

Jones v. City of Los Angeles:
A Moral Response to One City's Attempt
To Criminalize, Rather than Confront,
Its Homelessness Crisis

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I. INTRODUCTION

Judicial attitudes have progressed since 1837, when the Supreme Court approved of a New York law designed to keep the “pestilence of paupers, vagabonds, and possibly convicts” from state ports.¹ In the past century, federal courts have found attempts to exclude the homeless² and to criminalize the status of vagrancy constitutionally offensive.³ Localities, however, have rebelled against exertions of judicial authority that officials view as robbing them of valuable tools in the fight against social unrest.⁴ As the problem of homelessness has reached crisis proportions, more than thirty cities have added to their arsenals by criminalizing activities associated with vagrancy, such as sleeping in the streets, panhandling, and erecting temporary shelters.⁵ The City of Los Angeles’s ordinance, which prohibited sleeping, sitting, or lying on the street at any time of day, was among the most restrictive.⁶ Until recently, Los Angeles police officers descended early each morning upon the homeless sleeping in Skid Row,⁷ demanding that they leave with their belongings, discarding items left behind, and arresting or citing any individuals who refused to cooperate.⁸ Los Angeles

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¹ *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 142 (1837).

² *See Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974).

³ *See, e.g., Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971).

⁴ Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 645 (1992). This article gives a thorough analysis of efforts to control homeless populations, beginning with the fourteenth-century Black Plague and continuing to the modern day.

⁵ Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 293–97 (1996).

⁶ *Jones v. City of Los Angeles*, 444 F.3d 1118, 1123 (9th Cir. 2006) (citing L.A., CAL., MUN. CODE § 41.18(d) (2005)).

⁷ *See infra* text accompanying notes 15–16.

⁸ Eric Malnic, *Police Continue Homeless Sweeps on Skid Row Despite ACLU Suit*, L.A. TIMES, Feb. 21, 2003, at B3.

police chief William J. Bratton described the ordinance as “a very effective tool” in securing the downtown area.⁹

Last spring, in *Jones v. City of Los Angeles*,¹⁰ a divided panel of the Ninth Circuit Court of Appeals struck down Los Angeles’s ordinance as a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. The panel held that the ordinance unconstitutionally criminalized conduct that, due to the city’s shortage of housing for the homeless, was an unavoidable outgrowth of the status of homelessness.¹¹ Though logically sound, the Ninth Circuit’s decision was unprecedented among circuit courts and is unlikely to survive Supreme Court scrutiny.¹² An examination of lower-court decisions reveals a split between those courts rejecting and those following the Ninth Circuit’s approach; the latter holdings are prone to reversal.¹³ Moreover, the *Jones* decision is vulnerable to criticism on slippery-slope and federalism grounds.

Nevertheless, the Ninth Circuit’s decision will not be devoid of impact. The panel’s holding is a powerful statement on the morality of criminalizing rather than confronting the problems of homelessness. The decision sends a message to cities struggling to deal with their homeless populations that they must do more to address the problem than simply shift the homeless from streets to jails. Additionally, the panel acted to avoid a second slippery slope; the spread of such ordinances to cities surrounding Los Angeles as the homeless migrated into areas where they would be subject to less harassment.

The decision reflects the panel’s preference for a ruling that would be morally sound over one that would be legally unassailable. The Ninth Circuit rightly recognized in *Jones* that criminalization of the very existence of society’s undesirables can never be anything but cruel and unusual.¹⁴

⁹ Richard Winton & Patrick McGreevy, *Appeal of Skid Row Ruling Is Urged*, L.A. TIMES, Apr. 19, 2006, at B4.

¹⁰ 444 F.3d 1118.

¹¹ *Id.* at 1138.

¹² *See id.* at 1139 (Rymer, J., dissenting). It remains to be seen whether Supreme Court review will occur. The City has filed a petition for en banc review by the Ninth Circuit. Art Marroquin, *Untitled Article*, CITY NEWS SERVICE, Oct. 6, 2006. In September, the City Council rejected one settlement supported by both Chief Bratton and Los Angeles Mayor Antonio Villaraigosa. Richard Winton & David Pierson, *LAPD Arrests Skid Row Campers*, L.A. TIMES, Oct. 4, 2006, at A1. At the time of this writing, the ACLU and City remained in negotiations on a second settlement proposal. Art Marroquin, *City Puts Off Settlement with ACLU Over Policing Skid Row*, CITY NEWS SERVICE, Nov. 14, 2006.

¹³ *See Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev’d*, 61 F.3d 442 (5th Cir. 1995); *Joyce v. City & County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (Ct. App. 1994), *rev’d*, 892 P.2d 1145 (Cal. 1995); *see also* discussion *infra* Part III.A.

¹⁴ *See* Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1620 (1995).

II. THE HISTORY OF *JONES V. CITY OF LOS ANGELES*A. *Facts and Procedural History*

Los Angeles's Skid Row, a fifty-block area east of the city's downtown, had the nation's highest concentration of homeless individuals in April 2006.¹⁵ On any given night, Skid Row hosted between 11,000 and 12,000 of the more than 80,000 homeless in Los Angeles County.¹⁶ The area had also recently served as a dumping ground for homeless patients from local hospitals; in one case, a woman was discharged onto the street with only slippers and a hospital gown.¹⁷ Skid Row was a place where prostitution and drug use flourished in portable toilets and "urine still [ran] in the gutters."¹⁸ A columnist for the *Los Angeles Times* described the area as "a rock-bottom depository and national embarrassment. A place where disease, abuse, crime, and hard-luck misery are on public display and have been for years, conveniently out of sight and mind for most Angelenos. No matter how many times I go in, I come out shocked all over again."¹⁹

Although Los Angeles's homeless services were concentrated in Skid Row, these services remained inadequate to address the needs of the city's homeless population.²⁰ Shelter was only available for at most 10,000 Skid Row residents, leaving the rest with no choice but to remain on the streets.²¹ The shortage meant "[s]cores of people sleep[ing] on the streets in large cardboard boxes, tents or blankets."²²

Hostilities between advocates for the homeless and the business community flared as Los Angeles moved ahead with plans to revitalize its downtown.²³ Led by the city's new police chief, William J. Bratton, Los Angeles took steps to crack down on its homeless population.²⁴ Efforts included enforcement of Municipal Code section 41.18(d), which provided that "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way," except during parades and upon benches.²⁵ Violation of section 41.18(d) was punishable by a fine of up to \$1000 and up to six

¹⁵ *Jones*, 444 F.3d at 1121.

¹⁶ *Id.* at 1121–22.

¹⁷ Cara Mia DiMassa & Richard Winton, *Homeless Patient Policy May Shift*, L.A. TIMES, Mar. 25, 2006, at B1.

¹⁸ Steve Lopez, *A Corner Where L.A. Hits Rock Bottom*, L.A. TIMES, Oct. 17, 2005, at A1.

¹⁹ *Id.*

²⁰ *Jones*, 444 F.3d at 1121.

²¹ *Id.* at 1122.

²² Jocelyn Y. Stewart, *Skid Row Plan Just Short of Sweeping Endorsement*, L.A. TIMES, Nov. 3, 2001, at B1.

²³ See Carla Rivera, *Crackdown Demanded on Skid Row Camps*, L.A. TIMES, Nov. 19, 2002, at B1.

²⁴ Jocelyn Y. Stewart, *ACLU Sues to Block Enforcement of L.A. Ordinance Against Homeless*, L.A. TIMES, Feb. 20, 2003, at B3.

²⁵ L.A., CAL., MUN. CODE § 41.18(d) (2006).

months' imprisonment.²⁶ Though the ordinance had been on the books since 1968, it had only rarely been used.²⁷ In 2002, police officers acting under the section's authority began sweeping the Skid Row area daily.²⁸

In February 2003, the ACLU filed suit under 42 U.S.C. § 1983 in federal district court on behalf of six homeless individuals living in Skid Row. The plaintiffs sought an order permanently enjoining the City of Los Angeles, Police Chief Bratton, and Captain Charles Beck from enforcing section 41.18(d) between 9:00 PM and 6:30 AM.²⁹ Two of the plaintiffs, Robert Lee Purrie and Stanley Barger, had been convicted of violating the ordinance. In addition, Purrie had lost many of his belongings during his arrest.³⁰ The other four plaintiffs, Thomas Cash, Edward Jones, and Patricia and George Vinson, had been cited for violating the section.³¹ The plaintiffs alleged that the City was criminalizing the status of homelessness, a violation of the Eighth and Fourteenth Amendments of the United States Constitution as well as similar protections of the California Constitution. The district court granted summary judgment in favor of the City of Los Angeles, finding that the ordinance criminalized conduct rather than status.³²

B. Reaching the Merits of the Eighth Amendment Claim

A panel of Ninth Circuit judges voted 2 to 1 to reverse the district court's decision. Writing for the majority, Circuit Judge Kim McLane Wardlaw first addressed whether the appellants had standing to challenge the ordinance, an issue raised by the City for the first time on appeal.³³ The majority rejected both reasons the City proffered to deny standing: first, that not all appellants had been convicted of violating the ordinance, and second, that they could have raised a necessity defense to prosecution.³⁴

The majority found that the appellants had satisfied the requirements of standing in a suit for prospective injunctive relief.³⁵ In such suits, "[t]he plaintiff need only establish that there is a reasonable expectation that his conduct will recur, triggering the alleged harm; he need not show that such recurrence is probable."³⁶ The majority concluded that appellants had demonstrated both past injuries and a threat of future harm. As long as

²⁶ *Id.* § 11.00(m).

²⁷ Steve Hymon, *Council Backs Sidewalk Sleeping Ban*, L.A. TIMES, May 3, 2006, at B3.

²⁸ Malnic, *supra* note 8.

²⁹ *Jones v. City of Los Angeles*, 444 F.3d 1118, 1120, 1125 (9th Cir. 2006).

³⁰ *Id.* at 1124.

³¹ *Id.* at 1124–25.

³² *Id.* at 1125.

³³ *Id.* at 1126; *see also* Brief of Appellees at 10–19, *Jones*, 444 F.3d 1118 (No. 04-55324). The question of standing consumed more than half of the argument section of the city's appellate brief.

³⁴ *Jones*, 444 F.3d at 1126.

³⁵ *Id.* at 1127.

³⁶ *Id.*

there remained inadequate housing for the homeless, they would have little choice but to continue sitting or lying on the street.³⁷

The majority faulted the district court for its reliance on *Ingraham v. Wright*³⁸ to support the proposition that the Eighth Amendment's Cruel and Unusual Punishment Clause applies only after conviction.³⁹ In *Ingraham*, the Supreme Court held that the Eighth Amendment does not limit the use of corporal punishment in schools, as school discipline is outside the criminal process.⁴⁰ The *Jones* court found *Ingraham* inapposite to the issue of distinguishing between law enforcement actions before and after conviction.⁴¹ Dicta from *Ingraham* stating that Eighth Amendment protections applied only post-conviction referred to the type and proportionality of punishment, not to protections against "what can be made criminal and punished as such."⁴² Moreover, even if convictions were required for standing, the fact that Purrie and Barger had been convicted would satisfy the requirement for all six appellants.⁴³

Further, the *Jones* court found that the possibility of asserting a necessity defense did not deprive appellants of standing.⁴⁴ Even if able to avoid conviction, appellants could not avoid other harms concomitant to arrest, such as the loss of their possessions. Additionally, the homeless are especially unlikely to possess either the means for asserting such a defense or the motivation to do so when pleading guilty results in their immediate release. The majority concluded its discussion with the following query: "If there is no offense for which the homeless can be convicted, is the City admitting that all that comes before is merely police harassment of a vulnerable population?"⁴⁵

³⁷ *Id.*

³⁸ 430 U.S. 651 (1977).

³⁹ *Jones*, 444 F.3d at 1127.

⁴⁰ *Id.* at 1127–28 (citing *Ingraham*, 430 U.S. at 668).

⁴¹ *Id.*

⁴² *Id.* at 1128 (quoting *Ingraham*, 430 U.S. at 667). The Ninth Circuit noted that "[u]nder this approach, the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the Clause cannot be subject to the criminal process." *Id.* at 1129.

⁴³ *Id.* at 1129–30. The Ninth Circuit specifically rejected the Fifth Circuit's approach in the similar case of *Johnson v. City of Dallas*, 61 F.3d 442, 443–45 (5th Cir. 1995). The Fifth Circuit determined in *Johnson* that plaintiffs who had been ticketed but not convicted for violating an ordinance lacked standing to challenge it.

⁴⁴ *Jones*, 444 F.3d at 1130–31. If successful, such a defense would excuse the appellants' violations of the law. In California, courts instruct juries on a necessity defense when:

[T]here is "evidence sufficient to establish that defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency."

Id. at 1142 (quoting *People v. Pepper*, 48 Cal. Rptr. 2d 877, 880 (Ct. App. 1996)).

⁴⁵ *Id.* at 1131.

C. The Eighth Amendment Right To Be Free from Cruel and Unusual Punishment

After a thorough analysis of the Supreme Court's decisions in *Robinson v. California*⁴⁶ and *Powell v. Texas*,⁴⁷ the majority recognized two factors limiting the state's power to criminalize: the distinctions between status and conduct and between involuntary and voluntary acts or conditions.⁴⁸ Homelessness, the majority concluded, is "a chronic state that may have been acquired 'innocently or involuntarily,'" and sleeping or lying on the streets of Skid Row is an inevitable consequence of this status.⁴⁹ Consequently the majority enjoined continuous enforcement of section 41.18(d), holding that such enforcement violated the appellants' Eighth Amendment rights as long as the number of homeless persons exceeded the number of available shelter beds.⁵⁰

The majority began by citing *Robinson* for the proposition that a state cannot criminalize status.⁵¹ In *Robinson*, the Supreme Court found that a state statute criminalizing narcotics addiction violated the Eighth and Fourteenth Amendments. The Court called addiction an illness, analogizing its criminalization to that of leprosy or a venereal disease.⁵²

Additionally, by considering the *Robinson* holding in light of the Supreme Court's decision six years later in *Powell*, the *Jones* majority concluded that *Robinson* also barred punishment for involuntary acts and conditions arising from status.⁵³ The *Powell* Court decided 4 to 1 to uphold the conviction of a chronic alcoholic under a statute "making it a crime to 'get drunk or be found in a state of intoxication in any public place.'"⁵⁴ The four Justices in the *Powell* plurality read *Robinson* as re-

⁴⁶ 370 U.S. 660 (1962) (holding that a state statute criminalizing the status of drug addiction violated the Eighth Amendment's Cruel and Unusual Punishment Clause).

⁴⁷ 392 U.S. 514 (1968) (holding that a state statute criminalizing public intoxication was not unconstitutional when applied to an alcoholic who could remain out of public view).

⁴⁸ *Jones*, 444 F.3d at 1136. The majority criticized the district court for relying on the analysis of *Robinson* and *Powell* given in *Joyce v. City & County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994), rather than engaging in an independent analysis. *Jones*, 444 F.3d at 1131.

⁴⁹ *Id.* at 1136–37 (quoting *Robinson*, 370 U.S. at 667).

⁵⁰ *Jones*, 444 F.3d at 1138.

⁵¹ *Id.* at 1133.

⁵²

[N]arcotic addiction is an illness. Indeed it is apparently an illness which may be contracted innocently and 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.

Id. at 1132–33 (quoting *Robinson*, 370 U.S. at 666–67).

⁵³ *Id.* at 1133.

⁵⁴ *Id.* (quoting *Powell v. Texas*, 392 U.S. 514, 517 (1968) (quoting TEX. PENAL CODE ANN., ART. 477 (Vernon 1952))).

stricting only the criminalization of status. Because Powell was convicted for his conduct, not for his status, they held that his conviction did not violate the Eighth Amendment.⁵⁵

Rather than following the *Powell* plurality, the *Jones* court adopted as persuasive authority the conclusion of the other five *Powell* Justices—four dissenters and Justice White—that *Robinson* stands “for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being.”⁵⁶ The panel gave weight to the separate opinion of Justice White, who voted to uphold Powell’s conviction due to a lack of evidence that his public drunkenness was not voluntary, but noted:

For those chronic alcoholics who lack homes, “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.”⁵⁷

The *Jones* majority concluded that, because the appellants may have become homeless involuntarily and had no choice but to sleep on the street, their conduct was both “involuntary and inseparable from status.”⁵⁸ Criminalization of such conduct was a violation of the Eighth Amendment.⁵⁹ The panel, however, explicitly limited its holding.⁶⁰ The judges found no protection when conduct was either unavoidable only because of immediately prior voluntary acts or was not an inevitable consequence of status.⁶¹ The opinion stopped short of suggesting any social policy to the City, noting only that it had a problem with homelessness that could not be addressed through continuous enforcement of section 41.18(d).⁶²

D. The Dissent

Circuit Judge Pamela Ann Rymer issued a lengthy dissenting opinion criticizing the majority for ignoring both Ninth Circuit and Supreme Court precedent and for “cobbling together” dissenting and concurring

⁵⁵ *Id.*

⁵⁶ *Id.* at 1135 (citing *Powell*, 392 U.S. at 548, 550 n.2, 551). The *Jones* court agreed with Justice White as to the futility of distinguishing between acts and conditions.

⁵⁷ *Id.* at 1134 (quoting *Powell*, 392 U.S. at 551 (White, J., concurring)).

⁵⁸ *Id.* at 1136.

⁵⁹ *Id.* at 1137.

⁶⁰ *Id.*

⁶¹ *Id.* (citing *United States v. Black*, 116 F.3d 198, 201 (7th Cir. 1997)). Examples of conduct that were not an inevitable consequence of homelessness included panhandling or obstructing public thoroughfares.

⁶² *Id.* at 1138.

views to create a foundation for its argument.⁶³ She described as virtually unprecedented the majority's decision to extend Eighth Amendment protection to conduct inevitably caused by status or by governmental failure to provide a benefit. Neither the Supreme Court nor any Circuit Court, Judge Rymer wrote, had ever taken such a position.⁶⁴

Even under the majority's interpretation of *Robinson*, Judge Rymer would have rejected the appellants' arguments. She noted that appellants, while presenting statistics on shelter in Los Angeles, had failed to show that there was insufficient shelter at the time of their arrests or citations. If sufficient shelter existed, enforcement of the ordinance could not have violated the Eighth Amendment.⁶⁵ Finally, she asserted that the appellants lacked standing to challenge the ordinance. Judge Rymer argued that the Eighth Amendment protects against conviction, not deprivation of property or liberty. Appellants had failed to show a likelihood of future conviction under the ordinance, as they could raise a necessity defense to prosecution.⁶⁶

III. THE IMPACT OF *JONES V. CITY OF LOS ANGELES*: AN UNCERTAIN LEGAL FUTURE

A. Jones's *Unsteady Legal Foundation*

The Ninth Circuit's decision rests on a legal foundation that is shaky at best. Because *Powell* failed to overrule *Robinson*, courts have discretion to choose whether to follow the *Powell* plurality or an interpretation of the *Robinson* decision.⁶⁷ Though the Ninth Circuit chose the latter course, it is the only circuit ever to find that the criminalization of "conduct derivative of a status" violates the Eighth Amendment.⁶⁸ The split in lower courts between approaches similar to the Ninth Circuit's and those following the *Powell* plurality has been extensively documented in legal scholarship.⁶⁹ A review of four commonly cited cases, *Pottinger v. City of Miami*,⁷⁰ *Joyce v. City and County of San Francisco*,⁷¹ *Tobe v. City of Santa*

⁶³ *Id.* at 1139 (Rymer, J., dissenting).

⁶⁴ *Id.* at 1139. Judge Rymer quoted the *Ingraham* Court's holding that the Eighth Amendment imposes limits on what can be criminalized and that this limitation should only be applied in rare circumstances. *Id.* at 1144 (citing *Ingraham v. Wright*, 430 U.S. 651, 667 (1977)).

⁶⁵ *Id.* at 1139–40.

⁶⁶ *Id.* at 1147–48.

⁶⁷ See Justin Cook, *Down and Out in San Antonio: The Constitutionality of San Antonio's Anti-Homeless Ordinances*, 8 SCHOLAR 221, 231 (2006).

⁶⁸ *Jones*, 444 F.3d at 1139 (Rymer, J., dissenting).

⁶⁹ See, e.g., Walters, *supra* note 14; Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual "Crimes,"* 96 J. CRIM. L. & CRIMINOLOGY 329 (2005).

⁷⁰ 810 F. Supp. 1551 (S.D. Fla. 1992).

⁷¹ 846 F. Supp. 843 (N.D. Cal. 1994).

Ana,⁷² and *Johnson v. City of Dallas*,⁷³ illustrates the fragility of the Ninth Circuit's holding.

In *Pottinger*, a class action brought on behalf of Miami's homeless, the United States District Court for the Southern District of Florida assessed the constitutionality of several city ordinances, including one that prohibited "sleeping on benches, sidewalks or in parks."⁷⁴ Miami, like Los Angeles, faced an acute shortage of shelter for the homeless. There were an estimated 6000 homeless and at most 700 shelter beds available at the time of the trial.⁷⁵ The *Pottinger* court's interpretation of *Powell* was similar to the Ninth Circuit's; the court held that "[a]s long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment—sleeping, eating and other innocent conduct."⁷⁶

In contrast, the United States District Court for the Northern District of California in *Joyce* upheld a San Francisco program that targeted "Quality of Life" violations, including sleeping in public parks and obstructing sidewalks.⁷⁷ The *Joyce* court attributed the different outcomes in *Robinson* and *Powell* to the fact that narcotics addiction, like age and gender, is a status, whereas being intoxicated in public is an act.⁷⁸ The court found that homelessness differed from drug addiction "in kind as much as in degree."⁷⁹ While addiction was fairly immutable, homelessness was a "condition" that could be more easily altered and effectively addressed with social interventions.⁸⁰ Moreover, the decision of whether to provide homeless shelters was one of discretion left to the City, and "status cannot be defined as a function of the discretionary acts of others."⁸¹

Both the *Tobe* and *Johnson* courts enjoined enforcement of city ordinances that restricted the ability of the homeless to live on the streets.⁸² The *Tobe* court held that Santa Ana's use of an anti-camping ordinance against the homeless was "constitutionally repugnant."⁸³ The court concluded that homelessness, like addiction and illness, was a status, and neither it nor its involuntary outgrowths could be criminalized.⁸⁴ The *John-*

⁷² 27 Cal. Rptr. 2d. 386 (Ct. App. 1994).

⁷³ 860 F. Supp. 344 (N.D. Tex. 1994).

⁷⁴ *Pottinger*, 810 F. Supp. at 1553, 1559–60 (citing MIAMI, FLA., CODE § 37-63 (1990)).

⁷⁵ *Id.* at 1564.

⁷⁶ *Id.* at 1563, 1565.

⁷⁷ *Joyce v. City & County of San Francisco*, 846 F. Supp. 843, 846 (N.D. Cal. 1994).

⁷⁸ *Id.* at 857.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 857 n.9.

⁸² *Johnson v. City of Dallas*, 860 F. Supp. 344, 346 (N.D. Tex. 1994), *rev'd*, 61 F.3d 442 (5th Cir. 1995); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 387 (Ct. App. 1994).

⁸³ 27 Cal. Rptr. 2d at 387.

⁸⁴ *Id.* at 393–94.

son court examined several municipal ordinances in Dallas, which also faced a shortage of shelter for the homeless.⁸⁵ In striking down an ordinance that prohibited sleeping in public, the court held that “[b]ecause 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.”⁸⁶

The decisions in both *Tobe* and *Johnson* were reversed on appeal. The Fifth Circuit determined that, as none of the *Johnson* plaintiffs had been convicted under the ordinance, they lacked standing to challenge it.⁸⁷ The California Supreme Court reversed *Tobe* on several grounds, including that the ordinance criminalized conduct rather than status.⁸⁸

Challenges based on the *Robinson* doctrine also have been unsuccessful in contexts outside of homelessness. Courts have refused to strike down statutes on grounds that they violate the Eighth Amendment in cases criminalizing outgrowths of narcotics addiction,⁸⁹ alcoholism,⁹⁰ and prior felony convictions.⁹¹ As a commentator recently observed while remarking on one such case, “[u]nder that status/act reading, *Robinson* is all but a dead letter.”⁹²

B. Jones’s Critics: Judicial Overreaching and the Slippery Slope

The decision in *Jones* is vulnerable to additional criticism on the grounds that it begins the descent down a slippery slope and undermines federalism’s aim of preserving local experimentation. The *Jones* court was careful to limit the scope of its holding, denying Eighth Amendment protection to conduct made unavoidable only because of immediately preceding voluntary acts, such as drinking and driving, or “camping or building shelters that interfere with pedestrian or automobile traffic.”⁹³ The court suggested that its holding would not prevent the state from criminalizing avoidable consequences of homelessness, including panhandling.⁹⁴

It is unclear, however, why the line should be drawn there. Both sleeping and eating are human necessities. If criminalization of sleeping on

⁸⁵ 860 F. Supp. at 350.

⁸⁶ *Id.*

⁸⁷ *Johnson v. City of Dallas*, 61 F.3d 442, 445 (5th Cir. 1995).

⁸⁸ *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1166–67 (Cal. 1995).

⁸⁹ See *Mitchell v. Hood*, 145 F. Supp. 2d 1188, 1190–91 (D. Or. 2001) (holding that revocation of parole for substance abuse did not punish the status of drug addiction).

⁹⁰ See *People v. Kellogg*, 14 Cal. Rptr. 3d 507, 513 (Ct. App. 2004) (holding that a homeless alcoholic was punished not for his status, but because his conduct while intoxicated created a safety hazard).

⁹¹ See *United States v. Jester*, 139 F.3d 1168, 1170–71 (7th Cir. 1998) (holding that a statute penalizing a convicted felon for possession of a firearm punished the conduct of firearm possession, not status as a felon).

⁹² Weisberg, *supra* note 69, at 346.

⁹³ *Jones v. City of Los Angeles*, 444 F.3d 1118, 1137 (9th Cir. 2006).

⁹⁴ *Id.*

the streets violates the Eighth Amendment when there is no alternative shelter, then surely criminalization of panhandling would face the same charge when there is no alternative source of money to purchase food. It is similarly unclear why camping or building shelters would not be a necessity if such a shelter were needed to stay sufficiently warm or to avoid rain.

This delineation problem is a familiar criticism of expanding the *Robinson* holding. Justice Black articulated these concerns in his *Powell* concurrence, writing that greater use of the decision would create uncertainty due to the necessity of distinguishing compelled from voluntary behavior.⁹⁵ Even if the Court succeeded in limiting the definition of compelled behavior, Justice Black argued, any expansion would have sweeping effects. Possible ramifications included relieving people of their responsibility for drug use and conduct symptomatic of mental illness.⁹⁶ These concerns were echoed by the *Joyce* court, which characterized the effect of protecting outgrowths of homelessness as “staggering. Courts seeking analytical consistency with such a holding would be required to provide constitutional protection to any condition over which a showing could be made that the defendant had no control.”⁹⁷

The Ninth Circuit’s decision has already come under fire for interference in an issue that may be better left to local administration. Ironically, some of the most vocal critics have been advocates for the homeless. Advocates have attacked the suit as tangential and claimed that it distracts from more vital issues, such as the distribution of funding for services. “We’ve invested a lot of energy and resources into this one item,” one advocate told the *Los Angeles Times* in August.⁹⁸ “And the streets are continuing to deteriorate. Come hell or high water, positive or negative, we still need a plan to deal with the lawlessness and the violence and the real health concerns we have on our streets.”⁹⁹

⁹⁵ *Powell v. Texas*, 392 U.S. 514, 544 (1968) (Black, J., concurring).

⁹⁶

Such a ruling would make it clear beyond any doubt that a narcotics addict could not be punished for “being” in possession of drugs or, for that matter, for “being” guilty of using them. A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease. More generally speaking, a form of the insanity defense would be made a constitutional requirement throughout the Nation, should the Court now hold it cruel and unusual to punish a person afflicted with any mental disease whenever his conduct was part of the pattern of his disease and occasioned by a compulsion symptomatic of the disease.

Id. at 545.

⁹⁷ *Joyce v. City & County of San Francisco*, 846 F. Supp. 843, 858 (N.D. Cal. 1994).

⁹⁸ Cara Mia DiMassa & Richard Winton, *Key Moment for Skid Row’s Future*, L.A. TIMES, Aug. 19, 2006, at B1.

⁹⁹ *Id.* Legal critics and courts have raised general concerns about judicial overreaching in expanding the *Robinson* holding. See *Powell*, 392 U.S. at 548 (Black, J., concurring) (describing the expansion of the *Robinson* doctrine as a move that “departs from the ancient faith based on the premise that experience in making local laws by local people themselves

IV. THE NECESSITY OF THE NINTH CIRCUIT'S DECISION

Though legally vulnerable, the Ninth Circuit's decision was necessary, and arguably the only morally acceptable choice. As the court remarked, "human beings are biologically compelled to rest, whether by sitting, lying, or sleeping."¹⁰⁰ Given that shelter was unavailable to many of Los Angeles's homeless individuals, it is unclear what choice they had but to sleep on the streets. When the only alternative to violating an ordinance is death, its enforcement cannot be anything but cruel and unusual punishment.¹⁰¹

Sanctioning Municipal Ordinance section 41.18(d) would send a clear message to Los Angeles and other cities that they have no obligation to confront their problems with homelessness. Keeping the homeless out of sight and out of mind was at the root of Los Angeles's decision to allow Skid Row's continued existence.¹⁰² The current crisis has arisen because the city's view of the area has changed. Los Angeles now sees Skid Row not as a convenient place to hide its homeless, but as a potential site of business development. Homeless shelters and street camps are incongruent with officials' visions of loft apartments and prosperous shops.¹⁰³ Los Angeles, in exercising its authority under section 41.18(d), selected the fastest and cheapest way of ridding the area of undesirables. The Ninth Circuit was correct to forbid Los Angeles from employing a quick and dirty alternative to addressing its poverty crisis in a meaningful way.

While expansion of the *Robinson* doctrine raises slippery-slope concerns, finding section 41.18(d) constitutional would cause a domino effect leading to similar legislation in the Los Angeles area. Cities surrounding Los Angeles are equally unenthusiastic about the presence of the homeless.¹⁰⁴ Were Los Angeles to succeed in driving out its homeless popula-

is by far the safest guide for a nation like ours to follow"); *Joyce*, 846 F. Supp. at 858 (noting that such a decision would cripple local efforts to deal with homelessness); Robert C. McConkey III, "Camping Ordinances" and the Homeless: Constitutional and Moral Issues Raised by Ordinances Prohibiting Sleeping in Public Areas, 26 CUMB. L. REV. 633, 657 (1995-96).

¹⁰⁰ *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006).

¹⁰¹ See Walters, *supra* note 13, for an argument that criminalization of life-sustaining conduct is cruel and unusual punishment and a "do-or-die principle" could successfully abrogate slippery slope concerns about the status/conduct distinction of *Robinson*.

¹⁰² Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1119 (2005) (citing Edward G. Goetz, *Land Use and Homeless Policy in Los Angeles*, 16 INT'L J. URB. & REGIONAL RES. 540, 544-45 (1992)). Garnett notes that officials considered demolishing Skid Row in the 1970s but decided to preserve it to avoid disorder and to contain the city's homeless. Instead of destroying Skid Row, the City moved services for the homeless into the area and took measures to isolate it from the remainder of downtown.

¹⁰³ Bernard E. Harcourt, *Policing L.A.'s Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles [An Experiment in Real Time]*, 2005 U. CHI. LEGAL F. 325, 331-33 (2005).

¹⁰⁴ See Cynthia H. Cho & Cara Mia DiMassa, *W. Covina Resists Idea of Regional Homeless Center*, L.A. TIMES, Apr. 7, 2006, at B1 (documenting resistance to the conversion of a homeless drop-in center to a full-service shelter); Amanda Covarrubias, *Homeless Center*

tion, the homeless would likely migrate to cities at its border. These cities, in turn, would be left with the expansion of their own homelessness problems. Rather than expend resources to confront homelessness, they might emulate Los Angeles's successful strategy of using police tactics to control the homeless population. If the cities pass anti-sleeping or camping ordinances, their neighbors would then need to consider similar measures to combat the spread of homelessness. Criminalization of homelessness could eventually become a popular means of control throughout California and perhaps even in neighboring states.

V. CONCLUSION: NEW DIRECTION IN THE HOMELESS CRISIS

Though the Ninth Circuit's decision in *Jones v. Los Angeles* is legally vulnerable and unlikely to survive review, it is not without effect. The panel's holding sends a message to Los Angeles and other cities confronting the crisis of homelessness that they cannot make their problems disappear. If criminalization of the homeless is an uncertain proposition, these cities may be forced to take a more confrontational stance toward approaching the problems of homelessness and poverty.¹⁰⁵

While the issue of whether the homeless can sleep on the sidewalk may be tangential, forbidding the criminalization of this behavior forces the city to confront questions central to the well-being of homeless individuals. For example, where should the City place additional homeless shelters and how should these be funded? Should each city deal independently with its own homeless, or should the state recognize that the population is transitory and adopt a central role in confronting the issue? It is clear that cities cannot simply exterminate the "pestilence of paupers."¹⁰⁶ Instead, officials must recognize the pestilence as people and begin to confront their basic needs.

Plan Spurs Resistance, L.A. TIMES, May 25, 2006, at B1 (describing local resistance to Los Angeles County's plan to relocate some services for the homeless to the suburbs, such as converting a suburban senior center into a housing center for women and children).

¹⁰⁵ The City of Los Angeles and the ACLU are currently engaged in mediation to settle the suit. Some advocates, however, contend that the talks distract from issues more central to improving the quality of life of the homeless. See DiMassa & Winton, *supra* note 98.

¹⁰⁶ *Mayor of N.Y. v. Miln*, 36 U.S. 102, 142 (1837).

