Regulating the Homeless.
A Dispassionate, Apolitical Examination of Panhandling and Anti-Camping Ordinances

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Four of Thomas's five children are teenagers this year, including a 19 year old daughter, a twin sixteen-year-old sons, and a thirteen year old son.

Thomas has therefore adopted an official department policy requiring "warm, clean and [most of all] calm" client service. Thomas has represented the City in numerous real estate transactions (including the purchase of property for a proposed wastewater treatment plant), a few successful economic development projects (including the final assembly plant for large yellow-and-black hydraulic excavators), and exactly zero criminal indictments (zero and counting).

Thomas was staff attorney at the Texas Association of School Boards, where he enjoyed both travelling the state teaching school board members why they couldn't fire the football coach, and coming home to a small house in the Texas hill country filled to the brim with five wonderful children and a strong Texas woman.

Thomas has also represented large corporate clients in transactions involving too many zeroes between the dollar-sign and the decimal.

Due to the eight years he spent teaching high school English to reluctant teenagers, Thomas eschews obfuscation whenever possible, and delights in reducing complex, convoluted Texas law to practical paradigms.

Outside of the office, Thomas maintains his sanity by riding a bicycle as fast as possible. Thomas has been signing his email messages with his initials since before Al Gore invented the internet, and he contains his mild exasperation that no one has yet started calling him Tag.

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Regulating the Homeless: This will be a dispassionate review of the legal limitations on ordinances designed to control or eliminate panhandling and camping. We'll breeze through the first, fifth, eighth, and fourteenth amendments, the equal protection clause, and the due process clause, in a session designed to give city attorneys the tools needed to either draft an ordinance tailored to their city, or to tell their mayor why they can't.

1) **Panhandling.** Soliciting "donations or payment" is a form of speech protected by the First Amendment. *See Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) ("[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment."). Through the due process clause of the Fourteenth Amendment, the First Amendment applies to a municipal government such as the City. *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1268 (11th Cir. 2004); *Homeless Helping Homeless, Inc. v. City of Tampa, Florida*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882, at *3 (M.D. Fla. Aug. 5, 2016). When a city attempts to regulate panhandling, it must confront the inherent barriers imposed by this First Amendment protection.

   a) **Prohibiting Panhandling Based on the Content of the Speech**. The most common method of regulating panhandling in Texas is the "Aggressive Panhandling" approach, in which the City allows panhandling, but prohibits panhandling in an aggressive manner. These "time, place and manner" restrictions may have historically survived under an intermediate scrutiny examination, but are less likely to survive in a post-*Reed* analysis.

      i) *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Gilbert, Arizona (Town), has a comprehensive code (Sign Code or Code) that prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including Temporary Directional Signs, Political Signs, and Ideological Signs. Good News Community Church and its pastor, Clyde Reed were cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the Town, petitioners filed suit, claiming that the Code abridged their freedom of speech. The Supreme Court held that the sign ordinance was content based, and therefore subject to strict scrutiny:

> "The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of

> the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015)

ii) At least six federal cases have examined panhandling ordinances since *Reed.* Five of the six concluded that the ordinance in question was a content-based restriction, and the other two were content-neutral. All six struck down the regulation as unconstitutional. The cumulative impact of these seven cases has been a significant narrowing of a city's ability to regulate panhandling using time, place and manner restrictions.

(1) *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 411–12 (7th Cir. 2015), cert. denied, 136 S. Ct. 1173, 194 L. Ed. 2d 178 (2016). The Seventh Circuit had initially concluded that Springfield's anti-panhandling ordinance regulated based on subject matter, rather than content or viewpoint, and therefore did not draw lines based on the content of anyone's speech. This conclusion was based on its analysis of supreme court cases prior to *Reed*, and its determination that the Supreme Court's classification of speech as content-based did not include all regulations of subject matter of the speech, but was limited to situations where the government regulated speech because of the ideas it conveyed or because the government disapproved of the message. The Court concluded, "It is hard to see an anti-panhandling ordinance as entailing either kind of discrimination." *Norton v. City of Springfield, Ill.*, 768 F.3d 713, 717 (7th Cir. 2014). After *Reed*, however, the court granted a petition for rehearing. Applying *Reed* to the Springfield ordinance, the *Norton* court found it was not content-neutral, and thus violated free speech rights under the First Amendment:

> *Reed* understands content discrimination differently. It wrote that "regulation of speech is content based if a law applies to particular speech because of the topic discussed *or* the idea or message expressed." 135 S.Ct. at 2227 (emphasis added). Springfield's ordinance regulates "because of the topic discussed". The Town of Gilbert, Arizona, justified its sign ordinance in part by contending, as Springfield also does, that the ordinance is neutral with respect to ideas and viewpoints. The majority in *Reed*

> found that insufficient: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 135 S.Ct. at 2228. It added: "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id*. at 2230. *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 412 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1173, 194 L. Ed. 2d 178 (2016).

(2) *Homeless Helping Homeless, Inc. v. City of Tampa, Florida*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882, at *5 (M.D. Fla. Aug. 5, 2016). The City of Tampa's anti-panhandling ordinance follows typical "aggressive panhandling" limitations. The court reluctantly followed *Reed* and determined that the ordinance was a content-based restriction on speech. They city attempted to negate that conclusion by arguing that the ordinance was drafted with input from both sides of the issue, and that it therefore did not intend to harm the homeless. The city showed that the Tampa City Council's meetings about Section 14-46(b) were "replete with concern about the plight of the homeless and how to assist them" and lacked "discussion on keeping [the homeless] out of sight or banishing them." Also, the City states that a representative of an organization benefitting the homeless participated in the meetings about Section 14-46(b). The court rejected that argument, holding that the regulation was content-based, and failed to pass strict scrutiny:

> However, the Tampa City Council's solicitude toward the interests of the homeless and the City Council's amiable reception of advocates for the homeless are, especially after Reed, unresponsive to a constitutional attack on Section 14-46(b) as impermissibly content-based. To the extent that the City argues that Section 14-46(b) is content-neutral because the City actively accommodates the homeless, the argument fails.

(3) *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 181 (D. Mass. 2015). The City of Lowell, Massachusetts's ordinance banned all vocal panhandling in Lowell's downtown, and banned what was identified as aggressive panhandling behaviors citywide. The court found that the aggressive panhandling provisions were not the least restrictive means available to protect the public safety. The court also found that the downtown ban was plainly content-based on its face: "On its face, the Ordinance distinguishes solicitations for immediate donations from all others. A person could vocally request that passersby in the Historic District make a donation tomorrow, but not today (a distinction that may be of great import to someone seeking a meal and a bed tonight). He could ask passersby to sign a petition, but not a check. *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 185 (D. Mass. 2015). The City attempted to justify the ordinance using the "secondary effects" doctrine, under which zoning ordinances meant to

address not the content of adult establishments but effects on crime, property values and other neighborhood characteristics can be evaluated as content-neutral regulations. The court, however rejected that notion:

> This doctrine does not justify Lowell's ordinance. Even putting aside the issue whether the doctrine applies at all outside the zoning context, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448-49, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion) (Kennedy, J., concurring), Lowell has not provided the kind of reliable data needed to show that it is truly targeting secondary effects. More importantly, it is at least substantially, if not exclusively, targeting the content of panhandlers' speech, not any secondary effects that follow. *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 187 (D. Mass. 2015)

(4) *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015). City residents who regularly panhandled in public areas and school committee member who regularly campaigned on traffic islands throughout city brought action against city challenging ordinances that prohibited panhandling and soliciting in an aggressive manner and restricted standing or walking on traffic islands or roadways. Citing *Reed, McLauglin,* and *Browne,* the court found the aggressive panhandling ordinance to be facially content-based, and subject to strict scrutiny. The ordinance was struck down as not being the least restrictive means available to protect the public. The court additionally examined a separate ordinance restricting standing or walking on traffic islands and roadways, which was found to be content-neutral on its face. Further discussion of this part of *Thayer* can be found below in the content-neutral regulation section.

(5) *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1280 (D. Colo. 2015). Individual panhandlers and a local non-profit brought suit against the City of Grand Junction seeking to invalidate the City's anti-panhandling ordinance. Grand Junction's ordinance follows typical aggressive panhandling language, and also includes a prohibition on panhandling after dark. The court cited *Reed* and *Norton* to support its conclusion that the anti-panhandling ordinance was a content based restriction on speech, and struck down the ordinance.

b) **Content Neutral Regulations**.

i) *Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2015). The city of Portland's ordinance provided that "No person shall stand, sit, stay, drive or park on a median strip ... except that pedestrians may use median strips only in the course of crossing from one side of the street to the other." It was passed by the city council only after significant concerns were raised to council about panhandling. Three individuals brought suit claiming the ordinance restricted their speech in various ways. Because of the historic role as a venue open to the public for discussion and debate, a traditional public forum receives special protection under the First Amendment. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014), The court concluded that "the ordinance restricts speech only on the basis of where such speech

takes place. The ordinance does not take aim at—or give special favor to—any type of messages conveyed in such a place because of what the message says." However, despite being content-neutral, the court found that the ordinance imposed "serious burdens" on speech in a traditional public forum:

> The ordinance prohibits virtually all activity on median strips and thus all speech on median strips, with a narrow exception only for speech that pedestrians may engage in while crossing the median strip in the course of crossing the street (and, perhaps, another one for pedestrians posting signs or engaged in activity that is similarly fleeting). In fact, it is hard to imagine a median strip ordinance that could ban more speech. *See Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) ("We must ... look ... to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve."). *Cutting v. City of Portland, Maine*, 802 F.3d 79, 88 (1st Cir. 2015).

As a content-neutral restriction on free speech, the Portland ordinance only need be narrowly tailored to serve a significant public interest. Nevertheless, the court found the ordinance to be unconstitutional. The city's two justifications for the ordinance, to protect drivers from people in the medians, and to protect people in the medians from drivers, were both found suspect by the court. In short, the City did not offer sufficient evidence that a safety risk existed, and the court was not persuaded that the ordinance was sufficiently narrow to address the risk, if it existed.

ii) *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015). As discussed above, city residents who regularly panhandled in public areas and school committee member who regularly campaigned on traffic islands throughout city brought action against city challenging ordinances that prohibited panhandling and soliciting in an aggressive manner and restricted standing or walking on traffic islands or roadways.

> No person shall, after having been given due notice warning by a police officer, persist in walking or standing on any traffic island or upon the roadway of any street or highway, except for the purpose of crossing the roadway at an intersection or designated crosswalk or for the purpose of entering or exiting a vehicle at the curb or for some other lawful purpose. *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 230 (D. Mass. 2015)

The Court found the ordinance to be content neutral on its face, but still struck it down, citing *Cutting v. Portland* 802 F.3d 79, 81-82, the court found that the city-wide application of the prohibition was unconstitutionally overbroad:

> The City can point to specific medians and traffic islands as to which a pedestrian use should be prohibited in the

> interest of public safety (the traffic islands and/or medians in Kelly, Newton and Washington Squares come to mind). However, on this record, it has not established the need for the "sweeping ban ... it chose." *Cutting*, 802 F.3d at 92 " 'In short, the City has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it.' Instead, it 'sacrific[ed] speech for efficiency,' and, in doing so, failed to observe the 'close fit between ends and means' that narrow tailoring demands." Id. (internal citation and citation to quoted case omitted) *Thayer*, 144 F. Supp. 3d 237–38.

2) **Anti-Camping Regulations.** The practice of regulating homeless encampments can run afoul of constitutional provisions on multiple levels. First, the city regulation must avoid depriving citizens of a liberty interest in their right to be in a public place. Second, the regulation's enforcement must avoid criminalizing status and thus violating the eighth amendment.

   a) **Removal of Citizens from public rights of way implicates a liberty interest.**

      i) The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. *Kent v. Dulles*, 357 U.S. 116, 125, 78 S. Ct. 1113, 1118, 2 L. Ed. 2d 1204 (1958). The Supreme Court, in a divided opinion, suggested that the right to remain in a public place is a protected liberty interest.

> Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" *Kent v. Dulles*, 357 U.S. 116, 126, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765). *City of Chicago v. Morales*, 527 U.S. 41, 54, 119 S. Ct. 1849, 1857–58, 144 L. Ed. 2d 67 (1999)

Likewise, the public has a liberty interest in using or being present on public property, including roadways; it is his/her property in a real sense. *Papachristou v. Jacksonville*, 405 U.S. 156, 164, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *Kent v. Dulles*, 357 U.S. 116, 126, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); The right of a citizen in Texas to use public streets "to his heart's content," however, is limited by the state's authority to control the roadways for the benefit of the public at large.

> The streets of the cities of this country belong to the public. Primarily, every member of the public has the natural right to the free use of such streets in the normal pursuit of his private or personal business or pleasure. In his errands of

> pleasure, he may use these highways to his heart's content. If he is in the dry goods or grocery business, or operates a laundry, or ice plant, or dairy, or bakery, or is engaged in any other business, he has the right to use the streets in delivering to his customers his dry goods, groceries, laundry, ice, milk, bread, or any other stores or products of his industry, or for any other purpose incident to such business. These rights, being inherent in him as an American citizen, cannot be taken away from him, or unreasonably restricted or regulated.
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> …
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> But this inherent right of the citizen to the use of the streets ceases abruptly when he reaches the maximum of such use in the ordinary or normal pursuit of his personal pleasure or private business. Passing that point, he exceeds his natural right, and burdens the streets with an unusual use, thus encroaching upon the paramount rights of the public at large. It is at this juncture that the city commissioners, as substitute trustee for the public, enters with the power to determine whether or not, or to what extent, or upon what streets, this extraordinary use will be permitted. *City of San Antonio v. Fetzer*, 241 S.W. 1034, 1035–36 (Tex. Civ. App. 1922), writ refused (Oct. 11, 1922).

Stated in the modern vernacular, a deprival of the individual's liberty interest is a question of substantive due process. "A violation of substantive due process, for example, occurs only when the government deprives someone of liberty or property; or, to use the current jargon, only when the government works a deprivation of a constitutionally protected interest." *Simi Inv. Co. v. Harris Cty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000). In Texas, the rational basis test applies to deprivals of liberty interests that are not fundamental interests. "The question is only whether a rational relationship exists between the [policy] and a conceivable legitimate objective. If the question is at least debatable, there is no substantive due process violation." *Id.*, 236 F.3d at 251.

ii) *Don't expect help from the State.* If the homeless encampment is located on a state highway or other state property, a city might hope that TxDOT will resolve the issue. However, briefs prepared by TxDOT counsel make clear that TxDOT will defer to the local jurisdiction. TxDOT claims it has a rational basis only to protect the safety of drivers or their stored equipment.

(1) According to TxDOT, two Texas statutes could potentially address a homeless encampment situation specifically: obstructing a highway or passageway (TEX. PENAL CODE ANN. § 42.03) and criminal trespass (TEX. PENAL CODE ANN. § 30.05).

(a) Criminal obstruction of a highway or passageway would not likely apply to areas that are not on the roadway itself. Courts have held that an offense is

committed if a person disobeys a reasonable order to move to prevent obstruction of a highway, but that a potential obstruction must exist. *See e.g., Hardy v. State* 281 S.W.3d 414, 424 (Tex. Crim. App. 2009).

(b) Criminal Trespass does not "allow police authorities to antisepticly [sic] remove persons lawfully gathered engaging in lawful behavior from public property where the individuals have a lawful right to be." *Johnson v. Board of Police Com'rs* 351 F.Supp.2d 929, 950 (E.D.Mo.,2004)

iii) The City can use its broader police power in the state rights of way:

(1) TEX. TRANSP. CODE ANN. § 311.001 (West): **"**(a) A home-rule municipality has exclusive control over and under the public highways, streets, and alleys of the municipality. (b) The municipality may: (1) control, regulate, or remove an encroachment or obstruction on a public street or alley of the municipality; (2) open or change a public street or alley of the municipality; or (3) improve a public highway, street, or alley of the municipality."

b) **Criminalizing Campers could violate the Eighth Amendment**:

i) *Status Crimes are Unpunishable Crimes.* In 1962, a municipal judge in California instructed the jury in a criminal drug case that the statute made it a misdemeanor for a person "either to use narcotics, or to be addicted to the use of narcotics…. That portion of the statute referring to the 'use' of narcotics is based upon the 'act' of using. That portion of the statute referring to 'addicted to the use' of narcotics is based upon a condition or status. They are not identical. … To be addicted to the use of narcotics is said to be a status or condition and not an act." *Robinson v. California*, 370 U.S. 660, 662, 82 S. Ct. 1417, 1418, 8 L. Ed. 2d 758 (1962). He likely did not know the weight of the words in that jury instruction. The US Supreme Court opinion in *Robinson v. California* has become the seminal case for the proposition that crimes based on a status or condition are not the same as crimes based on actions. Status crimes are unenforceable.

(1) The Supreme Court recognized a state's right to regulate drug trafficking in a variety of forms. "A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders." But, for the purpose of Robinson's appeal, the Supreme Court noted that the California courts had not construed the law to require proof of the actual use of narcotics within the State's jurisdiction. The jury instructions, according to the Supreme Court, allowed the jury to convict if they found simply that the defendant's status was that of being "addicted to the use of narcotics."

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in

> the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *See State of Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422. *667 2
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> We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666–67, 82 S. Ct. 1417, 1420–21, 8 L. Ed. 2d 758 (1962)

(2) Six years later in *Powell v. State of Texas*, over the dissent of Justices Fortas, Douglas, Brennan, and Sewell, the Supreme Court declined to extend *Robinson* to create a constitutional holding that 'a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease.' Instead, Justice Marshall, writing for the plurality, found that the facts of the case did not lend themselves to such extension:

> On its face the present case does not fall within that holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill, or a leper.' *Powell v. State of Tex.*, 392 U.S. 514, 532, 88 S. Ct. 2145, 2154, 20 L. Ed. 2d 1254 (1968)

ii) *Homelessness has been held to be a Status Crime in Texas, California, and Florida.* Since the holding in *Powell*, at least three District Courts have used *Powell* to extend Robinson's status crimes prohibition to anti-camping ordinances. *See Johnson v. City of Dallas,* 860 F. Supp. 344, (N.D. Tex. 1994), rev'd on other grounds, 61 F.3d

442 (5th Cir. 1995); *Jones v. City of Los Angeles* 444 F.3d 1118 (9th Cir. 2006)(*vacated after settlement*, 505 F.3d 1006 (9th Cir. 2007)); *Pottinger v. City of Miami,* 810 F. Supp.1551 , 1563 (S.D. Fla. 1992).

In the Northern District of Texas case, the court held that an anti-camping ordinance criminalized the status of homelessness and violated Eighth Amendment, because it criminalized sleeping in public when homeless individuals had no other choice but to sleep in public. *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), rev'd on other grounds, 61 F.3d 442 (5th Cir. 1995). The opinion was reversed and vacated by the Fifth Circuit for lack of standing, and is clearly not controlling authority. Nevertheless, the District Court opinion is instructive of how the proposition that homelessness is a status crime could be argued before a federal court.

(1) Judge Kendall, writing for the Northern District of Texas, effectively contrasts Justice Black's concurring opinion in *Powell* to Justice White's concurrence in the result of *Powell*, to, first define the limits of the status-crime prohibition, and, second, to tie Robinson's status prohibition to the homelessness examined in *Johnson.*

Justice Black, *as excerpted by Judge Kendall:*

> The rule of constitutional law urged by appellant is not required by *Robinson*. In that case we held that a person could not be punished for the mere status of being a narcotics addict. We explicitly limited our holding to the situation where no conduct of any kind is involved.... The argument is made that appellant comes within the terms of our holding in *Robinson* because being drunk in public is a mere status or "condition." Despite this many-faceted use of the concept of "condition," this argument would require converting *Robinson* into a case protecting actual behavior, a step we explicitly refused to take in that decision. *Powell*, 392 U.S. at 541–42, 88 S.Ct. at 2159 (Black, J., concurring) (citations omitted).

Justice White, *as excerpted by Judge Kendall:*

> The fact remains that some chronic alcoholics must drink and hence must drink somewhere. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this

> statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk. *Powell*, 392 U.S. at 551, 88 S.Ct. at 2163–64 (White, J. concurring) (footnote omitted).

(2) Justice White's concurrence, especially when contrasted with Justice Black's concurrence, clearly envisions situations where a person's conduct and status are conincident, and where *Robinson* would therefore apply to conduct as well as status. Justice White's opinion, while representing the deciding vote in *Powell*, did not find that *Powell's* facts required that holding, however, and therefore only concurred in the result:

> These prerequisites to the possible invocation of the Eighth Amendment are not satisfied on the record before us. Whether or not Powell established that he could not have resisted becoming drunk on December 19, 1966, nothing in the record indicates that he could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street. Indeed, the evidence in the record strongly suggests that Powell could have drunk at home and made plans while sober to prevent ending up in a public place. Powell had a home and wife, and if there were reasons why he had to drink in public or be drunk there, they do not appear in the record. Powell at 392 U.S. at 552–53, 88 S. Ct. at 2164, (White, J. concurring).

(3) Judge Kendall relies on White's deciding concurrence to extend *Robinson*'s status-crime prohibition to the anti-camping regulations examined in *Johnson:*

> Eighth Amendment scrutiny on the facts before the Court does not bode well for the sleeping in public ordinance. It should be a foregone conclusion that maintaining human life requires certain acts, among them being the consuming of nourishment, breathing and sleeping. …. The evidence demonstrates that for a number of Dallas homeless at this time homelessness is involuntary and irremediable. They have no place to go other than the public lands they live on. In other words, they must be in public. And it is also clear that they must sleep. Although sleeping is an act rather than a status, the status of being could clearly not be criminalized under *Robinson*. Because being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless, a status forcing them to be in public. The Court concludes that it is clear, then, that the sleeping in public ordinance as applied against the homeless is unconstitutional. *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), rev'd on other grounds, 61 F.3d 442 (5th Cir. 1995).

iii) *The US Department of Justice argues that anti-camping ordinances are unconstitutional violations of the Eighth and Fourteenth Amendments.* The US Department of Justice has filed briefs in three cases examining anti-camping ordinances. *See* Brief for the United States as Amicus Curiae, *Joyce v. City and County of San Francisco*, No. 95-16940 (9th Cir. Mar. 29, 1996); Brief for the United States as Amicus Curiae, *Tobe v. City of Santa Ana*, No. S003850 (Cal. June 9, 1994); Statement of Interest of the United States, *Bell v. City of Boise*, No. 1:09-cv-540-REB (D. Idaho. Aug. 6, 2015). The most recent case, *Bell*, is currently on remand to the District Court in Idaho. In each case, the United States takes the position that criminalizing sleeping in public when no shelter is available violates the Eighth Amendment by criminalizing status.

(1) DOJ interprets this requirement to mean that a city ordinance cannot prohibit camping in public property unless one of these two things is true:

(a) There are alternative public property locations in which citizens are allowed to camp, or

(b) There are adequate beds available in homeless shelters for all homeless individuals.