals (70 percent). They lived in every state and territory, and they reflected the diversity of our country.
4. People in families with children make up 30 percent of the homeless population. Unaccompanied youth (under age 25) account for six percent of the larger group.
5. Males are far more likely to experience homelessness than their female counterparts. Out of every 10,000 males, 22 are homeless. For women and girls, that number is 13. Gender disparities are even more evident when the focus is solely on individual adults (the most significant subgroup within homelessness). The overwhelming majority (70 percent) are men.
6. Native Hawaiians and other Pacific Islanders have the highest rate of homelessness (109 out of every 10,000 people).1 Groups such as Native Americans (45 out of every 10,000) and Black or African Americans (52 out of every 10,000) also experience elevated rates. Importantly, these rates are much higher than the nation's overall rate of homelessness (18 out of every 10,000).
7. While there are shelters available for the homeless, on any given night there are at least as many people sleeping on the street as there are sleeping in shelters.[2] A survey of 50 of the largest cities in the United States found that not one had enough shelter spaces for the number of homeless people in that city on any given day.[3]

The causes of being homeless are varied. In recent years, some people who were affected by the economic downturn and foreclosure crisis have become homeless.[4] Some communities make it a crime to be homeless. Many communities have laws that criminalize activities homeless people need to do in public to survive including:

- Sitting or lying down

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[1] https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/

[2] See James D. Wright & Joel A. Devine, Housing Dynamics of the Homeless: Implications for a Count, 65 Am. J. of Orthopsychiatry 320, 323 (1995).

[3] Nat'l Coalition for the Homeless, Illegal to be Homeless: The Criminalization of Homelessness in the United States at 13 (Aug. 2003) ("Illegal to be Homeless")

[4] U.S. Dep't of Hous. and Urban Dev., 2014 Annual Homeless Assessment Report ("2014 AHAR") 1 (October 2014), available at https://www.hudexchange.info/resources/documents/2014-AHAR-Part1.pdf. The 2014 AHAR found that as of January 2014, 578,424 individuals in the United States were homeless on any given night

- Loitering[5] or loafing
- Eating or sharing food
- Asking for money or panhandling
- Sleeping in cars and outside or camping[6]

Nonetheless, "at least thirty-nine American cities have initiated or continued policies that criminalize activities associated with homelessness."[7] These "quality of life" laws, defined as laws addressing behaviors that cannot be classified as serious crimes, "spread an exceedingly wide net."[8] The most egregious cases of efforts against homeless people leave no doubt as to the motivation behind such laws. For example, the City of Santa Ana, California developed what the California Supreme Court described as a "four-year effort … to expel homeless persons" and "to show 'vagrants' that they were not welcome." ***Tobe v. City of Santa Ana,*** 892 P.2d 1145, 1151 (Cal. 1995). As a part of what the trial court described as Santa Ana's "war on the homeless," police conducted sweeps in which homeless persons "were handcuffed and taken to an athletic field where they were booked, chained to benches, marked with numbers, and held for up to six hours, after which they were released at a different location." Id. Some of the conduct leading to the arrests "involved nothing more than dropping a match, leaf, or piece of paper, or jaywalking." Id.

It is unconstitutional to make the status of homelessness into a crime. The "Cruel and Unusual Punishments" Clause of the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." ***Ingraham v. Wright,*** 430 U.S. 651, 667-68 (1977). Pursuant to that clause, the Supreme Court has held that laws that criminalize an individual's status, rather than specific conduct, are unconstitutional. ***Robinson v. California,*** 370 U.S. 660 (1962). In ***Robinson,*** the Court considered a state statute criminalizing not only the possession or use of narcotics, but also addiction. Noting that the statute made an addicted person "continuously guilty of this offense, whether or not he had ever used or possessed any narcotics within the State"—and further that addiction is a status "which may be contracted innocently or involuntarily," given that "a person may even be a narcotics addict from the moment of his birth"—the Court found that the statute impermissibly criminalized the status of addiction and constituted cruel and unusual punishment. Id. at 666-67 & n.9.

Six years after ***Robinson,*** the Court addressed whether certain acts also may not be subject to punishment under the Eighth Amendment if they are unavoidable consequences of one's status. In ***Powell v. Texas,*** 392 U.S. 514 (1968), the Court considered the constitutionality of a statute that criminalized public intoxication. A four-member plurality interpreted ***Robinson*** to prohibit only the criminalization of status and noted that the statute under consideration in ***Powell*** criminalized conduct—being intoxicated in public—rather than the status of alcohol addiction. The plurality

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[5] Loitering statutes are constitutionally suspect. [5] Loitering statutes are constitutionally suspect. ***City of Chicago v. Morales,*** 527 U.S. 41, 53-55 (1999) ([T]he freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.); ***United States ex rel. Newsome v. Malcolm,*** 492 F.2d 1166, 1171-74 (2d Cir. 1974), aff'd on other grounds sub nom. **Lefkowitz v. Newsome,** 420 U.S. 283 (1975).

[6] https://invisiblepeople.tv/category/learn-more/criminalization-of-homelessness/

[7] Juliette Smith, Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine, 29 Colum. J.L. & Soc. Probs. 293, 293 (1996).

[8] Mary I. Coombs, The Constricted Meaning of "Community" in Community Policing, 72 St. John's L. Rev. 1367, 1369 (1998)

declined to extend ***Robinson***, citing concerns about federalism and a reluctance to create a "constitutional doctrine of criminal responsibility." Id. at 534 (plurality opinion). Moreover, the plurality found that there was insufficient evidence to definitively say Mr. Powell was incapable of avoiding public intoxication. Id. at 521-25. The dissenting justices, on the other hand, found that the Eighth Amendment protects against criminalization of conduct that individuals are powerless to avoid, and that due to his alcoholism, Mr. Powell was powerless to avoid public drunkenness. Id. at 567 (dissenting opinion). The dissenters, therefore, would have reversed Mr. Powell's conviction. Id. at 569-70.

Justice White provided the decisive fifth vote to uphold Mr. Powell's conviction. Instead of joining the plurality opinion, in a separate concurrence he set forth a different interpretation of ***Robinson.*** Justice White did not rest his decision on the status-versus-conduct distinction raised by the plurality. Instead, Justice White considered the voluntariness, or volitional nature, of the conduct in question. See ***Powell,*** 392 U.S. at 548-51 (White, J., concurring in the judgment). Under this analysis, if sufficient evidence is presented showing that the prohibited conduct was involuntary due to one's condition, criminalization of that conduct would be impermissible under the Eighth Amendment. Id. at 551.

Therefore, if one is involuntarily made homeless, and the state seeks to prosecute you, you may have a defense. ***People v. Gonzalez,*** 7 Cal.App.5th 370 (2017) (cannot revoke probation due to homelessness); ***Justin v. City of Los Angeles,*** No. CV-00-12352 LGB (AIJx) (C.D. Cal. Dec. 5, 2000). If a defendant presents evidence that defendant slept in a public place because his alternatives were inadequate and economic forces were primarily to blame for his predicament, he may present a defense of necessity. ***In re Eichorn,*** 81 Cal. Rptr. 2d 535, 540 (Ct. App. 1998) (permitting a homeless man, arrested for sleeping in a public location, to raise the necessity defense); ***Johnson v. Dallas,*** 860 F. Supp. 344, 350 (N.D. Tex. 1994), rev'd on other grounds, 61 F.3d 442 (5th Cir. 1995) (ordinance violated the Eighth Amendment in that at any given time there are persons in Dallas who have no place to go, who could not find shelter even if they wanted to - and many of them do want to - and who would be turned away from shelter for a variety of reasons.). See 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law 5.4(a) (1986) (explaining that "one who, under the pressure of circumstances, commits what would otherwise be a crime may be justified by "necessity' in doing as he did and so not be guilty of the crime in question"); Michael M. Burns, Fearing the Mirror: Responding to Beggars in a "Kinder and Gentler" America, 19 Hastings Const. L.Q. 783, 809 (1992) (discussing the application of five common law elements of the necessity defense to the crime of begging); Robert C. McConkey III, "Camping Ordinances" and the Homeless: Constitutional and Moral Issues Raised by Ordinances Prohibiting Sleeping in Public Areas, 26 Cumb. L. Rev. 633, 658-59 (1995-1996) (discussing potential factors that courts could utilize in determining the application of the necessity defense); Donald E. Baker, Comment, "Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless, 45 U. Miami L. Rev. 417, 452-53 (1991) (applying a hypothetical example of a homeless woman arrested for sleeping on the street to the four traditional elements of the necessity defense. But see David M. Smith, Note, A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy, 12 Yale L. & Pol'y Rev. 487, 508 (1994) (advocating for the application of the defense of duress to anti-homeless ordinances over the defense of necessity). See also ***Davidson v. Tucson,*** 924 F. Supp. 989, 993 (D. Ariz. 1996) (discussing the plaintiffs' claim that the anti-camping ordinance violated their right to travel, a fundamental constitutional

right); ***Pottinger v. City of Miami,*** 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) (noting that members of the class of plaintiffs could not raise the defenses of necessity or duress to contest an ordinance that criminalized sleeping and eating in public places because authorities released the arrested plaintiffs from custody without being charged)

The court did not analyze why Eichorn was denied public assistance, why he was not working at the time he was cited, or why he did not contact relatives or travel to another location, each of which may have been used to determine whether he was involuntarily homeless. The court made clear that once Eichorn proved the basic elements of the necessity defense, he could evoke such defense without inquiry into the causes of his homelessness. Thus, if a defendant shows that: (1) the shelter was full, (2) there were more homeless people in the area than shelter space, and (3) he or she did not have funds to afford housing or a motel room, then any alternative to sleeping in public, such as staying awake and moving around, will be inadequate to rebut application of the defense.