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# Criminally Homeless? The Eighth Amendment Prohibition Against Penalizing Status

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# ARTICLES

## CRIMINALLY HOMELESS? THE EIGHTH AMENDMENT PROHIBITION AGAINST PENALIZING STATUS

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### INTRODUCTION

The United States Court of Appeals for the Ninth Circuit held in *Jones v. City of Los Angeles* that a city ordinance criminalizing sitting, lying, or sleeping on public streets and sidewalks—in all places and at all times—violated the Eighth Amendment's prohibition against cruel and unusual punishment.[1] The court recognized that people must sit, lie, and sleep at some

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[1] Jones v. City of Los Angeles, 444 F.3d 1118, 1131–38 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

point each day.[2] The court concluded that a 24/7 ban against sitting, lying, and sleeping in public areas violates the rights of homeless persons when other alternatives are unavailable because individuals in such unfortunate circumstances are unable to entirely avoid engaging in those innocent activities.[3]

The Ninth Circuit later vacated *Jones* after the parties settled, and Los Angeles agreed that its ordinance would not be enforced during nighttime hours.[4] *Jones* was nonetheless subsequently utilized by lower courts as guidance when analyzing ordinances targeted at subsistence activities regularly performed by homeless persons in public places.[5] The United States Department of Justice (DOJ) argued in 2015 that *Jones* provides the appropriate legal framework for analyzing Eighth Amendment claims.[6] It asserted that half a million people are likely to experience homelessness on any given night.[7] The DOJ further reported, based upon an annual homeless assessment report generated by the Department of Housing and Urban Development, that 42% of homeless persons slept in unsheltered public locations in 2014.[8] The DOJ maintained that the logic of *Jones* "remains instructive and persuasive,"[9] and it took the position "that criminalizing sleeping in public when no shelter is available violates the Eighth Amendment by criminalizing status."[10]

The Ninth Circuit recently reaffirmed its adherence to the *Jones* framework in *Martin v. City of Boise*.[11] The appellate panel in *Martin*

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[2] *Id.* at 1136; *see also In re* Eichorn, 81 Cal. Rptr. 2d 535, 539 (Cal. Ct. App. 1998) ("Sleep is a physiological need, not an option for humans.").
[3] *Jones*, 444 F.3d at 1136–37.
[4] Jones v. City of Los Angeles, 505 F.3d 1006 (9th Cir. 2007); *see also* Jones v. City of Los Angeles, 555 F. App'x. 659, 661 (9th Cir. 2014) (explaining that the court vacated and withdrew its opinion in *Jones* "only after the parties entered a settlement agreement suspending the nighttime enforcement" of the Los Angeles ordinance).
[5] *E.g.*, Cobine v. City of Eureka, 250 F. Supp. 3d 423, 431 (N.D. Cal. 2017); Bell v. City of Boise, 834 F. Supp. 2d 1103, 1107 (D. Idaho 2011), *rev'd on other grounds*, 709 F.3d 890 (9th Cir. 2013); State v. Adams, 91 So. 3d 724, 745–54 (Ala. Crim. App. 2010); *contra, e.g.*, Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1231–34 (E.D. Cal. 2009) (choosing to adopt the reasoning of the dissent in *Jones* rather than its majority's rationale).
[6] Statement of Interest of the United States at 4, 10, 16, Bell v. Boise 834 F. Supp. 2d 1103 (D. Idaho 2011) (No. 1:09-cv-540-REB).
[7] *Id.* at 2.
[8] *Id.*
[9] *Id.* at 10.
[10] *Id.* at 9–10.
[11] Martin v. City of Boise, 902 F.3d 1031, 1035–36, 1046 (9th Cir. 2018).

recognized the *Jones* decision was not binding but wrote that it agreed "with *Jones'*s reasoning and central conclusion."[12] The panel held "that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."[13] It explained:

> Like the *Jones* panel, "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place." We hold only that "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]," the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.[14]

This Article examines the extent to which the Cruel and Unusual Punishments Clause of the Eighth Amendment protects the ability of homeless persons to subsist in public places. It reviews the origins and history of the clause and how it has been applied to test the constitutionality of local laws targeted at the homeless. It further discusses whether homelessness constitutes a recognizable status protected by the Eighth Amendment, and, if so, whether protection is extended to unavoidable conduct resulting from that status. Lastly, this Article examines the circumstances under which subsistence activities performed in public by homeless persons may be considered unavoidable and thereby protected by the Cruel and Unusual Punishments Clause against criminalization.

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[12] *Id.* at 1035.
[13] *Id.*
[14] *Id.* at 1048 (citations omitted) (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)).

## I. A BRIEF HISTORY OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE.

The Cruel and Unusual Punishments Clause is derived from a 1689 act of the British Parliament.[15] The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[16] That act adopted a bill of rights in response to abuses committed during the reign of James II.[17] Among other enumerated rights, the 1689 act declared "that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[18] The 1776 Virginia Declaration of Rights adopted an identical provision.[19] "The Eighth Amendment was based directly on Art. I, § 9, of the Virginia Declaration of Rights . . . ."[20]

The Cruel and Unusual Punishments Clause was originally believed to be directed at prohibiting certain methods of punishment.[21] The General Court of Virginia explained with respect to the provision contained in the Virginia Declaration of Rights that it "was never designed to control the Legislative right to determine *ad libitum* [at pleasure] upon the *adequacy* of punishment, but is merely applicable to the modes of punishment."[22] The United States Supreme Court similarly concluded in the case of *In re Kemmler* that the punishment of crime is almost wholly confided in the legislative branch of government, and the prohibition against cruel and unusual punishment operates as a limitation upon the types of punishment

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[15] Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 750 (Hilliard, Gray, and Company, 1833).
[16] U.S. CONST. amend. VIII.
[17] *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 130 (Philip H. Nicklin, 2d ed. 1829) (1825); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 29, at 723 (WM. Hardcastle ed. 1892)(1769); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 852–60 (1969).
[18] An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689 1 W. & M. 2, c. 2, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 41, 43 (1971) (modernizing the spelling of terms contained in England's Official Bill of Rights).
[19] *See* VIRGINIA DECLARATION OF RIGHTS of 1776, art. I, § 9.
[20] Solem v. Helm, 463 U.S. 277, 285 n.10 (1983).
[21] *See* Gregg v. Georgia, 428 U.S. 153, 169–70 (1976); Granucci, *supra* note 17, at 839–42.
[22] Aldridge v. Commonwealth, 2 Va. Cas. 447, 449–50 (Gen. Ct. 1824).

that may be imposed.[23] "So that, if the punishment prescribed for an offence . . . were manifestly cruel and unusual as burning at the stake, crucifixion[,] breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."[24]

The Supreme Court began to broaden its view of the Cruel and Unusual Punishments Clause at the end of the 19th century. The majority in *O'Neil v. Vermont* rejected a challenge to a conditional sentence of 19,914 days imprisonment imposed for unlawful sale of liquor on the basis that federal error had not been assigned, and because the Eighth Amendment was not at that time applied to the states.[25] Justice Field wrote in dissent that this sentence of more than 54 years seemed unusual and cruel in its severity when considering the offenses for which it was imposed.[26] He reasoned that the inhibition against cruel and unusual punishment is not only directed against atrocious punishments like the rack, thumbscrew, and iron boot, "but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged."[27] Writing for himself and Justice Brewer, the first Justice Harlan agreed that confinement for "54 years and 204 days, inflicts punishment, which, in view of the character of the offences committed, must be deemed cruel and unusual."[28]

Justice Field's position in *O'Neil* later became the prevailing view in *Weems v. United States*, where the Supreme Court struck a criminal sentence by measuring the disproportionality of punishment against the crime charged.[29] The Court acknowledged the origins of the prohibition against cruel and unusual punishments, but it explained that "a principle, to be vital, must be capable of wider application than the mischief which gave it birth."[30] It expanded the scope of the prohibition beyond methods of punishment,

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[23] *In re* Kemmler, 136 U.S. 436, 446–47 (1890).
[24] *Id.* at 446; *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 329–30 (Little, Brown and Company 3d ed., 1874).
[25] O'Neil v. Vermont, 144 U.S. 323, 331–32 (1892).
[26] *Id.* at 338–41, 364–65 (Field, J., dissenting).
[27] *Id*. at 339–40.
[28] *Id*. at 371 (Harlan, J., dissenting).
[29] *See* Weems v. United States, 217 U.S. 349, 380–81 (1910). *Weems* applied a prohibition against cruel and unusual punishments found in the Philippine bill of rights, which the Court explained "was taken from the Constitution of the United States, and must have the same meaning." *Id.* at 367.
[30] *Id.* at 373.

rhetorically asking, "[w]ith power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power?"[31] It thus held that, although the Cruel and Unusual Punishments Clause arose from the experience of certain evils, its general language should not "be necessarily confined to the form that evil had theretofore taken."[32]

The Court proceeded to compare the sentence in that case to sentences that might be handed out for similar and more serious crimes.[33] It found that the disproportionality of the penalty established for the crime at issue in *Weems* (when contrasted against other penalties) showed more than "different exercises of legislative judgment," and, instead, exhibited the "difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."[34] By requiring comparative proportionality, the *Weems* Court concluded that "[t]he purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."[35]

Justice Edward White dissented in *Weems* because logical future application of the majority's expansion of the prohibition against cruel and unusual punishment beyond methods of punishment to "the degree of severity with which authorized modes of punishment may be inflicted" could completely divest the legislative branch of government of its legitimate independent power to define and punish crime.[36] The dissent complained that statements made by the majority imposing a legislative duty to shape legislation with a view to reform and punish a criminal conferred power upon courts to refuse to enforce laws defining and punishing crimes if they are not, in a court's opinion, properly motivated.[37]

Justice White opined that the ban against cruel punishment forbids criminal penalties that inflict "unnecessary bodily suffering through a resort

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[31] *Id*. at 372–73.
[32] *Id*. at 373.
[33] *Id*. at 381.
[34] *Id*.
[35] *Id.*
[36] *Id.* at 388 (White, J., dissenting); *see also id.* at 397–98, 410–11.
[37] *Id*. at 386–88.

to inhuman methods for causing bodily torture . . . ."[38] He further wrote that the proscription of unusual punishment forbids courts from inflicting lawful modes of punishment in an unusual manner and legislatures from conferring such power to the courts.[39] Justice White disputed the majority's assertion that the vitality of the Cruel and Unusual Punishments Clause could be ensured only by expanding its scope beyond methods of punishment.[40] He agreed that the clause is not limited to historically decried practices and, instead, "being generic, embraces all methods within its intendment."[41] Therefore, "if it could be conceived that to-morrow the lawmaking power, instead of providing for the infliction of the death penalty by hanging, should command its infliction by burying alive, who could doubt that the law would be repugnant to the constitutional inhibition against cruel punishment?"[42] In his view this did not, however, warrant expanding "the judicial power by endowing it with a vast authority to control the legislative department in the exercise of its discretion to define and punish crime."[43]

Many decades after deciding *Weems*, the Supreme Court again expanded the reach of the Eighth Amendment in *Robinson v. California*.[44] *Robinson* struck a statute that had been construed as criminalizing a person's "status" or "chronic condition" of being a drug addict.[45] The Court recognized that a state might validly regulate by imposing criminal sanctions "against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders."[46] It further noted that a state could establish compulsory treatment programs for addicts that might require periods of involuntary confinement and penal sanctions for failure to comply with such programs.[47] However, the Court categorized drug addiction among other illnesses[48] and opined that "a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of

[38] *Id*. at 409.
[39] *Id*. at 409–10.
[40] *Id.* at 410–11.
[41] *Id*. at 410.
[42] *Id.*
[43] *Id*. at 411.
[44] *See* Robinson v. California, 370 U.S. 660 (1962).
[45] *Id.* at 665–67.
[46] *Id*. at 664.
[47] *Id.* at 664–65.
[48] *Id*. at 666–67.

cruel and unusual punishment . . . ."[49] It concluded that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[50]

Justice Byron White dissented, writing that he deemed the majority's "application of 'cruel and unusual punishment' so novel" that he suspected "the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty."[51] He wrote that he might have other thoughts if a conviction rested upon sheer status.[52] However, Justice White maintained that someone could not be convicted of being an addict without proof of regular use of narcotics and opined that a state possesses the power to punish such use.[53] Justice Clark wrote in dissent that "[i]t is no answer to suggest that we are dealing with an involuntary status and thus penal sanctions will be ineffective and unfair."[54] He asserted that a state should not be powerless to deter persons who purchase, possess, and use narcotics from becoming addicts.[55] Justice Clark noted that the majority recognized the authority of a state to punish the actions by which addicts became addicted and opined that such resulting volitional addiction should be treated no differently.[56] In addition, he wrote that "'status' offenses have long been known and recognized in the criminal law."[57]

The Supreme Court later discussed *Robinson* at length in *Powell v. Texas*, but it could not reach a majority opinion upon how to apply it.[58] A plurality upheld the conviction of a person for being intoxicated in a public place.[59] Justice Thurgood Marshall wrote for himself and three other justices that *Robinson* did not apply because the statute at issue did not seek to punish mere status.[60] It instead imposed "a criminal sanction for public behavior

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[49] *Id*. at 666.
[50] *Id*. at 667.
[51] *Id*. at 689 (White, J., dissenting).
[52] *Id*. at 685.
[53] *Id.* at 686–88.
[54] *Id*. at 684 (Clark, J., dissenting).
[55] *Id*. at 683.
[56] *Id*. at 683–84.
[57] *Id.* at 684 (Clark, J., dissenting); *see generally* Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953).
[58] Powell v. Texas, 392 U.S. 514 (1968).
[59] *See id*. at 516–37 (Marshall, J.); *Id*. at 537–48 (Black, J., concurring); *Id*. at 548–54 (White, J., concurring in result).
[60] *Id*. at 532–534 (Marshall, J.).

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."[61] He further commented that "unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of criminal law, throughout the country."[62]

Justice Fortas took a different view and wrote in dissent for himself and three other justices that *Robinson* stands on a principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[63] He noted that the statute at issue in *Powell* differed from the one at issue in *Robinson* since it punished a condition coupled with an act: being intoxicated and being found in such condition in a public place.[64] In other words, "[t]he statute covers more than a mere status."[65] However, the dissent found this difference immaterial, asserting that "the essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid."[66]

The Marshall plurality in *Powell* found the dissent's interpretation of *Robinson* troubling because it would extend the Eighth Amendment to establish a "constitutional doctrine of criminal responsibility."[67] It asserted that the dissent's logic would have no limitation.[68] It insisted the same logic that excuses a chronic alcoholic from criminal responsibility for involuntary conduct caused by that disease could be used to excuse a murderer afflicted with a compulsion to kill.[69] The Marshall plurality wrote that "as the dissent acknowledges, there is a substantial definitional distinction between a 'status,' as in *Robinson*, and a 'condition,' which is said to be involved in this case."[70] It argued that the dissent's interpretation would convert *Robinson*

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[61] *Id*. at 532.
[62] *Id*. at 533.
[63] *Id*. at 567 (Fortas, J., dissenting).
[64] *Id.*
[65] *Id.*
[66] *Id*. at 567–68.
[67] *Id.* at 534 (Marshall, J.).
[68] *Id.*
[69] *Id.*
[70] *Id*. at 533.

into a national standard for personal accountability that is contrary to traditional common law concepts and considerations of federalism.[71]

Justice Byron White disagreed with both the Marshall plurality and the dissent's apparent preoccupation with labels.[72] He wrote that a chronic alcoholic should not be shielded by a compulsion to drink if he or she knowingly fails to take precautions while sober against committing an act that has been criminalized.[73] He also recognized, however, that some alcoholics do not have homes and "[f]or all practical purposes the public streets may be home for these unfortunates . . . ."[74] Justice White posited that "[t]his is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition."[75] He concluded that a statute punishing public drunkenness "is in effect a law which bans the single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk."[76] He nonetheless concurred in the judgment affirming the conviction in *Powell* because the defendant "made no showing that he was unable to stay off the streets on the night in question."[77]

The Supreme Court summarized its Eighth Amendment jurisprudence in *Ingraham v. Wright*.[78] The *Ingraham* Court wrote that the framers of the Constitution "feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured."[79] The Court reviewed earlier decisions upon whether a punishment is "cruel and unusual" and explained:

> [T]he Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such. We

[71] *Id*. at 535–37.
[72] *Id*. at 550, n.2 (White, J., concurring in result).
[73] *Id*. at 550.
[74] *Id.* at 551.
[75] *Id.*
[76] *Id.*
[77] *Id*. at 554.
[78] Ingraham v. Wright, 430 U.S. 651, 664–67 (1977).
[79] *Id.* at 665.

> have recognized the last limitation as one to be applied sparingly.[80]

The third category mentioned in *Ingraham* originates from *Robinson*.[81]

The Ninth Circuit explained in *Jones v. City of Los Angeles* that the third protection enumerated in *Ingraham* "differs from the first two in that it limits what the state can criminalize, not how it can punish."[82] It held that *Robinson*, at a minimum, "establishes that the state may not criminalize 'being'; that is, the state may not punish a person for who he is, independent of anything he has done."[83] A majority in *Jones* discerned from the Fortas dissent and the White concurrence that a majority of the Supreme Court in *Powell* read *Robinson* as supporting the proposition the "state cannot punish a person for certain conditions, either arising from his own acts or contracted involuntarily, or acts that he is powerless to avoid."[84] The *Jones* court concluded from those principles that a city cannot "expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eight Amendment, nor can it criminalize acts that are an integral aspect of that status."[85]

The *Jones* majority wrote that "Justice White and the *Powell* dissenters shared a common view of the importance of involuntariness to Eighth Amendment inquiry."[86] It posited that Justice White's disagreement upon the meaning of *Robinson* deprived the Marshall plurality's opinion of precedential value beyond the precise facts in *Powell*.[87] The *Jones* majority recognized that Justice White and the *Powell* dissenters also did not fully agree, and it agreed with Justice White to the extent that his views differed from those of the dissenters.[88] However, it found any disagreement between

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[80] *Id.* at 667 (citations omitted); *see also* Martin v. City of Boise, 902 F.3d 1031, 1045 (9th Cir. 2018); *but see* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (Scalia, J.) (concluding for himself and Chief Justice Rehnquist that "the Eighth Amendment contains no proportionality guarantee").

[81] *See Ingraham*, 430 U.S. at 667 (citing *Robinson*, 370 U.S. 660).

[82] Jones v. City of Los Angeles, 444 F.3d 1118, 1128 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

[83] *Id.* at 1133.

[84] *Id.*; *see also id.* at 1135 (adopting an interpretation of *Robinson* upon which it determined that the dissenters and Justice White would agree in *Powell*).

[85] *Id.* at 1132.

[86] *Id.* at 1134.

[87] *Id.* at 1135.

[88] *Id.* ("We agree with Justice White that analysis of the Eighth Amendment's substantive limits on criminalization 'is not advanced by preoccupation with the label "condition"'.");

Justice White and the *Powell* dissenters immaterial writing that, notwithstanding their differences, "five Justices in *Powell* understood *Robinson* to stand 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."[89] The *Jones* majority asserted, based upon its reading of the opinions of Justice White and the dissenters in *Powell*, that there are two considerations that are relevant with respect to the limit placed upon the state's power to criminalize by the Cruel and Unusual Punishments Clause.[90] "The first is the distinction between pure status—the state of being—and pure conduct—the act of doing. The second is the distinction between an involuntary act or condition and a voluntary one."[91]

The *Jones* court found that Los Angeles did not have sufficient shelter space to house all of its homeless.[92] Many homeless, therefore, had no place to be other than on city sidewalks.[93] It asserted that "[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human."[94] The *Jones* court further explained that human beings cannot remain in a state of perpetual motion and must sit, lie, and sleep at some time during the day or night.[95] It therefore concluded that "by criminalizing sitting, lying, and sleeping, the City is in fact criminalizing [the] status [of] homeless individuals."[96]

The United States District Court for the District of Idaho in *Bell v. City of Boise* summarized its understanding of the majority holding in *Jones* as follows:

> First, the Court must determine whether the homeless have no choice but to be present in the City's public spaces. This could be established either on the basis that there is insufficient shelter space or perhaps because, for at least a portion of the homeless population, the ''chronic homeless,'' living in a

*see also id.* at 1136 (stating that the *Jones* majority was guided by an admonition made by Justice White in *Powell*).

[89] *Id.* at 1135; *see also* Martin v. City of Boise, 902 F.3d 1031, 1047–48 (9th Cir. 2018).

[90] *Jones*, 444 F.3d at 1136.

[91] *Id.*

[92] *Id.* at 1122–23.

[93] *Id.* at 1123.

[94] *Id.* at 1136.

[95] *See id.* at 1136–37.

[96] *Id.* at 1137.

> shelter is not a viable option. Second, the Court must find that [the] enforcement of [a prohibition] effectively penalizes the homeless for simply being present or engaging in innocent activity, such as sleeping, that does not warrant punishment under the Eighth Amendment and, in effect, criminalizes the status of being homeless.[97]

Circuit Judge Rymer dissented in *Jones*, writing that "[n]either the Supreme Court nor any other circuit court of appeals has ever held that conduct derivative of a status may not be criminalized."[98] She asserted that the majority improperly assembled the individual opinions in *Powell* into a result that not even the dissent would have reached.[99] Judge Rymer explained that *Powell* dissenters said only that conduct closely related to status may not be punished if "the conduct is 'a characteristic and involuntary part of the pattern of the [status] as it afflicts' the particular individual. This is not the case with a homeless person who sometimes has shelter and sometimes doesn't."[100] She further explained that no federal appellate court had until then "intimated (let alone held) that status plus a condition which exists on account of discretionary action by someone else is the kind of 'involuntary' condition that cannot be criminalized."[101] Judge Rymer warned that the decision of the *Jones* majority would, in effect, "immunize from criminal liability those who commit an act as a result of a condition that the government's failure to provide a benefit has left them in."[102]

Judge Rymer additionally criticized the *Jones* majority for accepting general facts about the status of homeless persons that Justice White's concurrence in *Powell* would have insisted be specifically proven.[103] She asserted that the *Jones* majority, without proof, assumed the condition of the persons who challenged the ordinance at issue.[104] In summary, Judge Rymer complained that the *Jones* majority synthesized the concurring and dissent

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[97] Bell v. City of Boise, 834 F. Supp. 2d 1103, 1108 (D. Idaho 2011), *rev'd on other grounds*, 709 F.3d 890 (9th Cir. 2013); *accord* Cobine v. City of Eureka, 250 F. Supp. 3d 423, 431 (N.D. Cal. 2017).
[98] *Jones*, 444 F.3d at 1139 (Rymer, J., dissenting).
[99] *Id*.
[100] *Id.* (citation omitted) (quoting Powell v. Texas, 392 U.S. 514, 559 n.2 (1967) (Fortas, J., dissenting)).
[101] *Id.*
[102] *Id.*
[103] *Jones*, 444 F.3d at 1146–47 (Rymer, J., dissenting); *see generally* Powell v. Texas, 392 U.S. 514, 552–54 (1967) (White, J., concurring in result).
[104] *Jones*, 444 F.3d at 1147 (Rymer, J., dissenting).

opinions in *Powell* into a broad proposition expressly endorsed by neither,[105] all while ignoring that *Ingraham* subsequently reconfirmed the Marshall plurality's determination in *Powell* that the *Robinson* principle has limited application.[106]

Judge Rymer noted that *Ingraham* referred to the Marshall plurality's interpretation of *Robinson* in *Powell* when stating that the Cruel and Unusual Punishments Clause should be "applied sparingly" when limiting legislative authority to define crimes.[107] She wrote that it should be applied only in rare cases involving "an *internal* affliction, potentially an innocent or involuntary one."[108] She explained that homelessness in not an innate or immutable characteristic and is instead a transitory state into which some people fall and others opt.[109] Judge Rymer wrote that "*Robinson* does not apply to criminalization of conduct."[110] Judge Rymer further wrote that it only applies to situations where a law makes a person continuously guilty of a crime without having actually done something where the offense was supposedly committed.[111] She therefore reasoned that *Robinson* does not apply to the act of sleeping, sitting, or lying on a city street.[112]

## II. IS HOMELESSNESS A RECOGNIZABLE STATUS?

The United States District Court for the Northern District of California held in *Joyce v. City and County of San Francisco* that homelessness is not a status.[113] The court in *Joyce* wrote that "[d]epicting homelessness as 'status' is by no means self-evident . . . ."[114] It explained that homelessness cannot be readily classified as a status.[115] The court acknowledged that the concept of status is difficult to define, but it wrote that "certain factors assist in its determination, such as the involuntariness of the acquisition of that quality (including the presence or not of that characteristic at birth), and the degree to which an individual has control over that

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[105] *Id.*
[106] *See id*. at 1139, 1144, 1149.
[107] *Id*. at 1144 (quoting Ingraham v. Wright, 430 U.S. 651, 667 (1977)).
[108] *Id.* at 1146.
[109] *Id.*
[110] *Id*. at 1145.
[111] *Id.* at 1146.
[112] *Id.* at 1145.
[113] Joyce v. City and County of San Francisco, 846 F. Supp. 843, 854–58 (N.D. Cal. 1994).
[114] *Id.* at 856.
[115] *Id.* at 857.

characteristic."[116] The court in *Joyce* identified age, race, gender, national origin, and illness as examples that demonstrate the characteristics of status.[117] It noted that the *Robinson* Court recognized drug addiction as a status by analogizing it to an illness or disease that might be involuntarily contracted.[118] It did not, however, find homelessness directly analogous to a disease.[119] The court explained:

> While homelessness can be thrust upon an unwitting recipient, and while a person may be largely incapable of changing that condition, the distinction between the ability to eliminate one's drug addiction as compared to one's homelessness is a distinction in kind as much as in degree. To argue that homelessness is a status and not a condition, moreover, is to deny the efficacy of acts of social intervention to change the condition of those currently homeless.[120]

In the view of the court in *Joyce*, "status cannot be defined as a function of the discretionary acts of others."[121]

The California Supreme Court endorsed, but did not expressly adopt, the *Joyce* analysis in *Tobe v. City of Santa Ana*.[122] It refused to recognize homelessness as a status because the declarations submitted in that case by persons claiming to be homeless were "far from clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness . . . ."[123] The California Court of Appeals subsequently explained in *Allen v. City of Sacramento* that "being homeless is not necessarily equivalent to an involuntary condition or status."[124] The *Allen* court noted that "no generalization can describe a diverse population," and it rejected status claims because the homeless persons in that case alleged only that they had no shelter available but did not allege why they had no shelter.[125]

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[116] *Id.* (citations omitted).
[117] *Id.*
[118] *Id.*
[119] *Id.* at 858.
[120] *Id.* at 857.
[121] *Id.*
[122] *See* Tobe v. City of Santa Ana, 892 P.2d 1145, 1166–67 (Cal. 1995).
[123] *Id.* at 1167.
[124] Allen v. City of Sacramento, 234 Cal. App. 4th 41, 59 (Ct. App. 2015).
[125] *Id.*

The *Jones* majority disagreed with the analysis in *Joyce*.[126] In its view, the involuntariness of the act or condition criminalized "is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment."[127] The *Jones* majority largely skirted discussing whether homelessness qualifies as a status and instead focused upon the distinction between voluntary and involuntary acts and conditions.[128] It found that single factor determinative.[129] Without separately analyzing what constitutes status, the *Jones* majority concluded that homelessness is a status, writing that homeless individuals "are in a chronic state that may have been acquired 'innocently or involuntarily.'"[130]

The United States District Court for the Southern District of Florida similarly ruled in *Pottinger v. City of Miami* that "voluntariness of [a] status or condition is the decisive factor."[131] Based on the testimony of a number of expert witnesses, the court in *Pottinger* found that homeless persons "rarely choose to be homeless."[132] It recounted testimony that homeless persons share the characteristic of being socially isolated and having no one to take them in.[133] The court also noted that experts identified many causes for homelessness, and that those causes are often exacerbated by factors that result from that homelessness.[134] In summary, the court in *Pottinger* concluded that people "become homeless due to a variety of factors that are beyond their control,"[135] and they do not choose to live under the conditions

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[126] Jones v. City of Los Angeles, 444 F.3d 1118, 1132 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).
[127] *Id.*
[128] *See id.* at 1132–36.
[129] *See id.* at 1137 (explaining that "an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable").
[130] *Id.* at 1136; *see also id.* (writing that the *Jones* "dissent veers off track by attempting to isolate the supposed 'criminal conduct' from the status of being involuntarily homeless at night on the streets").
[131] Pottinger v. City of Miami, 810 F. Supp. 1551, 1562 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir.1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (1996).
[132] *Id.* at 1563.
[133] *Id.*
[134] *Id.* at 1563–64.
[135] *Id.* at 1564.

attendant to homelessness, except in rare cases.[136]

Cases employing reasoning similar to *Pottinger* integrate the question of status into a more generalized inquiry into "being."[137] The United States District Court for the Northern District of Texas opined in *Johnson v. City of Dallas* that the distinction drawn in *Joyce* between status and acts does not appear to flow logically from *Robinson*.[138] The court explained that "[i]t should be a foregone conclusion that maintaining human life requires certain acts, among them being the consuming of nourishment, breathing and sleeping."[139] It explained that many homeless persons have no choice but to perform those acts in public.[140] The court in *Johnson* therefore concluded that prohibitions against performing those life sustaining activities in public impermissibly punish status because "the status of being could clearly not be criminalized under *Robinson*."[141]

In *Anderson v. City of Portland*, the United States District Court for the District of Oregon departed from the reasoning of the *Jones* majority and *Pottinger* that voluntariness is the decisive factor in determining status.[142] It explained that the nature of the prohibited conduct is an equally important factor.[143] It noted that both the Marshall plurality in *Powell* and Judge Rymer's dissent in *Jones* looked at the nature of a prohibited act to see if it involved something that created a substantial health or safety hazard or other conduct that society has an interest in preventing.[144] The court in *Anderson*, therefore, concluded that Eighth Amendment analysis focuses upon whether an enactment criminalizes something that is both "involuntary and innocent."[145]

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[136] *Id.* at 1563.
[137] *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1133 (9th Cir. 2006) ("[T]he state may not criminalize 'being'. . . ."), *vacated*, 505 F.3d 1006 (9th Cir. 2007); Johnson v. City of Dallas, 860 F. Supp. 344, 350 (N.D. Tex. 1994) ("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."), *rev'd in part,* 61 F.3d 442 (5th Cir. 1995), *and vacated in part*, 61 F.3d 442 (5th Cir. 1995); *see also* Martin v. City of Boise, 902 F.3d 1031, 1047–48 (9th Cir. 2018) (adopting the reasoning of *Jones*).
[138] *Johnson*, 860 F. Supp. at 349.
[139] *Id.* at 350.
[140] *Id.*
[141] *Id.*
[142] Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. Jul. 31, 2009).
[143] *Id.*
[144] *Id.*
[145] *Id.*

*Joyce* and the *Jones* majority approach the issue of status from opposite directions. *Joyce* treats the existence of status as a question that must be resolved first before addressing whether a prohibition penalizes status or conduct.[146] The *Jones* majority instead starts with the penalized activity to determine whether it was voluntary and concludes that status has been unconstitutionally punished if the activity was unavoidable.[147] The White concurrence and the dissent in *Powell* both find the issue of voluntariness important.[148] However, nothing in *Powell* suggests that a majority of the justices would have skipped the threshold question of status.[149]

The Marshall plurality in *Powell* would not extend *Robinson* to cover conduct committed as a result of a condition,[150] but it also would not assume status was at issue and roundly criticized the trial court's finding that alcoholism is a disease, writing "the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that 'alcoholism' is a 'disease.'"[151] The dissent disagreed but nonetheless found that "consideration of the Eighth Amendment issue in this case requires an understanding of 'the disease of chronic alcoholism' . . . ."[152] Having found alcoholism to be a disease causing symptomatic compulsion that destroyed the affected person's will power, the dissent concluded that the Eighth Amendment does not allow punishment of an alcoholic for a condition that person can no longer control.[153] Both the Marshall plurality and the dissent place considerable emphasis upon the threshold question of status and whether alcoholism constitutes a disease.[154]

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[146] *See* Joyce v. City and County of San Francisco, 846 F. Supp. 843, 857–58 (N.D. Cal. 1994).
[147] Jones v. City of Los Angeles, 444 F.3d 1118, 1132–37 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).
[148] *See* Powell v. Texas, 392 U.S. 514, 551 n.2 (1968) (White, J., concurring in result) ("The proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts a sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'"); *Id.* at 567 (Fortas, J., dissenting) ("Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.").
[149] *See, e.g.*, Powell v. Texas, 392 U.S. 514 (1968).
[150] *See id*. at 533–34 (Marshall, J.).
[151] *Id.* at 522.
[152] *Id.* at 559 (Fortas, J., dissenting).
[153] *Id.* at 567–70.
[154] *See id.* at 559–65.

Justice White's analysis in *Powell* also does not appear to eliminate the threshold question of status.[155] He opined that a person who claims he has been unconstitutionally punished for being a chronic alcoholic must both prove his disease and that the alcoholism created the compulsion to engage in the activity for which he has been penalized.[156] Justice White wrote in *Powell* that *Robinson* dealt with the "'status' of narcotics addiction" which meant "a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values."[157] He further explained that chronic alcoholism was the same, but the mere transitory state of being drunk was not.[158] In contrast to chronic alcoholism, the condition of being merely drunk is (1) not far removed from the acts that caused the intoxication, (2) not a state of great duration, and (3) an isolated instance that has relatively slight importance in the life of the intoxicated person.[159]

A. *Supreme Court Guidance Upon Status.*

It is unclear whether the Supreme Court would recognize homelessness as a status. Neither *Robinson*, nor the Marshall plurality, nor the dissent in *Powell* provided an analytical framework for determining when something constitutes status, but it is noteworthy that all focused on whether the condition at issue was an illness or disease.[160] *Robinson* addressed drug addiction.[161] *Powell* involved alcoholism.[162] It could therefore be maintained that the *Robinson* principle is limited to those types of settings involving ingrained human characteristics and internal afflictions.[163]

Justice White's definition of status could encompass more than just

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[155] *See, e.g., id.* at 548–54 (White, J., concurring in result).
[156] *Id.* at 549–50.
[157] *Id.* at 550 n.2.
[158] *Id.*
[159] *Id.*
[160] *See id.* at 517–26 (Marshall, J.); *Id.* at 559–65 (Fortas, J., dissenting); Robinson v. California, 370 U.S. 660, 666–67 (1962).
[161] *Robinson*, 370 U.S. at 667.
[162] *Powell*, 392 U.S. at 517–26 (Marshall, J.); *Id.* at 549–50 (1967) (White, J., concurring in result); *Id.* at 559–65 (1967) (Fortas, J., dissenting).
[163] *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1146 (9th Cir. 2006) (Rymer, J., dissenting); Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1231 n.3 (E.D. Cal. 2009); Joyce v. City and County of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994).

infirmities and ailments[164] and might include chronic homelessness. Justice White expressly mentioned economic factors as a relevant consideration.[165] Justice Douglas later wrote (with citation to *Robinson*) in his dissent from the Supreme Court's dismissal of certiorari in *Hicks v. District of Columbia* that he did "not see how economic or social status can be made a crime any more than being a drug addict can be."[166] Under Justice White's formulation in *Powell*, homelessness could be a status if it (1) has a cause remote in time from its condition, (2) is relatively permanent in duration, and (3) has great magnitude and significance in terms of human behavior and values.[167] Satisfaction of each factor may be reasonably debated, but chronic homelessness would seem to qualify in most instances. A person does not suddenly become chronically homeless. It is usually caused by a variety of economic, physical, and psychological factors having distant origins.[168] Homelessness also perpetuates itself because it creates barriers that make it hard to escape once someone becomes homeless.[169] Thus, by the time it becomes chronic, homelessness may have attained a relatively permanent

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[164] *Cf.* Bowers v. Hardwick, 478 U.S. 186, 202–03 n.2 (1986) (Blackmun, J., dissenting) (writing that homosexuality is no longer viewed as a disease or disorder, but it is nonetheless protected under Justice White's analysis in *Powell*, because sexual orientation "may well form part of the very fiber of an individual's personality."); *see generally Powell*, 392 U.S. at 550 n.2 (White, J., concurring in result) (explaining his understanding of what constitutes "status").

[165] *Powell*, 392 U.S. at 551 (White, J., concurring in result) (writing that the plight of homeless alcoholics may be more a "function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition."). The court in *Johnson v. City of Dallas* later referred to Justice White's example of a homeless alcoholic who has no private place to drink as the "fusion of homelessness and status . . . ." Johnson v. City of Dallas, 860 F. Supp. 344, 348 (N.D. Texas 1994), *rev'd in part,* 61 F.3d 442 (5th Cir. 1995), *vacated in part*, Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995).

[166] Hicks v. District of Columbia, 383 U.S. 252, 257 (1966) (Douglas, J., dissenting); *see, e.g.*, Baker v. State, 478 S.W.2d 445, 448 (Tex. Crim. App. 1972) ("The status of being unemployed or without visible means of support is not a sufficient ground for criminal sanctions.") (citing cases); *see also* Goldman v. Knecht, 295 F. Supp. 897, 907–08 (D. Colo. 1969). Justice Jackson wrote in *Edwards v. California* that "'[i]ndigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." Edwards v. California, 314 U.S. 160, 184–85 (1941) (Jackson, J., concurring).

[167] *Powell*, 392 U.S. at 550 n.2 (White, J., concurring in result).

[168] *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir.1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (1996).

[169] *Id.* at 1564.

duration.[170] Homelessness arguably has great magnitude and significance in terms of human behavior and values because those who experience it suffer from unsafe and unsanitary living conditions that few would choose.[171]

## III. DOES THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE PROTECT CONDUCT DERIVED FROM STATUS?

In *Lehr v. City of Sacramento*, the United States District Court for the Eastern District of California rejected the reasoning of the *Jones* majority that the Eighth Amendment extends protection to involuntary acts occasioned by status.[172] It expressed concern that extension of the *Jones* majority's reasoning "would potentially provide constitutional recourse to anyone convicted on the basis of conduct derivative of a condition he is allegedly 'powerless to change.'"[173] For example, "[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."[174] It explained that such reasoning would, in effect, establish a constitutional doctrine of criminal responsibility.[175] The court in *Lehr* warned that constitutionalizing the involuntariness principle would require a court "to couch its own moral beliefs in constitutional terms and to substitute its own judgment as to the morality of the criminal law for that of the states."[176]

The court acknowledged in *Lehr* that homelessness is a serious problem.[177] It nonetheless found slippery slope concerns too great to hold that conduct derivative of status may not be criminalized.[178] The court opined that it would be "dangerous bordering on irresponsible" to address the plight of

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[170] The U.S. Department of Housing and Urban Development defines a chronically homeless individual as "an individual with a disability who has been continuously homeless for 1 year or more or has experienced at least four episodes of homelessness in the last 3 years where the combined length of time homeless in those occasions is at least 12 months." CLAUDIA D. SOLARI, ET AL., U.S. DEP'T. HOUS. & URBAN DEV., OFFICE OF CMTY. PLANNING & DEV., THE 2016 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS (2017).
[171] *Pottinger*, 810 F. Supp. at 1563.
[172] Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1229–31 (E.D. Cal. 2009).
[173] *Id.* at 1234; *see also* Hendrick v. Caldwell, 232 F. Supp. 3d 868, 887 (W.D. Va. 2017).
[174] *Lehr*, 624 F. Supp. 2d at 1234 (quoting Powell v. Texas, 392 U.S. 514, 545 (1967) (Black, J., concurring)).
[175] *Id.* at 1233–34.
[176] *Id.* at 1234.
[177] *Id*. at 1231.
[178] *See id*. at 1231–34.

homelessness by constitutionalizing an involuntariness principle because of its potential ramifications across the entire field of criminal law.[179]

The United States District Court for the Northern District of California in *Ashbaucher v. City of Arcata* similarly declined to adopt the reasoning of the *Jones* majority.[180] It wrote that "[t]his issue whether the Eighth Amendment protects the homeless against laws that prohibit conduct that is impossible for a homeless person to avoid was not, however, presented in *Powell* and has not been decided by the Supreme Court."[181] It reasoned that the Marshall plurality in *Powell* expressly rejected the expansive conclusion reached by the *Jones* majority that the *Robinson* principle extends to conduct.[182] In that court's view, *Powell* "did not set forth a constitutional rule that involuntary conduct cannot be criminalized under *Robinson* . . . ."[183] The court questioned the validity of the involuntariness principle cobbled together by the *Jones* majority from the Fortas dissent and White concurrence in *Powell*.[184] It instead asserted that only *Powell* did not foreclose the possibility "that an individual could challenge a statute punishing conduct that was compelled by a disease or otherwise involuntary under the Cruel and Unusual Punishments Clause if he could make a greater showing of compulsion or involuntariness of the prohibited conduct than was shown in *Powell*."[185] However, it shared the concerns expressed in *Joyce* about "the ramifications of providing constitutional protection to any condition over which a showing could be made that the defendant had no control."[186] The court in *Ashbaucher* ultimately agreed with the holding in *Lehr* that *Robinson* and *Powell* did not extend the protection of the Cruel and Unusual Punishments Clause to involuntary conduct derived from status.[187]

The outright rejection of *Jones* by lower courts in *Lehr* and *Ashbaucher* is no longer tenable in that circuit with the reaffirmation of *Jones* by the Ninth Circuit Court of Appeals in *Martin v. City of Boise*.[188] However,

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[179] *See id*. at 1234.
[180] Ashbaucher v. City of Arcata, No. 08-2840 MPH (NJV), 2010 WL 11211481, at *7 (N.D. Cal. Aug. 19, 2010).
[181] *Id.* at *8.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* at *9.
[187] *Id.* at *11.
[188] *See* Martin v. City of Boise, 902 F.3d 1031, 1035–36 (9th Cir. 2018).

*Martin* leaves many questions unanswered.[189] The *Martin* panel wrote that its "holding is a narrow one."[190] It purports not to "suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside."[191]

The United States District Court for the District of Oregon wrote in *Anderson v. City of Portland* that it understood the slippery slope concerns expressed in *Lehr*, and that court's reluctance to extend blanket constitutional protection to involuntary acts derived from status.[192] The court in *Anderson* nonetheless concluded that "it seems a reasonable proposition under the Eighth Amendment that homeless persons should not be subject to criminal prosecution for merely sleeping in public at any time of day."[193] It further explained that the Eighth Amendment's prohibition against criminalizing status extends to involuntary conduct that does not threaten public health, safety, or welfare.[194] The court wrote that the critical factor is whether, and to what degree, an ordinance "criminalizes 'conduct that society has an interest in preventing.'"[195] The Oregon District Court indicated in a subsequent *Anderson* ruling that public safety and sanitation may be sufficient governmental interests to support prohibitions against particular activities.[196]

The United States District Court for the Northern District of Texas took an approach in *Johnson v. City of Dallas* which is similar to the one taken in *Anderson*.[197] The court in *Johnson* held that homeless persons cannot be prevented from performing certain life sustaining acts in public, such as eating, breathing, and sleeping, if they have nowhere else to go.[198] However, it drew a distinction between innocent acts and those that a community has an interest in protecting against.[199] Therefore, while the court acknowledged

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[189] *See id*. at 1048 n.8.
[190] *Id*. at 1048.
[191] *Id*. at 1048 n.8.
[192] Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *6 (D. Or. Jul. 31, 2009).
[193] *Id.*
[194] *See id.* at *7.
[195] *Id.* (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1139 (9th Cir. 2006) (Rymer, J., dissenting)).
[196] *See* Anderson v. City of Portland, No. 08-1447-AA, 2011 WL 6130598, at *3–4 (D. Or. Dec. 7, 2011).
[197] *See* Johnson v. City of Dallas, 860 F. Supp. 344, 346–51 (N.D. Texas 1994), *rev'd in part,* 61 F.3d 442 (5th Cir. 1995), *vacated in part*, 61 F.3d 442 (5th Cir. 1995).
[198] *Id.* at 350.
[199] *See id.* at 349–50.

that homeless persons must consume nourishment, it nonetheless held that a city may prohibit individuals from rummaging through trash receptacles for food.[200] The court in *Johnson* recognized that a line must be drawn somewhere because there should not be a "class of persons who are constitutionally immune from much of the criminal law."[201]

It is uncertain where a line would be drawn if the Supreme Court extends Eighth Amendment protection to involuntary conduct derived from status. The court in *Lehr* opined that only minimal innocent activity like sitting, lying, or sleeping would be protected under the analysis of the *Jones* majority, and those activities could be criminalized when coupled with some sort of conduct like camping or obstructing pedestrian or vehicular traffic.[202] The United States District Court of the District of Idaho made a similar observation in *Bell v. City of Boise* that there is a difference between a "complete ban on innocent acts, such as sitting, lying, or sleeping in a public way at any time of day, and other ordinances that are directed toward conduct beyond merely being present in public places."[203] The *Jones* majority indicated that ordinances can avoid criminalizing status by "making an element of the crime some conduct in combination with sitting, lying, or sleeping in a state of homelessness."[204] It then proceeded to list examples that would ostensibly pass muster: (1) ordinances that prohibit standing or lying in a public way when it obstructs pedestrian or vehicle traffic, (2) ordinances that prohibit camping on any public property or right of way, (3) ordinances with safe harbor provisions that limit hours of enforcement and thereby provide times that homeless persons may sit, lie, or sleep, and (4) ordinances that prohibit sitting or lying in only certain designated zones.[205]

The United States District Court for the District of Oregon rejected a challenge to an anti-camping ordinance in *O'Callaghan v. City of Portland*.[206] The court in *O'Callaghan* noted the *Jones* majority mentioned

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[200] *Id.* at 350.
[201] *Id.*
[202] Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1231–32 n.5 (E.D. Cal. 2009).
[203] Bell v. City of Boise, 834 F. Supp. 2d 1103, 1108 (D. Idaho 2011), *rev'd on other grounds*, 709 F.3d 890 (9th Cir. 2013).
[204] Jones v. City of Los Angeles, 444 F.3d 1118, 1123 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).
[205] *Id.* at 1123–24.
[206] O'Callaghan v. City of Portland, No. 3:12-CV-00201-BR (D. Or. May 12, 2014), *rev'd*, 736 F. App'x. 704, 705–06 (9th Cir. Sept. 6, 2018); *see also* Ashbaucher v. City of Arcata, No. 08-2840 MPH (NJV), 2010 WL 11211481, at *6 (N.D. Cal. Aug. 19, 2010)

Portland's anti-camping ordinance as one that added a conduct element sufficient to survive Eighth Amendment scrutiny.[207] The court wrote that such mention suggested that the Ninth Circuit would sustain the constitutionality of an anti-camping ordinance.[208] The court in *O'Callaghan* also agreed with the court's conclusion in *Anderson* that an ordinance prohibiting derivative conduct does not punish status if the prohibition is based on legitimate governmental interests of safety and sanitation.[209]

It is, however, unclear whether the Ninth Circuit would agree with the Oregon District Court's reading of *Jones.* The district court denied a motion in *O'Callaghan* to declare Portland's anti-camping ordinance facially unconstitutional under the Eighth Amendment.[210] Days after deciding *Martin v. City of Boise*, the Ninth Circuit reversed that ruling and directed the district court to allow Mr. O'Callaghan to amend his complaint to include facts asserting an "as applied" challenge to the ordinance.[211] The Ninth Circuit noted in an unpublished memorandum ruling that it had "recently held that a city ordinance prohibiting individuals from sleeping outside on public property may violate the Eighth Amendment when enforced against homeless individuals who have no access to alternative shelter."[212] It therefore appears that the Ninth Circuit may reject the notion that the conduct of homeless camping falls outside the purview of *Jones* and *Martin*.

The court in *Martin* agreed with the *Jones* majority "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."[213] Like the *Jones* majority, the *Martin* panel recognized that some restrictions could survive constitutional scrutiny, writing: "Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at

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(concluding "that the Eighth Amendment does not extend protection to involuntary conduct, such as camping overnight on public grounds, attributable to [someone's] homeless status").

[207] *O'Callaghan*, No. 3:12-CV-00201-BR, at 9 (quoting *Bell*, 834 F. Supp. 2d at 1107–08).

[208] *Id.* at 9–10.

[209] *Id.* at 10.

[210] *Id.* at 6–11.

[211] O'Callaghan v. City of Portland, 736 F. App'x. 704, 705–06 (9th Cir. 2018).

[212] *Id.* at 705 (citing Martin v. City of Boise, 902 F.3d 1031, 1035–36 (9th Cir. 2018) and Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)).

[213] *Martin*, 902 F.3d at 1048 (quoting Jones, 444 F.3d at 1135, *vacated*, 505 F.3d 1006 (9th Cir. 2007)).

particular times or in particular locations might well be constitutionally permissible. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures."[214] The examples of things that might be permissible in *Jones* and *Martin* are not particularly helpful by themselves because they are not definitive. The *Martin* panel gave additional guidance, however, beyond listing examples. It explained: "Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the 'universal and unavoidable consequences of being human' in the way the ordinance prescribes."[215]

The Supreme Court has not given clear guidance. The Marshall plurality in *Powell* drew a clear line between behavior and status.[216] Justice Black added in concurrence on behalf of himself and the second Justice Harlan that *Robinson* explicitly refused to allow use of status, or a condition, as protection against criminal culpability for actual behavior.[217] The dissent countered that *Powell* did not deal with responsibility for criminal acts and instead dealt with culpability for a mere condition.[218] Justice White did not find preoccupation with labels to be fruitful.[219] He would not condone punishing a chronic alcoholic for yielding to an irresistible urge that he could no longer control.[220] In Justice White's view, however, a person who has a condition can sometimes still be punished without violating the Cruel and Unusual Punishments Clause.[221] He opined that a person can be punished for his or her condition if "volitional acts brought about the 'condition'" and "those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'"[222] In other words, a narcotics addict could be punished for that addiction if it was the result of recent voluntary use of narcotics.[223] In addition, a person suffering from a condition may nonetheless be punished for acts that could have been avoided

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[214] *Id.* at 1048 n.8 (citation omitted).
[215] *Id.* (citation omitted) (quoting Jones, 444 F.3d at 1136, *vacated*, 505 F.3d 1006 (9th Cir. 2007)).
[216] Powell v. Texas, 392 U.S. 514, 532–33 (1967) (Marshall, J.).
[217] *Id.* at 542 (Black, J., concurring).
[218] *Id.* at 559 (Fortas, J., dissenting).
[219] *Id.* at 550 n.2 (White, J., concurring in result).
[220] *Id.* at 549–50.
[221] *Id.* at 550.
[222] *Id.* at 551 n.2.
[223] *See* Robinson v. California, 370 U.S. 660, 686–88 (1962) (White, J., dissenting).

despite the condition.[224] Justice White explained, "I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act . . . ."[225] Any effort to reassemble these disparate opinions into a majority view entails a strained exercise.[226]

The Eighth Amendment may be the wrong platform upon which to build constitutional protection for conduct. Its protection of status dates back only to *Robinson* and lacks any significant historical development upon which to base a limiting principle.[227] Until *Weems*, the Supreme Court addressed the Cruel and Unusual Punishments Clause only to methods of punishment.[228] There are good arguments that extension of *Robinson* to acts derived from status opens a Pandora's box of unwanted applications that might excuse abhorrent conduct allegedly attributable to an uncontrollable compulsion caused by an illness or disease.[229] This does not, however, mean that state and local governments should be or are allowed to punish innocent conduct.

The second Justice Harlan disagreed with the majority's application of the Cruel and Unusual Punishments Clause in *Robinson*, but he nonetheless concurred on the basis that the statute in question, as construed, constituted "an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law."[230] Justice Harlan's view merits additional consideration. The United States Supreme Court has long recognized that "[t]he police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably."[231] Those limitations

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[224] *Powell*, 392 U.S. at 549–50 (White, J., concurring in result).
[225] *Id.* at 550.
[226] Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1227–31 (E.D. Cal. 2009).
[227] The Supreme Court in *Robinson* cited only *Francis v. Resweber* for the proposition that the Cruel and Unusual Punishments Clause prevents making a criminal offense of an illness or disease, and *Francis* did not address that issue in any way. *Robinson*, 370 U.S. at 666; *see generally* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463–64 (1947) (plurality opinion).
[228] Weems v. United States, 217 U.S. 349, 409–10 (1910) (White, J., dissenting).
[229] *See, e.g.*, Powell v. Texas, 392 U.S. 514, 534 (1968) (Marshall, J.); *Lehr*, 624 F. Supp. 2d at 1234.
[230] *Robinson*, 370 U.S. at 679 (Harlan, J., concurring).
[231] Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 415 (1935); *see, e.g.*, Fiske v. Kansas, 274 U.S. 380, 387 (1927); *cf.* Graves v. Minnesota, 272 U.S. 425, 428

may provide a better analytical foundation for protection of innocent conduct. The Washington State Supreme Court explained in *City of Seattle v. Pullman* that an ordinance which makes no distinction between harmful conduct and essentially innocent conduct is an unreasonable exercise of police power.[232]

The New York Court of Appeals in *Fenster v. Leary* characterized vagrancy as a status crime and recognized that a statute could not stand under *Robinson* if it made criminal a condition over which an accused has no control, but it held that the conditions of vagrancy did not appear to directly involve the constitutional problem encountered in *Robinson*.[233] The court, nonetheless, invalidated a vagrancy law as an improper exercise of police power because it was obvious that:

> The only persons arrested and prosecuted as common-law vagrants are alcoholic derelicts and other unfortunates, whose only crime, if any, is against themselves, and whose main offense usually consists in their leaving the environs of skid row and disturbing *by their presence* the sensibilities of residents of nicer parts of the community . . . .[234]

The *Fenster* court further explained:

> [A] statute whose effect is to curtail the liberty of individuals to live their lives as they would and whose justification is claimed to lie in the exercise of the police power of the State must bear a reasonable relationship to, some proportion to, the alleged public good on account of which this restriction on individual liberty would be justified.[235]

The court concluded that there was no reasonable relationship between public good and punishment of vagrants, and that the vagrancy law constituted:

> [A]n overreaching of the proper limitations of the police power in that it unreasonably makes criminal and provides punishment for conduct (if we can call *idleness* conduct) of an individual which in no way impinges on the rights or interests of others and which has in no way been demonstrated to have anything more than the most tenuous connection with

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(1926) ("[P]olice statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest.").

[232] City of Seattle v. Pullman, 514 P.2d 1059, 1063 (Wash. 1973).

[233] Fenster v. Leary, 229 N.E.2d 426, 428–29 (1967).

[234] *Id*. at 430.

[235] *Id*. at 429.

prevention of crime and preservation of the public order . . .[236]

The courts in *Johnson v. City of Dallas* and *Anderson v. City of Portland* supplemented their inquiry into questions of status with considerations traditionally addressed under the auspices of whether an exercise of police power was reasonable.[237] Each court expressed concern that inquiry solely into the involuntariness of prohibited conduct was insufficient.[238] As the court in *Johnson* recognized, "[i]f one's homeless status entitled one to evade prosecution for removing waste from trash receptacles in order to find something to eat or wear, it is not difficult to rationalize constitutional protection for stealing food or clothing."[239] The addition of traditional police power considerations to Eighth Amendment analysis was necessitated by extension of the *Robinson* principle to protect conduct.[240] When considering the admonition in *Ingraham* that the *Robinson* principle should be applied sparingly, it is conceivable that the Supreme Court might ultimately opt against extending *Robinson* to acts derived from status and instead leave questions regarding the scope of constitutional protection afforded conduct to traditional police power analysis.[241]

## IV. WHEN ARE PUBLIC SUBSISTENCE ACTIVITIES UNAVOIDABLE?

The extension of the *Robinson* principle to involuntary acts derived from status raises issues regarding whether particular conduct is avoidable.[242]

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[236] *See Fenster*, 229 N.E.2d at 428; *accord* Alegata v. Commonwealth, 231 N.E.2d 201, 205–07 (Mass. 1967).

[237] *Compare* Johnson v. City of Dallas, 860 F. Supp. 344, 349–50 (N.D. Tex. 1994) (distinguishing between innocent acts and conduct that a community has an interest in protecting against), *rev'd in part,* 61 F.3d 442 (5th Cir. 1995), *and vacated in part*, 61 F.3d 442 (5th Cir. 1995), *and* Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. Jul. 31, 2009) (looking to see whether a prohibition involved a substantial health or safety hazard or other conduct that society has an interest in preventing), *with Fenster*, 229 N.E.2d at 428–30 (examining whether the exercise of police power has a reasonable relationship to protection of public good).

[238] *See Anderson*, No. 08-1447-AA, 2009 WL 2386056, at *7 (concluding that the nature of prohibited conduct is an equally important consideration to involuntariness); Johnson v. City of Dallas, 860 F. Supp. 344, 349–50 (N.D. Tex. 1994) (explaining that a person's needs arising from homeless status should not immunize him or her from criminal laws that prohibit activities that society has an interest in protecting against), *rev'd in part,* 61 F.3d 442 (5th Cir. 1995), *and vacated in part*, 61 F.3d 442 (5th Cir. 1995).

[239] *Johnson*, 860 F. Supp. at 350.

[240] *See Anderson*, No. 08-1447-AA, 2009 WL 2386056, at *5–7; *Johnson*, 860 F.Supp. at 346–50.

[241] *See* Ingraham v. Wright, 430 U.S. 651, 666–68 (1977).

[242] *See* Martin v. City of Boise, 902 F.3d 1031, 1048 n.8 (9th Cir. 2018).

The Ninth Circuit wrote in *Martin v. City of Boise* that "[n]aturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it."[243] It did not, however, enunciate a standard by which it may be determined whether an individual has means to pay for shelter or has chosen not to use available shelter.[244]

The Eleventh Circuit in *Joel v. City of Orlando* rejected an Eighth Amendment challenge to an anti-camping ordinance because other alternatives were available to homeless persons.[245] The court explained that *Pottinger* and *Johnson* both explicitly relied upon lack of shelter space when determining that prohibitions against sleeping in public unconstitutionally punished involuntary conduct.[246] It therefore found the reasoning of those cases distinguishable in instances where alternative shelter is available.[247] The *Joel* court wrote that the availability of shelter space provides an opportunity for homeless persons to comply with a ban against camping in public places, and such a prohibition, therefore, does not criminalize involuntary behavior or punish status.[248]

The Idaho District Court in *Bell v. City of Boise* similarly held that an anti-camping ordinance does not criminalize homelessness if viable shelter options are available.[249] In that case, the court determined that city parks provided an adequate safe harbor where homeless persons could sit, lie down, and sleep during the day.[250] It further held that a city directive to suspend enforcement of the ordinance at night when shelter space was unavailable reasonably ensured that homeless persons were not being punished for status.[251] The adequacy of the safe harbors identified in *Bell* are, however, questionable in light of *Martin v. City of Boise*.[252] The *Martin* panel commented upon and disapproved of Boise's enforcement of its anti-camping

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[243] *Id.*
[244] *Id.*
[245] Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000).
[246] *Id.* at 1362.
[247] *Id.*
[248] *Id.*
[249] Bell v. City of Boise, 834 F. Supp. 2d 1103, 1108 (D. Idaho 2011), *rev'd on other grounds*, 709 F.3d 890 (9th Cir. 2013).
[250] *Id.*
[251] *Id.* at 1108–09.
[252] Martin v. City of Boise, 902 F.3d 1031, 1040–42, 1049 (9th Cir. 2018).

ordinance against persons who slept in city parks with rudimentary precautions to protect themselves against the elements.[253] It was also critical of Boise's enforcement suspension policies because the panel determined that enforcement action was taken against individuals when shelter space may have been generally available but was functionally unavailable to them.[254]

The United States District Court for the Northern District of California emphasized in *Cobine v. City of Eureka* that the majority in *Jones* determined the homeless individuals in that case had no choice but to be present on public streets and sidewalks because the number of homeless persons vastly outnumbered the amount of shelter beds and low income housing available in Los Angeles.[255] It found such unavailability determinative of whether someone was voluntarily in a public space.[256] Thus, the court concluded that an anti-camping ordinance would not be found to criminalize involuntary conduct resulting from homelessness if there is available and adequate shelter space.[257] It further explained in *Drake v. County of Sonoma*:

> There is a strong argument that the Eighth Amendment (and perhaps also the Due Process Clause) precludes the government from enforcing an anti-camping ordinance against homeless people when it has no shelter available for them. Moreover, the common assumption that it's enough for the government simply to make temporary shelter beds available is likely wrong. Even if shelter beds are available, the ability of the government to take enforcement action against homeless people who are camping should depend on the adequacy of conditions in the shelters. This is a particular concern for people with disabilities, who sometimes struggle to see their needs met in temporary shelters. And after all, many homeless people have disabilities.[258]

Decisions have focused upon whether shelter space is available.[259]

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[253] *Id.* at 1049.
[254] *Id.* at 1040–42.
[255] Cobine v. City of Eureka, 250 F. Supp. 3d 423, 431 (N.D. Cal. 2017).
[256] *Id.*
[257] *Id.* at 432.
[258] Drake v. Sonoma, 304 F. Supp. 3d 856, 857–58 (N.D. Cal. 2018) (citation omitted).
[259] *E.g.*, Martin v. City of Boise, 902 F.3d 1031, 1049, n.9 (9th Cir. 2018) (commenting that unrefuted evidence of available shelter space was critical to the court's holding in *Joel v. City of Orlando*); Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000).

However, general availability of shelter space may not constitute access to adequate temporary shelter. The panel in *Martin* found that shelter's religious requirements and stay duration limitations functionally limited access, and in such situations made no viable shelter available.[260] The court in *Drake* noted that a shelter may be inadequate to meet the needs of a disabled homeless person.[261] The court in *Anderson* indicated that an Eighth Amendment claim may be stated if "homeless people cannot access shelters based on physical disabilities, mental illness, or other factors."[262] The courts in *Bell* and *Cobine* each adopted a two-part inquiry: (1) is there sufficient shelter space?; and (2) is the available space a viable option?[263] Therefore, the question of whether certain activities are involuntary or unavoidable may require a case-by-case individualized determination.[264]

## CONCLUSION

The Eighth Amendment's prohibition against cruel and unusual punishment has three components: (1) it limits the types of punishments that can be imposed; (2) it prohibits punishments that are grossly disproportionate to the severity of the crime committed; and (3) it imposes substantive limits on what can be made a crime.[265] The Supreme Court recognized in *Robinson v. California* that this third component of the Cruel and Unusual Punishments Clause prevents punishment on the basis of status.[266] The Ninth Circuit Court of Appeals held in *Jones v. City of Los Angeles* that the prohibition against status crimes protects homeless persons from being punished for acts that they are powerless to avoid.[267] It therefore concluded that a local ban against sitting, lying, and sleeping in public areas violates the rights of homeless persons when other alternatives are unavailable because they cannot avoid engaging in such activities.[268] The precedential value of *Jones* became

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[260] *Martin*, 902 F.3d at 1041–42.
[261] *Drake*, 304 F. Supp. 3d at 858.
[262] Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. Jul. 31, 2009).
[263] Cobine v. City of Eureka, 250 F. Supp. 3d 423, 431 (N.D. Cal. 2017) (quoting *Bell*); Bell v. City of Boise, 834 F. Supp. 2d 1103, 1108 (D. Idaho 2011), *rev'd on other grounds*, 709 F.3d 890 (9th Cir. 2013).
[264] *See* Powell v. Texas, 392 U.S. 514, 551–54 (1967) (White, J., concurring in result).
[265] Ingraham v. Wright, 430 U.S. 651, 667 (1977).
[266] *See* Robinson v. California, 370 U.S. 660, 665–67 (1962).
[267] Jones v. City of Los Angeles, 444 F.3d 1118, 1133, 1135–36 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).
[268] *Id.* at 1136–37.

uncertain when the Ninth Circuit later vacated *Jones* after the parties settled. However, the Ninth Circuit reaffirmed its commitment to *Jones* in *Martin v. City of Boise*.[269]

Some courts have expressed skepticism about whether homelessness constitutes a status.[270] It is, however, hard to see how drug addiction could be considered a status, as it was in *Robinson*, but homelessness would not.[271] Under the analytical framework provided by Justice White in *Powell v. Texas*, homelessness would constitute a status if (1) it has a cause remote from its condition, (2) its duration is relatively permanent, and (3) it has great magnitude and significance in terms of human behavior and values.[272] Chronic homelessness would seem to qualify because it is usually caused by a variety of remote factors, it is difficult to escape, and it forces those who suffer it to live in conditions few would choose.[273]

The Ninth Circuit held in *Jones* and *Martin* that a city cannot criminalize unavoidable acts that are an integral part of a person's homeless status.[274] If the *Robinson* principle is extended by the Supreme Court to protect involuntary acts, questions arise regarding when conduct will be considered constitutionally unavoidable.[275] *Jones*, *Martin*, and other cases have emphasized the lack of other options when ruling that involuntary acts derived from homeless status may not be criminalized.[276] The Eleventh Circuit rejected a challenge to an anti-camping ordinance in *Joel v. City of Orlando* because homeless persons had other available options.[277] However,

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[269] Martin v. City of Boise, 902 F.3d 1031, 1035–36, 1046 (9th Cir. 2018).
[270] *E.g.*, Joyce v. City of San Francisco, 846 F. Supp. 843, 854–58 (N.D. Cal. 1994); Allen v. City of Sacramento, 234 Cal. App. 4th 41, 59 (Ct. App. 2015).
[271] Hicks v. District of Columbia, 383 U.S. 252, 257 (1966) (Douglas, J., dissenting).
[272] *See* Powell v. Texas, 392 U.S. 514, 550, n.2 (1968) (White, J., concurring in result).
[273] *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1563–64 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir.1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (1996).
[274] Martin v. City of Boise, 902 F.3d 1031, 1048 (9th Cir. 2018); Jones v. City of Los Angeles, 444 F.3d 1118, 1132 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).
[275] *See Martin*, 902 F.3d at 1048 n.8.
[276] *See Martin*, 902 F.3d at 1040–41, 1046–49; *Jones*, 444 F.3d at 1137, *vacated by* 505 F.3d 1006 (9th Cir. 2007); Cobine v. City of Eureka, 250 F. Supp. 3d 423, 431–32 (N.D. Cal. 2017); Johnson v. City of Dallas, 860 F. Supp. 344, 351 (N.D. Tex. 1994), *rev'd in part*, 61 F.3d 442 (5th Cir. 1995), *vacated in part*, 61 F.3d 442 (5th Cir. 1995); Pottinger v. City of Miami, 810 F. Supp. 1551, 1564–65 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir.1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (1996).
[277] Joel v. City of Orlando, 232 F.3d 1353, 1361–62 (11th Cir. 2000).

a generally available option may be inadequate if it is functionally unavailable to a particular homeless person.[278] The question may be two-fold: (1) are other options available?; and (2) are those options viable for the homeless person whose acts are at issue?[279]

The Supreme Court may ultimately decide that the Cruel and Unusual Punishments Clause does not immunize actions of homeless persons from being criminalized. The Marshall plurality in *Powell* warned that extension of *Robinson* to conduct would create an unbounded principle with negative repercussions across the field of criminal law.[280] Other courts have expressed similar concerns.[281] Some courts have attempted to address such concerns by adding a requirement that conduct must be both involuntary and innocent before it is entitled to Eighth Amendment protection.[282] This supplementation is clearly needed to avoid potentially catastrophic over-application of the *Robinson* principle,[283] but constitutional limitations upon the exercise of police power already protect innocent conduct from being criminalized.[284] Extension of the *Robinson* principle to conduct may, therefore, be unnecessary and ultimately undesired by the Supreme Court in light of its admonition in *Ingraham v. Wright* that the *Robinson* principle should be sparingly applied.[285] However, the Ninth Circuit holds, and the DOJ has agreed, that substantive limits imposed by the Eighth Amendment's Cruel and Unusual Punishments Clause prevent imposition of criminal penalties

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[278] *See Martin*, 902 F.3d 1031, 1040–42 (9th Cir. 2018).
[279] *See Cobine*, 250 F.Supp.3d at 431 (N.D. Cal. 2017) (quoting *Bell*); Bell v. City of Boise, 834 F. Supp. 2d 1103, 1108 (D. Idaho 2011), *rev'd on other grounds*, 709 F.3d 890 (9th Cir. 2013).
[280] Powell v. Texas, 392 U.S. 514, 532–37 (1967) (Marshall, J.).
[281] *See, e.g.*, Ashbaucher v. City of Arcata, No. CV 08-2840 MPH (NJV), 2010 WL 11211481, at *9 (N.D. Cal. Aug. 19, 2010); Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009); Joyce v. City of San Francisco, 846 F. Supp. 843, 858 (N.D. Cal. 1994).
[282] Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. Jul. 31, 2009); *see also* Johnson v. City of Dallas, 860 F. Supp. 344, 349–50 (N.D. Texas 1994), *rev'd in part*, 61 F.3d 442 (5th Cir. 1995), *and vacated in part*, 61 F.3d 442 (5th Cir. 1995).
[283] *See, e.g.*, Powell v. Texas, 392 U.S. 514, 534 (1968) (Marshall, J.) (expressing concern that such extension would logically excuse a murderer afflicted with a compulsion to kill, and asserting that any limitation would be only by fiat rather than reason); Lehr v. City of Sacramento, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009) (asserting that such extension would provide defense to sex offenders who claimed their conduct was part of a pattern of a disease).
[284] *E.g.*, Fenster v. Leary, 229 N.E.2d 426, 428–30 (1967).
[285] *See* Ingraham v. Wright, 430 U.S. 651, 666–68 (1977).

against homeless persons for engaging in subsistence activities in public when other adequate options are unavailable to them.[286]

[286] Martin v. City of Boise, 902 F.3d 1031, 1047–49 (9th Cir. 2018); Jones v. City of Los Angeles, 444 F.3d 1118, 1130–37 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007); Statement of Interest of the United States at 4, 10, 16, Bell v. Boise 834 F. Supp. 2d 1103 (D. Idaho 2011) (No. 1:09-cv-540-REB).