

# CONDEMNED TO BREAK THE LAW: The Legality and Fairness of Anti- Camping Laws in Response to the Homelessness Crisis



## ABSTRACT

Homelessness is a widespread issue that impacts the lives of thousands and motivates the actions of various governmental entities. In “Condemned to Break the Law: The Legality and Fairness of Anti-Camping Laws in Response to the Homelessness Crisis,” I argue that governments have an obligation to make laws that can be reasonably followed. The analysis of obligation incorporates concepts of penological purpose and the capacity to follow the law. These philosophical measurements are applied to the Supreme Court’s decision to permit anti-camping laws in *Grants Pass v. Johnson* 603 US \_\_\_ (2024) to situate these concepts in a real-world context.

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## I. INTRODUCTION

Legal scholars and judicial decision-makers are often faced with complex issues that lack a simple solution. Homelessness, a problem the American government has been facing for generations, impacts over half a million people across the United States. This problem causes a lack of regular and adequate nighttime shelters.<sup>1</sup> Four in ten people experiencing homelessness are sleeping in places “not meant for human habitation,” including sidewalks, abandoned buildings, and camping grounds.<sup>2</sup> Examining legal decision-making regarding the homeless population presents questions about the responsibility of homeless individuals, what purpose the punishment of the homeless satisfies, and what solutions are responsible for reducing homelessness.

The central question of my paper will be about the legality and justice of anti-camping laws in response to the rise of the unhoused population across the United States. These types of laws have proliferated in US cities to prohibit camping and sleeping in public spaces. I focus on the laws introduced and implemented by the city of Grants Pass. Their laws became a moral and legal controversy that was eventually elevated to the US Supreme Court. Grants Pass’ anti-camping ordinances raise an important question of what ought to be the minimal expectations for a law to be morally and legally justified. One of these minimal expectations is whether governments have an obligation to make laws that can be reasonably followed.

I argue that governments do have an obligation to make laws that can be reasonably followed. This obligation arises from the idea that a deservedly punishable person is one that has control over their conduct, knowledge of their expected behavior, and the ability to act differently. I also argue that another important requirement is that the punishments instituted by the government need to have a “penological purpose” that justifies both the punishment itself and the effects of the punishment. Applying this standard to the Grants Pass anti-camping laws to situate these arguments in a real-world context, I argue that such laws are unjust. I also argue that the majority in *City of Grants Pass v. Johnson* 603 US (2024) decided wrongly by permitting the anti-camping laws to be publicly enforced and by levying punishment on the unhoused who lack the freedom to avoid camping in public spaces. In arguing for my thesis, I approach it in the following way: First, I

introduce the *Grants Pass* case. Second, I outline the philosophical measurements relevant to the case. Finally, I apply these philosophical principles to the case.

## II. THE CITY OF GRANTS PASS V. JOHNSON AND THE RISE OF ANTI-CAMPING LAWS

Like many other cities in the United States, the city of Grants Pass, Oregon has been grappling with homelessness and has instituted different approaches to deal with this escalating issue. As part of its strategy to address homelessness, the city of Grants Pass, enacted three laws restricting camping in public spaces. The first law prohibits “sleeping on public sidewalks, streets or alleyways.”<sup>3</sup> The second law prohibits “camping on public property.”<sup>4</sup> In the statute, camping is defined as “set[ting] up . . . or remain[ing] in or at a campsite,” defining a campsite as “any place where bedding, sleeping bag[s], or other material used for bedding purposes, or any stove or fire is placed . . . for the purpose of maintaining a temporary place to live.”<sup>5</sup> The third law prohibits “[c]amping’ and [o]vernight parking’ in the city’s parks.”<sup>6</sup> An initial violation of these ordinances will result in a fine, and subsequent violations could result in being barred from city parks. Violation of orders barring individuals from city parks can result in criminal trespassing charges that can be punishable by prison time and fines.

The Grants Pass laws inspired moral outrage from the unhoused community and its advocates who challenged its legality in the courts. The main challenge was that anti-camping ordinances violated the Eighth Amendment’s prohibition on cruel and unusual punishment. According to the challenge, if a city cannot meet people’s basic needs of housing, then punishing unhoused people for carrying out life-sustaining acts in public spaces—such as eating, camping, sitting, and sleeping—is “cruel and unusual.” The unhoused are “involuntarily homeless” because the homeless population in the city outnumbered the “practically available shelter beds.”<sup>7</sup> The definition of the involuntarily unhoused was established in the legal precedent *Martin v. Boise*.<sup>8</sup> The lack of available beds in shelters meant that the involuntarily unhoused were deprived of the choice of avoiding

3 *City of Grants Pass v. Johnson* 603 US 11 (2024).

4 *Grants Pass* at 11.

5 *Grants Pass* at 11.

6 *Grants Pass* at 11.

7 *Grants Pass* at 12.

8 *Martin v. City of Boise* 920F.3d 584 (2019).

1 *City of Grants Pass v. Johnson*, 603 US 1 (2024), (Sotomayor, Kagan, and Jackson, dissenting).

2 *Grants Pass* (Sotomayor et al.), 3.



camping in public spaces. The majority argued that the Eighth Amendment's prohibition on cruel and unusual punishment applied only to the type of punishment inflicted, not the determination of what was a punishable offense.

However, the interpretation of the cruel and unusual punishment clause was expanded to prohibit the criminalization of the "status" of an individual. In previous cases, the Court reasoned that a person's status cannot be criminalized and only conduct should be the subject of criminalization. The Court decided that the "status of narcotic addiction" could not be a criminal offense, but using the drugs could be criminalized.<sup>9</sup> The dissent argued that the Grants Pass laws are criminalizing the status of being homeless because they single out the very behavior that defines homelessness.<sup>10</sup> In response, the majority argued that the Grants Pass laws criminalized actions like "occupying a campsite for the purpose of maintaining a temporary place to live."<sup>11</sup> The majority argued that this prohibition applies to all individuals regardless of status. Although the lower courts reliably affirmed that Grants Pass' anti-camping laws were unconstitutional, the Supreme Court reversed its decisions and ruled that its laws were not in violation of the Eighth Amendment. These determinations relied heavily on the test established by the Ninth Circuit in *Martin*, which determined that the Eighth Amendment's Cruel and Unusual Punishments Clause prevented enforcement of public-camping ordinances against homeless individuals who lack "access to alternative shelter." The court said that access to alternative shelter was lacking when "there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters."<sup>12</sup> Similar to the *Grants Pass* case, the Ninth Circuit determined that about three quarters of the beds in Boise were "practically unavailable" because of "religious atmospheres."<sup>13</sup>

The majority opinion argues that the laws Grants Pass enacted are very similar to laws other American cities have instituted to address homelessness. The majority calls into question the "involuntarily homeless" test and argues that it does more harm than good to limit the resources of local governments. Majority opinion also calls attention to the other policies Grants Pass adopted to address homelessness to demonstrate the city's multifaceted approach. To demonstrate the city's approach, the majority opinion cites Grants Pass appointing a "homeless community liaison" officer to share information about

<sup>9</sup> *Grants Pass* at 18.

<sup>10</sup> *Grants Pass* (Sotomayor et al.), 13.

<sup>11</sup> *Grants Pass* at 20.

<sup>12</sup> *Grants Pass* at 7.

<sup>13</sup> *Grants Pass* at 7.

assistance programs and other resources with homeless individuals. They argue that the officer is proof that the city is using various methods to address the problem. The majority opinion also attempts to deemphasize the impact of criminal charges for homelessness by claiming that the training of officers to be empathetic towards homelessness reduces the harm done by city ordinances. The opinion cites the directions of the Grants Pass Department of Public Safety Policy Manual, which states that "homelessness is not a crime" and officers should "aid and support" the homeless whenever possible.<sup>14</sup> Majority opinion argues that these procedures demonstrate the need for cities to have a multitude of tools to respond to homelessness, and they should be able to "experiment and find effective responses."<sup>15</sup> The majority opinion also argues that punishment is a last resort in many cases and resources for homeless individuals are made available before laws are enforced.

The majority opinion consistently defends the actions of Grants Pass by claiming that the restrictions against encampments on public property are a necessary measure that local governments should be afforded. They disregard the legal reasoning behind "involuntarily homeless" statuses, arguing that preventing the criminalization of camping when there are inadequate alternative shelters is detrimental to local governments. They reference a brief from the City of Phoenix and argue that the decision limits tools available to governments and paralyzes "even commonsense and good faith efforts at addressing homelessness."<sup>16</sup> The concept of penological action against homelessness is often referred to as "commonsense" and "necessary." However, the punishment of individuals who violate a law has a specific purpose and assumes the punished has a responsibility for their actions. Both the purpose of the punishment and the responsibility of the punished are lacking in this situation, which I elaborate on in the next section.

### III. TWO PHILOSOPHICAL MEASUREMENTS OF THE FAIRNESS OF LAWS

In this section, I will outline the philosophical reasoning that determines what makes a person blameworthy of a crime. In Amelia Wirts', "Is Crime Caused by Illness, Immortality, or Injustice?: Theories

<sup>14</sup> *Grants Pass* at 12.

<sup>15</sup> *Grants Pass* at 10.

<sup>16</sup> *Grants Pass* at 9.



of Punishment in the 20th and Early 21st Centuries,” the work of H. L. A. Hart is used to explain the need for a person to be accountable for their actions if they are to be punished.<sup>17</sup> The concept Hart presents is called “capacity responsibility,” which is defined as a person being responsible for their actions because they understand the law and morality, are able to deliberate and decide on their actions, and control their conduct. A very important aspect of this concept is, as Hart writes, “if a person could not have understood a moral rule or was unable to make themselves conform to it, then they could not have been morally responsible.”<sup>18</sup> Based on this understanding of the responsibility of the punished, Hart argues that it is unjust for legal institutions to punish someone without considering their “capacity-responsibility.”<sup>19</sup>

The concept of capacity-responsibility can be further understood through Kant’s “ought implies can” formula.<sup>20</sup> The implementation and enforcement of laws establish the expected behavior for society which emulates the “ought” parameter of the formula. The legal standard for behavior specifically outlines what conduct is permissible and impermissible. When considering the objective of the law to uphold certain standards for behavior, the law is assumed to be followable. If the expectations of the law are inconsistent with the ability of the population to follow the law, the law is unable to fulfill its purpose. The distinction between status and conduct presented in the legal reasoning recognizes the need for actions that follow the “ought implies can” formula. Status is barred from being subject to criminal punishment due to the realistic inability to alter status, which would be necessary to follow the law. Abstractly, a law that criminalizes status is considered illegitimate because a law that expects behavior must also rationalize the expectations based on the ability to actualize the proposed conduct.

A second important measurement of the appropriateness of the law is its penological purpose. Laws are morally and legally justified to the extent that they promote a legitimate moral goal of punishment. It is standardly understood that legal punishment applies to bad actors. For the retributivist, proportional punishment is vital to balance the harms caused by wrongdoers and correct the wrongdoing. For the deterrence theorist, the reasons for punishment are to promote some broader social utility, in which punishment addresses the crimes of

wrongdoers while also deterring similar actions. For the rehabilitation model, the point of punishment is to reform the moral character of criminal offenders. Although there is a contentious debate over what properly justifies legal punishment, the point here is that legal punishment must serve some legitimate penological purpose. Since punishment involves levying harm, such responses to legal offenses must be justified.

#### IV. APPLYING THE PHILOSOPHICAL MEASUREMENTS TO THE GRANTS PASS CASE

In the case of *Grants Pass*, the lack of alternative forms of shelter makes it essentially impossible for the homeless population to follow laws preventing public camping. This lack of alternatives applies to the capacity-responsibility requirement for individuals to be able to control their conduct. As Justice Sotomayor states in the dissenting opinion, “Sleep is a biological necessity, not a crime.”<sup>21</sup> Minding this, it is only reasonable to determine that conduct and capacity cannot be separated. The inseparable nature of conduct and capacity also means that an obligation to follow the law implies one is capable of following the law. The lack of shelter for homeless individuals demonstrates a lack of a human necessity. Based on these circumstances, criminalization of public camping when there is no alternative action to take is punishing individuals for satisfying a human need. Furthermore, punishing these individuals for satisfying a human need when the government has failed to secure basic necessities for their population is an even more egregious violation of justice.

The second consideration for the anti-camping laws is the penological purpose of these laws. The amicus brief in support of the respondents of *Grants Pass*, written by the Formerly Incarcerated, Convicted People, and Families Movement, applies the concept of penological purpose to the *Grants Pass* laws.<sup>22</sup> In the context of this paper, penological purpose is defined as the justifications for the punishment of criminals who commit publicly known and clearly defined offenses. The justifications of punishment describe goals that can be reasonably accomplished by the punishment. The amicus brief

17 Amelia M. Wirts, “Is Crime Cause by Illness, Immorality, or Injustice? Theories of Punishment in the Twentieth and Early Twenty-First Centuries,” *The Palgrave Handbook on the Philosophy of Punishment* (Palgrave Macmillan, 2023), 75–97.

18 Wirts, “Theories of Punishment,” 81–82.

19 Wirts, “Theories of Punishment,” 82.

20 Frederick Wilmot-Smith, “Law, ‘Ought’, and ‘Can’,” *Ethics* 133, no. 4 (University of Chicago Press, 2023): 333–50, 10.1086/724533.

21 *Grants Pass* (Sotomayor et al.), 1.

22 Eric Sirota, David J. Chizewer, and Lawrence Wood, “Brief of Formerly Incarcerated Convicted People and Families Movement, The Shriver Center on Poverty Law, and National Consumer Law Center as *Amici Curiae* in Support of Respondents,” *City of Grants Pass v. Johnson* 603 US (2024), no. 23–175 (Counsel Press).





argues that the *Grants Pass* laws do not serve a “legitimate penological justification” or “offer a ‘good-faith effort’ to address harms associated with homelessness.”<sup>23</sup> Penological purpose identifies the goals of the punishment, which in the case of *Grants Pass*, the laws have repeatedly failed to achieve. This failure is not circumstantial but an intrinsic flaw within the laws’ implementation and enforcement. *Grants Pass* and cities in similar situations argue that they need to be able to enforce anti-camping laws because it will reduce homelessness.

However, as the dissenting opinion and the amicus brief argue, these laws will create new criminal records for homeless people, which will make it even more difficult for them to find housing. As the amicus brief writes, “Anti-sleeping ordinances necessarily create additional barriers to housing and trap those affected in a cycle of homelessness and punishment.”<sup>24</sup> This completely discredits the argument that the ordinances help alleviate homelessness. Based on this lack of penological purpose, the *Grants Pass* laws are operating in direct opposition to the goals the city claimed the laws could achieve. To this point, one could even argue that the laws transcend the dilemma of lacking penological purpose and prevent penological purpose from existing due to their destructive nature.

## V. OBJECTIONS AND RESPONSES

A primary objection raised by the majority opinion is the health and safety risks homeless encampments impose on cities. Most encampments lack running water or proper sanitation facilities, which can increase the spread of diseases. The majority opinion asserts that many states have seen a reemergence of “typhus, shigella, trench fever, and other diseases” on their city streets.<sup>25</sup> The majority articulates the security risks that encampments introduce by citing various reports of increased drug circulation and violent crimes in association with encampments. One estimate reports that “more than 40 percent of the shootings in Seattle in early 2022 were linked to homeless encampments.”<sup>26</sup> These circumstances motivate many of the actions of many municipalities to address homelessness. These concerns also emphasize the need to address homelessness as neglected homeless

encampments produce health and safety concerns for communities and their homeless populations alike.

The main objection to the argument presented is that cities have limited resources and preventing them from using legal tools can worsen the effects of homelessness. This objection is repeatedly raised by the majority opinion. The majority opinion presents the opinions of states and cities arguing against restrictions on anti-camping laws. As previously stated, the local governments and the majority opinion argue that homelessness is too complex to have one solution and that governments should “have latitude” to experiment to find solutions.<sup>27</sup> The majority opinion also quotes the cities of the Ninth Circuit, who argues that “injunctions and the threat of federal litigation impede this democratic process.”<sup>28</sup> The majority opinion furthers this argument, writing that the restrictions “undermine local governments, and do not well serve the homeless or others who live in the Ninth Circuit.”<sup>29</sup> The idea that local governments should be free from critique for policies that are admittedly experimental demonstrates a lack of consideration for the homeless population.

Additionally, recalling the concepts of “capacity responsibility” and “penological purpose,” the argument that these laws are helping the homeless is untrue. The city at large is also being harmed because homelessness will continue to rise as a result of the laws and the harms they cause. In the case of *Grants Pass*, there are arguments left out of the majority opinion that provide more clarity on the harms caused by these laws.

Despite what the majority opinion argues, the motivations behind the *Grants Pass* laws can be discovered by examining the city council’s decision-making. The approach of the *Grants Pass* city council focused on removing the homeless population, not helping them like many have claimed. This desire for removal went so far that the council considered “denying basic services such as food, clothing, bedding, hygiene, and those types of things.”<sup>30</sup> A city council member remarked, “maybe they aren’t hungry enough or cold enough . . . to make a change in their behavior.”<sup>31</sup> The change in behavior the council is referring to is the mere existence of the homeless in *Grants Pass*. Beyond contradicting the claims that these laws are targeted at helping the homeless, it demonstrates the inhumane treatment of the homeless and the desire to withhold basic services to those in need.

<sup>23</sup> Sirota, “*Amici Curiae*,” 4.

<sup>24</sup> Sirota, “*Amici Curiae*,” 4.

<sup>25</sup> *Grants Pass* at 4.

<sup>26</sup> *Grants Pass* at 3.

<sup>27</sup> *Grants Pass* at 10.

<sup>28</sup> *Grants Pass* at 10.

<sup>29</sup> *Grants Pass* at 10.

<sup>30</sup> *Grants Pass* (Sotomayor et al.), 13.

<sup>31</sup> *Grants Pass* (Sotomayor et al.), 13.



## VI. CONCLUSION

“Capacity responsibility” and “penological purpose” inform all of our laws and their enforcement. They are considerations that seem inherent to the legal system. However, with anti-camping laws and the criminalization of homelessness, the issue of the obligation to follow the law versus the capability to follow the law is revealed. If laws are made to require certain actions and punishments are made to enforce certain actions, punishing someone who has no ability to follow the law makes the law and punishment arbitrary. The *Grants Pass* laws fail to consider the “capacity responsibility” of the homeless by dismissing the lack of shelter and other resources that cause homelessness. The laws also fail to produce a “penological purpose” because the actions they seek to enforce are impossible to conduct based on the resources available. Additionally, the laws fail to produce a “penological purpose” because the laws worsen the situation they seek to improve. For these reasons and more, the *Grants Pass* laws and similar laws should not be upheld.



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