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Warming Up the Bulldozers:

Homelessness, Law, and the Making of Maximally Unjust Cities

Don Mitchell
Department of Human Geography, Uppsala University

Abstract

The United States Supreme Court majority's decision in the 2024 case, *Grants Pass v. Johnson*, is an object lesson in cruelty. Its main directive – that cities are now free to punish homeless people simply because they are homeless – has been enthusiastically received by official across urban America. The United States war on homeless people has entered a new phase. This paper examines the trail of precedents leading to *Grants Pass*, the tortured reasoning of the majority's decision, and the stinging dissent by Associate Justice Sonya Sotomayor, to better understand the ways in which deadly cruelty is made *legal*. The paper then examines the decision in light of recent developments in justice theory among political philosophers to reveal how what is under construction in the USA is nothing less than *maximally* unjust cities.

Keywords: *Grants Pass*; U.S. Supreme Court; Homelessness; Law; Justice theory; Maximum injustice

San Francisco. Late July, 2024

San Francisco – that so-called progressive city on the USA's West Coast, that so-called "liberal bastion" – has revved up its war against homeless people. This is hardly first time. Ever since street homelessness metastasized in the 1980s, mayor after mayor has swept into office promising to be tougher on

homeless people (but also more compassionate!) than her or his predecessor. San Francisco has never been liberal, never been progressive when it comes to its unhoused populations,[1] which number in the thousands as they have since the Reagan Revolution, but this time the attack on homeless people is especially vicious. Egged on by California governor (and former San Francisco mayor) Gavin Newsom, who signed an executive order on 25 July formally allowing, but politically demanding, that cities and state agencies from San Diego in the South to Eureka in the north clear out homeless encampments, San Francisco mayor London Breed launched a campaign at the end of July to clear out every homelessness encampment in town and to cite, arrest, and/or jail any homeless person who refuses to accept an offer of shelter – in shelters that do not, in fact, exist. But she did not stop there. She also authorized the police to cite homeless people for sitting, lying, or camping on sidewalks, "obstructing people's ability to walk in public spaces" (in the words of the *New York Times*); or for being a "public nuisance" by being "offensive to the senses," in the words of a directive to officers by the chief of police.[2] Reviving an old tactic, Mayor Breed is also using city money to buy bus tickets for homeless people, hoping to make them someone else's problem, even though study after study has shown that homelessness is a *local* problem, with over 75% of the people living on American streets having been born or raised in the city or county where they are now homeless.[3]

Mayor Breed and Governor Newsom's reinvigorated viciousness has been licensed by a remarkable (but not at all surprising) U.S. Supreme Court decision called *Grants Pass* and announced in June, that invalidated a lower court's ruling that it was an unconstitutional violation of people's rights – basically the right to live – to criminalize sleeping or camping in public space if there were no other suitable options.[4] While the Supreme Court declared that this constitutional protection of poor people's life was "impossible to administer in practice,"[5] most cities had been complying with it – if often unwillingly – by simply estimating the size of the street homeless population and counting the number of available shelter beds. If the former outnumbered the latter –

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[1] For accounts of earlier campaigns against the homeless in San Francisco, see Outside in American Team. "Bussed out: How America moves its homeless," *Guardian*, December 20, 2017, www.theguardian.com/us-news/ng-interactive/2017/dec/20/bussed-out-america-moves-homeless-people-country-study; Teresa Gowan, *Hobos, Hustlers, and Backsliders: Homeless in San Francisco* (Minneapolis: University of Minnesota Press); Don Mitchell, *Mean Streets: Homelessness, Public Space, and the Limits of Capital* (Athens, GA: University of Georgia Press, 2020), 91-93.

[2] Heather Knight, "San Francisco takes a harder line against homeless camps, defying its reputation," *New York Times*, August 3, 2024.

[3] Outside in America Team, "Bussed out."

[4] *City of Grants Pass, Oregon v. Gloria Johnson et al*, 603 U.S. ___ (2024) (hereafter *Grants Pass*), invalidating *Martin v. Boise* 920 F. 3d 584 (2019) (hereafter *Martin*).

[5] *Grants Pass*, 27.

as it does in just about every western United States city – then laws against sleeping or camping in public could not be enforced. It was hardly "impossible" at all.

But that of course was not the point. The point, as the Supreme Court made clear in its decision, which I will discuss in more detail below, was that by eliminating the constitutional ban on cruelly punishing homeless people for their lack of a home, cities could be unshackled to do exactly what Mayor Breed and Gavin Newsom did at the end of July: launch an all-out war not against homelessness (there are no provisions in either's new policies for actually addressing the homeless crisis), but homeless people. As the mayor of the city of Lancaster, California put it gleefully after the Supreme Court decision and Newsom's executive order: "I'm warming up the bulldozer."[6] With the Supreme Court's *Grant's Pass* decision providing cover, Breed, Newsom, the mayor of Lancaster and countless other city and state officials are joyously bringing to an end a short-lived moment in American history when it seemed like maybe, just maybe, the most bare-minimum of homeless people's rights – the right to stay alive, in no matter how miserable a condition – would have to be respected, a brief moment, that is, when America's genocidal war against people without housing would be just a little less genocidal.

Boise, Idaho, 2009 and 2015.

That brief moment began, in fact, more than 1000 kilometers away from San Francisco – and a decade and a half earlier – in the small, not-at-all progressive or liberal city of Boise, Idaho. In 2009, eight Boise residents sued the city, its police department, and others after they had been arrested under a 2006 law banning camping. "Camping" was defined a sleeping with "the appurtenances of camping" – tents, sleeping bags, even a blanket, or at times just a sweater or jacket to keep warm in sub-freezing temperatures (in some western cities, like Boulder, Colorado, the shelter of a tree or bush during a snow storm was considered to be an "appurtenance" of camping).[7] Over the years, six plaintiffs dropped out of the law suit, or more accurately they died, moved away, or found housing, which meant that the law was unlikely to be enforced against them in the future, and thus, according to the rules of the American judicial system, they no longer had "standing" to bring a suit seeking to halt the enforcement of a law. But two remained, and what they claimed was pretty basic. To ban camping or sleeping within the city limits when there were no

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[6] Shawn Hubler, "Newsom orders California officials to remove homeless encampments," *New York Times*, July 25, 2004.

[7] A fuller examination of the facts at the root of *Martin* can be found in Mitchell, *Mean Streets*, chapter 1.

available shelter beds or other alternatives was a form of cruel and unusual punishment, and thus violated the Eighth Amendment of the U.S. Constitution. Sleeping, they argued, was a necessary biological act. Sleeping without protection from the elements – a jacket, a blanket, or a tent – when no indoor shelter was available could be a death sentence. Anti-camping laws criminalized not merely the acts that homeless people engaged in (*everyone* sleeps), but the status of being homeless.

The court cases were long and drawn out, but – quite remarkably in fact – the United States Department of Justice eventually weighed in on behalf of Boise's homeless people. This was in 2015, the midst of Barak Obama's second term, and the government was not averse to taking a few, somewhat progressive risks. Obama could not stand for reelection. He had nothing to lose. Filing a "Statement of Interest" in the Boise case, and echoing exactly what homeless advocates and activists had been arguing for more than thirty years, the Justice Department argued that "it should not be controversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment. … Sleeping is a life-sustaining activity – i.e. it must occur at some time and in some place. If a person literally has nowhere else to go, then enforcement of the anti-camping ordinance against that person criminalizes her for being homeless."[8]

The local judge was unimpressed and threw the case out. In the first place, he declared, the two remaining plaintiffs in fact did *not* have standing to bring the law suit. In the years since the suit was first filed in 2009, one plaintiff had moved in with his girlfriend (if only temporarily, it turned out) and the other had moved to another jurisdiction, though he did return to Boise frequently to visit his young child or for proceedings in the court case; when he did, he sometimes stayed at a cheap motel, paid for by the pro-bono lawyers who were representing them. It was unlikely, according to the judge, that the city's anti-camping ordinance would any longer be enforced against them. Besides, there *were* shelter-beds available: the River of Life Rescue mission would provide a bed in exchange for the men attending religious services and praying to Jesus for their salvation. That this violated the men's religious freedom bothered the judge no more than did the fact that the Rescue Mission limited stays in its shelter to 17 days in a month, with the additional proviso that if someone left *before* the 17 days were up, they could not come back until the following month. Nor did he seem at all concerned about the past harm, the citations, fines, and arrests, suffered by the two remaining plaintiffs (much less the six others and the class of homeless people they represented)

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[8] "Statement of Interest of the United States," *Bell et al. v. City of Boise et al.* Civil Action No. 1:09-cv-540REB, August 6, 2015.

as a result of the anti-camping ordinance. Finally, in his view, the law did not punish homeless people for their status of being homeless; instead it merely banned actions – sleeping, camping – and could be enforced against anyone, not just homeless people.[9]

Portland, Oregon, 2018, 2015

Three years later, and sitting in the city of Portland Oregon, a three-judge panel of the Ninth Circuit Court of Appeals – the level just below the US Supreme Court in the federal judiciary system – turned out to be quite concerned with the past harms Boise's homeless population might have suffered at the hands of a law targeting behaviors that were a necessary part of their survival. According to these justices, in a decision called *Martin* after one of the Boise plaintiffs, anti-camping ordinances across its jurisdiction (essentially the westernmost US states) criminalized homelessness and advanced a form of cruel and unusual punishment. The Ninth Circuit panel rejected just about every one of the Boise court judge's assertions, not only about the plaintiff's standing (finding it in fact quite likely that they would be cited or arrested under the law again) but also the facts of how the Boise shelter system worked. One way it worked, the Ninth Circuit court held, was to make it impossible for certain kinds of homeless people to receive shelter, while making it *look like* shelter beds were available giving the appearance that homeless people had rejected the shelter, rather than the shelter rejecting the person. What looked like a "voluntary" homelessness was nothing of the sort.[10]

Cutting a path through a thicket of precedents, the Court panel straightforwardly asked and unanimously answered: Does the Cruel and Unusual Punishments clause of the Eighth Amendment "bar a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to[?] We conclude that it does" – and it does because it punishes a *status* (being homeless) if under the guise of punishing an act (camping).[11] The panel was careful to declare, however, that its ruling was a narrow one, stating that "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets … at any time or at any place" – time and place

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[9] *Robert Martin and Robert Anderson v. City of Boise* Case No. 1:09-CV-00540-REB, 2015 U.S. Dist. LEXIS 134129

[10] The panel's decision, together with a series of opinions filed when the Ninth Circuit denied rehearing the case *en banc* is *Martin et al* v. *City of Boise* 920, F.3d. 584 (2019); the three-judge panel decision was filed in 2018: *Martin v. City of Boise* 902 F.3d 1031 (2018).

[11] 920 F.3d, 603.

could certainly be regulated.[12] It only ruled that if people are turned away from shelter they cannot be arrested for sleeping anyway. The panel's decision was later affirmed when the full Ninth Circuit refused to rehear the case. What this three-judge panel sitting in Portland in 2018 did and what the full circuit court affirmed, we might say, was to lay down a basic legal structure for a minimally just city, a city that at least does not jail and fine people for trying to live.

Simultaneously, the somewhat progressive City of Portland itself seemed to be creating a rather different legal framework for a minimally-just city. As homeless street populations grew in the wake of the 2008 economic crisis, which hit the city particularly hard, the city passed an emergency ordinance in 2015 that allowed for a small number of self-governing homeless encampments on city property. In part the city was merely ratifying reality. Several such encampments had long existed. But in part it was also experimenting with new ways of managing the homeless crisis, one less reliant on criminalization. Or, rather, one which understood criminalization to be only *one* tool in a fuller toolbox of weapons against homelessness (or homeless people) – an approach and a metaphor (tools in a tool box) that, in fact, the radically conservative US Supreme Court found extremely attractive.[13] Eventually five self-governing encampments were sanctioned, one (with significant design input from local planning and architecture students) for women only, one an encampment that had existed in various locations around the city, sometimes with city blessing, since the early 1990s. One that was on a city-owned lot near the city's old, gentrifying skid row (the fate of which was in many ways the spur to the passing of the emergency ordinance). One on a disused hillslope below a middle-class district and above an old train marshalling yard, that in fact, even after the emergency ordinance was never formally-sanctioned and so exists under a constant threat of eviction. And a new one not far from the city's sports arena.[14]

As geographer Stephen Przybylinski has shown, these encampments managed to operate as something like a commons, with decisions made through

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[12] *Ibid*. 617, quoting *Jones v. City of Los Angeles* 444 F.3d, 1118 (2006), 1138.
[13] *Grants Pass*, 7, 9.
[14] Stephen Przybylinski has examined the Portland experience in detail and my discussion are drawn from his work: Stephen Przybylinski, "Securing legal rights to place: Mobilizing around moral claims for a houseless rest space in Portland, Oregon," *Urban Geography*, 42(4) (2021), 417-438; *idem*, "Realizing citizenship in property: Houseless encampments and the limits of liberalism's promise," *Political Geography* 91 (2021), article 102494; *idem*, "Without a right to remain: Property's limits on Portland's self-governing houseless encampments," *Environment and Planning C: Politics and Space*, 40(8) (2022), 1711-1226; *idem*, "From rejection to legitimation: Governing the emergence of organized homeless encampments," *Urban Affairs Review* 60 (2024), 118-148.

debate and agreement, with rules on behavior, work rotas, and so forth mutually agreed on. But they were hardly perfect. Problems of internal safety and discipline were confounded by the fact that residents possessed no "property right to exclude" – that central aspect of property in liberal capitalism that allows an owner (or collective of owners) or its lessees to keep out those they do not want, backed by police power.[15] The encampments never had leases, and thus the police could not be deployed within them to remove intruders or to exclude unruly, dangerous residents, even if the collective had commonly agreed on their exclusion. Even so, the encampments provided a high degree of dignity and self-respect, as well as half-decent shelter, *not* governed by obnoxious religious requirements, ridiculous curfews, or impossible to meet rules on tobacco use and sobriety. Maybe most intriguingly, the encampments seemed poised to model a form of urban development – informal settlements, collectively governed – that of course exist in so many other parts of the world (and in fact are not entirely foreign, at least historically, to the United States) as a response to the chronic inability of capitalism to provide for the social-reproductive needs of those who live within it. Deeply problematic though they were, even for those who lived in them, Portland's self-governing encampments were, Stephen Przybylinski has shown, spaces of real possibility.[16]

The Portland city government saw a different kind of possibility. In the wake of the circuit court's decision upholding the rights of homeless people to camp or sleep in public space in 2018, the city made its emergency order permanent. One reason for doing so was that it could now count these encampments as *shelter* – a far cheaper alternative than building homeless shelters much less developing a robust affordable housing program. The self-governing encampments *were* a solution to homelessness, not just an attack on homeless people, or so the city surmised. This was especially the case because their existence also meant it could warm up the bulldozer and undertake a vigorous campaign of destroying *unsanctioned* encampments or round up individual rough sleepers under the pretext of having created the conditions of possibility for homeless people themselves to create sufficient shelter. That the city did not approve any more self-governing encampments after the original five (of which one still remains threatened), that it has proven impossible to find land on which to locate new encampments even if it did want to create them, and that other residents of the city continue to rail against the encampments that exist, has not bothered city officials overly much.[17] For the encampments are not just part of the city's *housing* policy, they are now also very much part of its *policing* strategy.

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[15] See especially Przybylinski, "Without a right to remain."
[16] Przybylinski, "Securing legal rights to place;" *idem*, "Realizing citizenship."
[17] Przybylinski, "From rejection to legitimation."

To the degree that it has been a successful policing strategy, and one seen as less punitive than just destroying every single homeless encampment that springs up, the Portland experiment has gained a good deal of attention, including from progressive media. The State of Oregon has even gone so far as to change a range of laws, related to zoning, building codes, and more, to allow such self-governing encampments to be more easily instituted elsewhere in the state.[18] In turn, these legal transformation at the state level caught the attention of the U.S. Supreme Court's conservative majority when it set about adjudicating the appeal made to it by the Oregon town of Grants Pass of the Ninth Circuit's minimally-just determination that outlawing sleeping in public when no shelter exists, and became a central justification for its repeal of the minimally-just conditions the circuit court had created in favor of rolling out a maximally-unjust legal framework for persecuting homeless people all around the United States.[19]

Grants Pass 2022/Washington, DC 1962, 1968, 2024

Grants Pass is a small town of 38,000 residents along the Rogue River in southern Oregon. Of these 38,000 more than 600 are homeless – in fact shelterless – on any given night.[20] There are no emergency shelter beds and the city avers that it has no obligation to build them. The Gospel Rescue Mission in town has 138 beds, mostly for long-term residents. In order to stay at the Rescue Mission, you must work forty hours a week, be in your room before 10 pm, not smoke, not be intoxicated, not have pets, not live with your partner, spouse, or children, attend daily religious services, and leave all prescription medicine at the front desk where it is locked away and dispensed by staff, who are not present between 10 pm and 7 am. Even if all homeless people wanted, or could abide by these rules – many cannot because they cannot work because of disabilities, because they need medication overnight, because there are no jobs, because they do not want to break up their family, or because they find the conservative evangelisms they are forced into to be offensive – and if there were not residents already there who *are* willing to abide by these rules, there would still be a nearly 450 people forced to sleep on the streets, in parks, or in their cars every night. In the early 2010s, Grants Pass passed three laws that together made it a crime to sleep outside with anything that could be construed

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[18] *Ibid*.
[19] *Grants Pass*, 31
[20] The facts of the case are discussed in *Grants Pass*, 10-13 and Sotomayor's dissent, 8-10; an in-depth look at homeless life (and death) in Grants Pass in the months before the decision is Tracy Rosenthal, "The new sun down towns," *New Republic*, April 24, 2024, https://newrepublic.com/article/181036/new-sundown-towns-grants-pass-v-johnson.

as camping equipment, which could be as little as a blanket or a jacket rolled up to form a pillow, or to sleep in cars if the intent was to reside there, which is to say, if the "camper" had nowhere else to go.[21]

In passing the laws, in instructions to police officers, and in public meetings, city officials made it clear that the law would not be enforced against everyone who slept in a park or street or car. If, for example, you went out on a clear night with a sleeping bag to stargaze and decided to sleep through the night, the law would not apply to you *because* you had a home to return to. Same goes for sleeping babies, napping store clerks, weary drivers heading home to California and afraid of falling asleep at the wheel, or even backpackers passing through town, though this latter is something the US Supreme Court majority has tried to pretend is not the case.[22] But for those who do not have a home to go to, the meaning of the law was clear: "either stay awake or be arrested," as Supreme Court Justice Sotomayor phrased it in a stinging dissent.[23] Of course, there was another choice too, as Sotomayor also noted: homeless people could leave town. And indeed, this was, according to the record, precisely one of the goals the city council had in passing the laws.[24]

In the wake of the *Martin* decision and in response to innumerable citations, fines, and arrests, a group of homeless Grants Pass residents sued in district court to get an injunction against the laws' enforcement. As in Boise, the plaintiffs asserted that the Grants Pass ordinances amounted to a kind of cruel and unusual punishment because it penalized homeless people for engaging in activities that they had to engage in, in order to survive. No one can live without sleep. The district judge agreed with the plaintiffs and enjoined the law, noting that "the only way for homeless people to legally sleep on public property in the City" – which they had no choice but to do – "is if they lay on the ground with only the clothing on their backs and without their items near them,"[25] especially since it was against the law for homeless people to sleep in even legally-parked cars. But in making this ruling the judge made sure it was very narrow. The city, the judge held, could "implement time and place restrictions for when homeless individuals may use their belongings to keep warm and when they must have their belongings packed up" and the city could ban the use of tents altogether. The city could also continue to enforce laws against public urination or defecation, blocking roadways or sidewalks,

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[21] *Grants Pass*, 11.
[22] *Grants Pass*, Sotomayor dissent, 13-14, 17-18: *Grants Pass*, 20-21.
[23] Sotomayor dissent, 2.
[24] *Ibid*, 13.
[25] Quoted in Sotomayor dissent, 9.

harassment, violence, public intoxication, or the possession or distribution of drugs.[26]

In 2022, the city appealed to the Ninth Federal Circuit court – the same one that decided *Martin* – which upheld the lower court's injunction but also ordered that court to narrow its injunction even more, making it clear that the city could ban all use of stoves and fires by homeless people, all forms of shelter (tents, shanties, cardboard boxes), and to make it clear that the bans on camping could be enforced on any individual when a shelter bed is available. What the Ninth Circuit demanded was only that homeless people be allowed a "limited right to protection against the elements" in the words of its judgement.[27] If the Ninth Circuit in *Martin* created the conditions for minimal justice for homeless people, the Ninth Circuit in *Grants Pass* instead create conditions for *very* minimal justice. Homeless people could be punished for being homeless, but they could not be made to die.

That was not enough for the US Supreme Court. The city of Grants Pass appealed the Ninth Circuit decision and the Supreme Court agreed to hear it in its 2024 session, announcing its decision on June 28. In doing so, the Court has created the conditions for what I will call a maximally unjust city.[28] The central question in the Supreme Court case was the one raised and answered in the affirmative in *Martin*: did enforcing an anti-camping/anti-sleeping ordinance against people who had nowhere else to go amount to a kind of cruel and unusual punishment and thus transgress the 8th Amendment of the US Constitution? In some ways this might seem an odd question. As the Supreme Court majority was quick to point out there is nothing unusual about the kinds of laws at stake in this case, nor with the kinds of penalties – fines on an escalating scale, area bans, jail time for repeat trespasses, etc. – that typically are imposed.[29] Nor do they seem particularly cruel – cities are not boxing the ears of homeless people, placing them in stocks, or burning them at the stake as they sometimes did during colonial times.[30] But more than 60 years ago, in a 1962 case called *Robinson*, the Court had held that arresting an addict for

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[26] *Ibid*, 9-10.
[27] *Johnson v. City of Grants Pass*, 72 F.4th, 868 (2023), 894-895.
[28] On minimal and maximal justice – concepts which will be developed further below – see Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2012); *idem*, *Normativity and Power: Analyzing Social Orders of Justification* (Oxford: Oxford University Press, 2017). I develop aspects of a geographical theory of maximal and minimal justice in Don Mitchell, "Reconceptualizing justice in human geography: Landscape as basic structure, justice as the right to justification," *Annals of the Association of American Geographers* 114 (2024), 2010-2027.
[29] *Grants Pass*, 6.
[30] Kenneth Kusmer, *Down and Out and On the Road: The Homeless in American History* (New York: Oxford University Press, 2002).

being an addict was indeed cruel.[31] It criminalized that person's *status*, not something they had done. Jurisdictions could criminalize drug use or possession, but they could not criminalize the addiction, which was understood to be a disease, and thus not "voluntary," at least in any simple sense. Criminalizing addiction, status, amounted to a cruel punishment because it punished who someone was. As part of what conservative law scholars call a "constitutional revolution" that rethought a number of aspects of law in the postwar period, *Robinson* was an important plank in a broader effort to decriminalize statuses, like addiction, poverty, and eventually, sexuality.[32]

Six years later in 1968, however, a Supreme Court plurality of four members – not a majority – determined that a Texas man called Powell, an alcoholic, was *not* wrongly arrested when he was arrested for being drunk in public.[33] They argued that public drunkenness laws, even enforced against addicts, were legitimate. A second group of four justices disagreed. The ninth, deciding vote, by Justice Byron White (who in fact had been in the minority in *Robinson*), agreed with the plurality that Powell had not been wronging arrested *but only because he had other places he could be drunk*. Had Powell been homeless, White argued, then enforcing public drunkenness laws against him would indeed be a violation of the 8th Amendment.[34] In the years since, *Robinson* and *Powell* have together been understood to define the ambit of "status" and thus of what constitutes unconstitutional lawmaking in relation to it. These were exactly the decisions that guided the Ninth Circuit in *Martin* and in *Grants Pass*, only with a slight twist. The plaintiffs in both cases were not arrested for *being* homeless as such, but for sleeping (with equipment, like a rolled-up t-shirt, or in a car). But, as the justices in those cases, and as Sotomayor in her dissent noted, that behavior, sleeping without shelter, is exactly what *defines* the status of homelessness.[35]

The Court majority was having none of it. In a concurrence, troglodytic Justice Clarence Thomas wrote to say that *Robinson* should simply be overturned,[36] but the other five members of the majority did not want to go that far, yet. Instead, the other five members of the majority just declared *Robinson* to be irrelevant. Justice Gorsuch wrote the opinion, and in it he sounds much more like a wannabe urban sociologist (and not a very good one) than a

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[31] *Robinson v. California* 370 U.S. 660 (1962).
[32] On the constitutional revolution, see Robert Ellickson, "Controlling chronic misconduct in city spaces: Of panhandlers, skid rows, and public space zoning," *Yale Law Review* 105 (1996), 1165-1248.
[33] *Powell v. Texas* 392 U.S. 514 (1968).
[34] For a fuller discussion, see Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: Guilford, 2003).
[35] Sotomayor dissent, 15.
[36] *Grants Pass,* Thomas concurrence, 1-2.

man steeped in jurisprudence. After waxing eloquent about the intractability of the homeless problem and the need for cities to have a full box of tools for combatting the problem and helping those experiencing it, he makes two basic claims. The first, against all evidence, is either that anti-camping and other anti-homeless laws are a last defense for cities and states,[37] that jurisdictions only use them when all else fails,[38] *or* that anti-camping ordinances are a kind of therapy or tough love – they are passed in the best interest of homeless people themselves,[39] *or* that they are an effective, minimally invasive law-enforcement tools that encourage homeless people to accept shelter[40] (when cops themselves admit they do no such thing). None of these are true, but that does not deter Gorsuch. The second is that, actually, the first claim does not matter at all, legally, because, in fact anti-camping ordinances in no way target status. They target a behavior, a conduct: sleeping or camping. Those who engage in it *do* something, and they do it with intent (the intent of residing), they do not just *exist*. They do not *have* to engage in this conduct of illegal camping; they could do something else. *Robinson* is not implicated at all. The law in *Robinson* criminalized status. The Grants Pass laws criminalized conduct.[41]

To make his point Gorsuch turned to *Powell*, leaning heavily on the plurality's opinion, authored by the great liberal (and first black) Justice Thurgood Marshall.[42] Marshall was skeptical of extending *Robinson* to *Powell* because he saw public order laws in jeopardy if some evil – public drunkenness – that was *occasioned by* one's status – being an alcoholic – could not be outlawed. It would be like allowing addicts to break into a house to steal jewelry to buy heroin to feed their addiction. In Marshall's own words, Powell was convicted not "for being" an alcoholic, but "for [engaging in the act of] being in public while drunk on a particular occasion" when he very easily could have chosen not to be on the streets.[43] There was in his act, a high degree of volition – *mens rea* – as it is called in law. He exercised choice. According to Gorsuch, so too did the homeless plaintiffs in Grants Pass exercise choice.[44] They chose to sleep in their cars or to sleep on the ground with some, minimal protection. It was not their status as homelessness – their being – that was being punished, but their acts, acts conducted in *mens rea*. With only a footnoted misrepresentation of swing vote Byron White's qualms about how

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[37] *Grants Pass*, 6.
[38] *Ibid*, 10.
[39] *Ibid*, 9.
[40] *Ibid*.
[41] *Ibid*, 19-21.
[42] *Ibid*, 22-23.
[43] *Powell* 392 U.S. 532, as quoted in *Grants Pass*, 23 (brackets are Gorsuch's).
[44] *Ibid*.

Powell would have been decided differently if Powell had been homeless,[45] Gorsuch thus declared that *Robinson* had no role in the *Grants Pass* case, only the plurality opinion in *Powell* did, and with that he swept away the Ninth Court's *Martin* decision.[46] *Martin* had only applied in the westernmost states of the US, but the Supreme Court's decision covers the nation. Jurisdictions all around the country now have carte blanch to write and enforce anti-homeless laws, *just so long as some form of conduct can be identified*.

As Justice Sotomayor caustically put it, the logic of Gorsuch's opinion goes like this: since *Robinson* still stands it remains unconstitutional to punish status, but it is now perfectly "legitimate to punish status *plus* some action, some essential bodily function," in her words: being homeless and blinking, being homeless and eating, being homeless and breathing or being homeless and sleeping. This latter action is, as she notes, *status defining*. It is no different, Sotomayor says, than if the Court had, rightly, refused to sanction laws against having a cold, but, bizarrely, approved laws against having a cold *and* coughing. "By this logic," she argued, "the majority would conclude" that it remains unconstitutional to criminalize "being an addict", as *Robinson* declared, but perfectly constitutional to criminalize "being an addict and breathing."[47]

Gorsuch tries to protect his majority against this charge by saying there is nothing in his ruling that *requires* cities to outlaw camping. They are perfectly free to allow homeless people to camp in public if they wish to.[48] His implication is that since jurisdictions do not have to write such laws, it is constitutionally acceptable if some do. Some may outlaw people with colds from coughing *because* others do not do so. Or to put this in less frivolous terms, it is like saying that while no jurisdiction may outlaw being gay, some jurisdictions may outlaw sex between men because others choose not to.[49] Not all men who have sex with other men are homosexual, but for those who are, having gay sex is status defining. Not all who camp in city parks are homeless – some are stargazers – but for those who are, camping is status defining.

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[45] *Ibid*, 23, fn. 6.
[46] *Ibid*, 33-34.
[47] Sotomayor dissent, 16.
[48] *Grants Pass*, 24.
[49] A line of reasoning that might, that is, lead to the current prudish and homophobic court to overturn *Lawrence v. Texas* 539 U.S. 558 (2003), the landmark decision that declared sodomy laws unconstitutional and helped pave the way for the national legalization of gay marriage in *Obergefell v. Hodges* 576 U.S. 644 (2015).

What Gorsuch and his conservative cronies on the Court have achieved with this decision, I will now argue, is the creation of a central component in the basic structure of a maximally unjust city.

Frankfurt 2010-1017/Harvard 1971

The language of minimal and maximal justice – which I have reframed for now as minimal justice and maximal injustice – comes from the Frankfurt School heir apparent Rainer Forst.[50] The concept of the basic structure comes from the god of liberal justice theorizing John Rawls.[51] For Forst, minimal justice is a bit different than how I used the term earlier. For him minimal justice consists in the creation of a "basic structure of justification;" maximal justice, by contrast, consists in a "fully justified basic structure."[52] To get what he means and why it matters in relation to what I have been talking about – that line of court decisions that have led to what I just called the basic structure for a maximally unjust city, together with the occasional ameliorating policies like Portland's sanctioning of homeless-governed homeless encampments – it is helpful first to spend a minute thinking about "basic structure."

In his monumental *A Theory of Justice*, Rawls theorized the basic structure as the *subject* of justice (though along with feminist philosopher Alison Jaggar, I think it is better termed the *object* of justice).[53] It is the thing against which claims of justice are made. The basic structure is that set of institutions and structures – laws, including constitutions, social welfare institutions, structures, rules, and relations of the economy, distributions of and rules governing police power and the use of violence more generally, education, and so forth – that are necessary, and which give form to, society. In Rawls's words, the basic structure is "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions" he "understand[s] the political constitution and principle economic and social arrangements."[54] For Rawls, these major institutions included legal protection of basic liberty rights (of thought and consciousness), "private property in the means of production," markets, and (in later revisions), "the monogamous family."[55] These (and similar)

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[50] Forst, *Right to Justification*; *idem*, *Normativity and Power*; *idem*, *Justification and Critique: Towards a Critical Theory of Politics* (Cambridge: Polity Press, 2014).
[51] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press 1999 [1971]); *idem*, *Justice as Fairness: A Restatement* (Cambridge, MA: Belknap Press, 2001).
[52] Forst, *Right to Justification*, 262.
[53] Alison Jaggar, "The philosophical challenges of global gender justice," *Philosophical Topics* 37(2) (2009), 1-15.
[54] John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005 [1993]), 258.
[55] Rawls, *Theory of Justice*, 6.

institutions are the basic structure because "Taken together as one scheme, … [they] define men's rights and duties and influence their prospects, what they can expect to be and how they can hope to do. The basic structure is the primary subject [or, my language, the primary object] of justice because its effects are so profound and present from the start."[56]

Almost completely ignored by urbanists seeking to theorize social justice in the city,[57] the concept of basic structure has by contrast been a central focus of debate among political philosophers and most consequentially among feminist political philosophers. Surprisingly radical liberal feminists like Susan Moller Okin, for example, very early on showed the sexist implications – and therefore the unjustness – of Rawls's formulation, and not just in its language.[58] His original dismissal of the family – that great school of despotism as John Stuart Mill called it – as part of the basic structure, even as he assumed that the subjects of justice, those able to make claims for justice, were "heads of households," was fatal, not for the concept of the basic structure, but for Rawls's conceptualization of it, which remained the case even after he eventually recognized was he called "the monogamous family" and later still, "the family in some form." As a central institution of social reproduction, the family – or household, or residential collective – of *whatever form*, had to be included in the basic structure, according to Okin.

For radical feminist and urban studies icon Iris Marion Young, the concept of the basic structure was too important to ignore, too important to throw out because of its taint of liberalism. Rather, it needed serious critical attention. "Theorizing justice," Young held, "should focus primarily on the basic structure, because the degree of justice or injustice in the basic structure conditions the way we should evaluate individual interactions or rules and distributions within particular institutions."[59]

Quite obviously, housing or even more basically, shelter, and the rules of access to it, is a central component of the basic structure. Shelter, housing, is a basic material precondition for human life, and thus if *not even a blanket in a cold park* is considered a necessary, or even legal, part of the social endowment within which we live – dismissible as an unnecessary conduct – then there is something deeply wrong with the basic structure, materially and legally. The basic structure must be changed, materially and legally. For one

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[56] *Ibid*, 6-7.
[57] For a discussion, see Don Mitchell, "The priority of justice," in Agatha Herman and Josh Inwood (eds.), *Researching Justice* (Bristol, Bristol University Press, 2024), 159-175.
[58] Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989).
[59] Iris Marion Young, "Taking the basic structure seriously," *Perspectives on Politics* 4 (2006), 91-97, quotation from 91.

resident of Grants Pass, the only way she could get a roof over her head, being poor, being sick, being elderly, being homeless, was to hand in her life-preserving, necessary medication at the front desk of the Gospel Rescue Mission, and thus not have access to the four doses she needed every night, thereby subjecting herself to death.[60] Under these kinds of conditions, and under the fact that the highest court in the United States thinks they are *just*, the basic structure needs serious political examination. That Court seems quite content with allowing the making of a basic structure that *does not* support even bare life. "Taken together as one scheme, … [the basic structure] defines [people's] rights and duties and influence their prospects, what they can expect to be and how they can hope to do" just as Rawls said.[61] What can homeless people in Grants Pass and across the United States expect? At best fines and jail time; quite imaginably, death. What can they do? Stay awake or leave. It's hard to imagine a more maximally unjust basic structure.

But for Rainer Forst, that is only partly the point. Forst was a student of Rawls's and of Habermas, and over a number of publications over the past decade or two he has sought to develop a theory of justice, rooted in the basic structure, adequate to a revivified historical materialism. Central to his conception of the basic structure were the dual questions of *first*, of the mode of production – the mode of production, as both he and Iris Marion Young put it, that *determined* distribution: of housing, of rights, of life chances, of susceptibility to premature death – and therefore, *second*, of power.[62] Any full theory of justice had to confront – had to begin with – the mode of production and who has power over it, whose power is enhanced by it, what powers must be marshalled to transform it.

The basic structure, rooted in the mode of production, is the object of justice to be struggled over. But that is not the *concept* of justice Forst works with. Instead, the concept of justice he has been developing can be most simply phrased as "justice as the right to justification."[63] There is a long logical argument as to how he derives, and then develops this definition (which was developed in direct dialog with Young's work,[64] but also with a range of other interventions too, such as Miranda Fricker's arguments about epistemic injustice),[65] but rather than go into those let me just lay out the basic outline of his argument. Justice, Forst argues, consists in, is founded on, what he calls

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[60] Sotomayor dissent, 7.
[61] Rawls, *Theory*, 6-7.
[62] Forst, *Normativity and Power*, 121.
[63] Forst, *Right to Justification*.
[64] Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); *idem*, *Inclusion and Democracy* (New York: Oxford University Press, 2000).
[65] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (New York: Oxford University Press, 2007).

reciprocity and generality. Reciprocity means that "one does not make any claims to certain rights or resources one denies to others in arguing for one's claims."[66] Generality means that all affected persons must be able to access and accept the reason (for a claim of justice) in relation to universal (that is, intersubjectively shared) and fundamental norms.[67] Under these conditions we all, as subjects of justice, have a right to justification: a right to know that any claims made to, around, against, or concerning us – your claim for a safe place to sleep for example – applies equally to me and that any deviation from that can be *justified*.

Minimal justice, in Forst's sense, is a basic structure of justification, that is, structured venues within which claims of justice can *and must* be justified. On this count, the American judicial system comes up woefully short. In both *Martin* and *Grants Pass* crucial questions of the justness of anti-camping ordinances were *excluded* from discussion, not because they were unimportant, but because those making the claims of justice, towards whom justification needed to be directed, *had died*, in good part precisely because of the conditions they were contesting. *Because they died* those conditions automatically became *just*, or at least unquestioned.[68] Maximal justice, however is something even more. It is a fully justified basic structure. I do not need to say much more about that. I will just let your imagination take over. Think about it. A fully justified basic structure. Thousands of homeless people in San Francisco. 600 in Grants Pass. Five sanctioned encampments in Portland. Bulldozers being revved up all across the Western US.

Lancaster, Sacramento, San Francisco, Grants Pass, Portland, 2024

The mayor of Lancaster is one of those warming up his bulldozer. Governor Newsom in Sacramento has ordered state agencies and jurisdictions under his sway to clear out every homeless encampment they can find without any requirement to find secure shelter, much less housing.[69] Mayor Breed in San Francisco, about to launch her reelection campaign, engaged in a vicious campaign to drive homeless people out of her city.[70] As it happens, such cruelty did little to save her campaign; she lost in November to another Democrat promising an even more vicious campaign against the city's homeless.[71] In

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[66] Rainer Forst, "The limits to toleration," *Constellations* 11(2) (2004), 312-325, quotation from 317.
[67] Forst, *Right to Justification*, 6.
[68] See the particularly callous footnote 2 on p. 12 of Gorsuch's majority opinion in *Grants Pass*.
[69] Hubler, "Newsom orders."
[70] Knight, "San Francisco."
[71] Heather Knight, "Mayor Breed's pitch to voters," *New York Times*, October 31, 2004, https://www.nytimes.com/2024/10/31/us/san-francisco-mayor-election.html; *idem*, "San

Grants Pass, city officials have stepped up their campaign of citing and arresting, fining and banishing all who cannot afford shelter. What's their justification? The Supreme Court has said it was fine to do that. It was fine to engage in what are so clearly death-dealing actions. And how have they justified their actions? In two ways. First none of these cities are licensed to attack homeless people, the court says, they are only licensed to attack homeless people who sleep. And how is *that* justified? It is justified because such jurisdictions do not *have* to attack homeless people who sleep. They could, if they wanted, do like Portland and allow a few self-governing encampments to exist. Because they do not *have* to be cruel, they are free to be cruel.

Under terms of reciprocity and generality, this is completely unjustifiable. The Supreme Court does not even pretend to meet the requirements for minimal justice, which at least the lower courts attempted to do, however minimally. As a result, they have helped create a basic structure that is in no way justified and thus have created the conditions for cities to construct a *material* basic structure that is maximally unjust. Instead, "We need some tough love on our streets," progressive San Francisco Mayor Breed said as she launched her so-called clean-up campaign. And as it got underway, she was out there on the streets to observe its success. "Ms. Breed did not engage with the homeless men," who were being disposed of their belongings and cited for camping in public, the *New York Times* reported. She stayed across the street. "She said she did not want to be recorded by a bunch of activists for homeless rights who had shown up to monitor the clearing and take videos of the workers."[72]

Francisco mayor concedes to Levi Strauss heir," *New York Times*, November 7, 2024, https://www.nytimes.com/2024/11/07/us/politics/san-francisco-mayor-breed-lurie.html

[72] Knight, "San Francisco."