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**JONES V. CITY OF LOS ANGELES:
A DANGEROUS EXPANSION OF EIGHTH
AMENDMENT PROTECTIONS STIFLES
EFFORTS TO CLEAN UP SKID ROW**

*Emily N. McMorris**

I. INTRODUCTION

Los Angeles County houses a homeless population in excess of 80,000 individuals.¹ Many of these individuals reside on the streets of the City of Los Angeles in an area known as “Skid Row.”² Skid Row covers approximately fifty blocks immediately east of downtown Los Angeles.³ The area houses the greatest concentration of homeless people in the western United States and is the site of twenty percent of all narcotics arrests within the City.⁴

In April 2006, a panel of the Ninth U.S. Circuit Court of Appeals, in *Jones v. City of Los Angeles*,⁵ ruled that the Eighth Amendment right to be free from “Cruel and Unusual Punishment”⁶ prohibited the enforcement of a Los Angeles ordinance (“Ordinance”) aimed at arresting people for sitting or sleeping on city streets, sidewalks, or alleys.⁷ The court held that as long as Los

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1. See Jan Perry, *ACLU's Victory is a Loss for Skid Row*, L.A. TIMES, Apr. 18, 2006, at B11.

2. See Richard Winton, *Plan Would End Homeless 'Tent Cities'*, L.A. TIMES, Sept. 19, 2006, at A1.

3. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1121 (9th Cir. 2006).

4. Winton, *supra* note 2.

5. 444 F.3d 1118.

6. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

7. See L.A., CAL., MUN. CODE § 41.18(d) (2005).

Angeles's homeless population exceeds the number of shelter beds available in the city, the ordinance cannot be enforced during sleeping hours.⁸

Our country faces a homelessness epidemic which is only getting worse. Thus, the American Civil Liberties Union ("ACLU") and the city of Los Angeles should be battling to end homelessness, rather than battling each other over an unfortunate decision which perpetuates homelessness and significantly hinders the Los Angeles police force's efforts to clean up Skid Row.⁹

This comment will explore the landmark cases dealing with conduct derivative of status and its application to Eighth Amendment protections. Through detailed analysis, the comment deconstructs the *Jones* majority's misinterpretation and exceedingly broad reading of these cases in justifying its decision. Finally, the conclusion explores the already present negative ramifications of the court's decision and the inevitable injustices bound to occur due to the court's expansive reading of Eighth Amendment protections. This comment approves of the message sent by the court that being homeless is not a crime, but does not condone the court's dangerously expansive decision.

II. STATEMENT OF THE CASE

The ACLU brought suit on behalf of six homeless individuals, all of whom were arrested or cited for violating the Los Angeles Ordinance designed to aid the City in cleaning up Skid Row.¹⁰ The Ordinance provides that "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way."¹¹ The Ordinance, however, does not apply to "persons sitting on the curb portion of any sidewalk or street while attending or viewing" a permitted parade.¹² The six individuals who brought suit were Edward Jones, Stanley Barger, Patricia Vinson, George Vinson, Thomas Cash, and

8. *Jones*, 444 F.3d at 1138.

9. See Richard Winton & Cara DiMassa, *No Skid Row Accord for City*, L.A. TIMES, Aug. 22, 2006, at B3 ("Before the court decision, police used the ordinance mostly during the day, allowing people to sleep in tents or on the streets at night as long as they were packed up by morning. But since the ruling, officers are not enforcing the ordinance at any hour.").

10. See *Jones*, 444 F.3d at 1120.

11. L.A., CAL., MUN. CODE § 41.18(d).

12. *Id.*

Robert Lee Purrie (“Appellants”).¹³ They argued that shelters are not always an option for them for numerous reasons, such as persons missing the bus to the shelter, shelters not being able to house spouses together, and certain shelters being full.¹⁴ Appellants live on the streets of Los Angeles’ Skid Row district.¹⁵ Each of the six Appellants were deemed to have violated the Ordinance for sleeping on the streets of Skid Row, some during daytime hours and others during the night.¹⁶ Defendants are the city of Los Angeles, Los Angeles Police Department Chief, William Bratton, and Captain Charles Beck (“Appellees”).¹⁷

The homeless individuals sought injunctive relief against enforcement of the Ordinance during sleeping hours, between 9:00 p.m. and 6:30 a.m.,¹⁸ and the parties filed a cross motion for summary judgment.¹⁹ The U.S. District Court for the Central District of California granted summary judgment for the City.²⁰ Appellants appealed and the Ninth Circuit reversed the award of summary judgment to the city of Los Angeles, granted summary judgment to the ACLU, and remanded the case to district court.²¹

III. HISTORICAL FRAMEWORK

The majority’s decision relies heavily upon two landmark Eighth Amendment decisions, *Robinson v. California*²² and *Powell v. Texas*,²³ to reach its determination that Appellants’ conduct was an unavoidable consequence of their status as homeless individuals,²⁴ which is constitutionally protected under the Eighth Amendment. The Ninth Circuit places substantial reliance on these cases in justifying its controversial decision. Nevertheless, it must be noted

13. *Jones*, 444 F.3d at 1120.

14. See Appellees’ Brief at 1, *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) (No. 04-55324).

15. *Jones*, 444 F.3d at 1120.

16. See *id.* at 1124–25.

17. *Id.* at 1120.

18. *Id.*

19. *Id.* at 1125.

20. Appellees’ Brief, *supra* note 14, at 1.

21. See *Jones*, 444 F.3d at 1138.

22. 370 U.S. 660 (1962).

23. 392 U.S. 514 (1968).

24. See *Jones*, 444 F.3d at 1136, 1138.

that the court's reliance on these cases is misplaced. The *Jones* court misinterprets *Robinson* and does not conduct a critical or detailed analysis of the multiple opinions within *Powell*. The court thus arrives at an unsupported decision.

When analyzing the Eighth Amendment, courts consider the "Robinson Test."²⁵ In *Robinson*, a police officer arrested a man for being a drug user after the officer saw what he believed to be track marks on the man's arm.²⁶ The arrest and conviction were based on a California statute making it a criminal offense to be "addicted to the use of narcotics."²⁷ The Supreme Court reversed the conviction, holding that a law criminalizing a person's status as a narcotics addict is an infliction of cruel and unusual punishment in violation of the Eighth Amendment.²⁸ The court's determination that drug addiction is a "status" was drawn from the idea that it is "unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease."²⁹ *Robinson* set the precedent that one cannot be criminalized for his mental state without an accompanying act. Thus, the case does not deal with criminalizing conduct or conduct derivative of status.³⁰

Six years later, the justices in *Powell* diverged regarding whether certain conduct derivative of one's status was in fact voluntary. A four justice plurality, headed by Justice Marshall, held that a Texas statute³¹ which made it illegal to be drunk in a public place did not violate the Eighth Amendment's Cruel and Unusual Punishment Clause.³² They reasoned that *Powell*, who was arrested and charged with being found drunk in public, was not being punished for his "status" or "condition" of being a chronic

25. *Municipalities Should Reconsider Anti-Homeless Ordinances*, 26 MUN. LITIG. REP. 166 (2006) (reviewing Justin Cook, *Down and Out in San Antonio: The Constitutionality of San Antonio's Anti-Homeless Ordinances*, 9 SCHOLAR 221 (2006)).

26. *See Robinson*, 370 U.S. at 661–62.

27. *Id.* at 660 (citing CAL. HEALTH & SAFETY CODE § 11721 (repealed 1972)).

28. *See id.* at 666 (citing *Francis v. Resweber*, 329 U.S. 459 (1947)).

29. *Id.*

30. *See id.*

31. TEX. PENAL CODE ANN. § 477 (Vernon 1952) ("Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.").

32. *See Powell v. Texas*, 392 U.S. 514, 531–37 (1968) (Marshall, J., plurality).

alcoholic.³³ Rather, he was punished for the conduct of being found drunk in a public place.³⁴ The four dissenting justices in *Powell* interpreted *Robinson* to stand for the notion that an individual cannot be penalized for a condition that he or she is incapable of changing,³⁵ and thus a person who commits some involuntary act or “compulsion” due to their condition or disease cannot be punished for such an act.³⁶

Justice White’s swing-vote concurrence provided the crucial vote to the divided panel, a vote which upheld Powell’s conviction. While White expressed his view that one should not be punished for yielding to a compulsion which stems from a disease,³⁷ he obviously did not feel comfortable joining the broad and unqualified opinion of the dissenters concerning what is required to deem conduct involuntary. White stressed that a chronic alcoholic who is able to prove his disease can be convicted for being drunk in public, unless he can affirmatively prove both an involuntary compulsion to drink and that it is impossible for him to stay out of public places while drunk.³⁸ White’s opinion set a strict standard for classifying conduct as involuntary. White did not feel that Powell had proven that he was in such a state of intoxication as to have lost the ability to understand what he was doing, nor did White feel it had been proven impossible for Powell to stay off the street that night.³⁹ Distinguishing himself from the dissenters, White suggested that some conduct resulting from a disease may be immune from criminalization, but he would not deem Powell’s conduct involuntary,⁴⁰ even though medical testimony suggested otherwise.⁴¹ Due to the sharp divide amongst the Justices, White’s opinion had

33. *See id.* at 532–534.

34. *See id.*

35. *Id.* at 566 (Fortas, J., dissenting).

36. *See id.* at 569–70.

37. *Id.* at 548–50 (White, J., concurring).

38. *See id.* at 550.

39. *Id.* at 553–54.

40. *Id.*

41. *See id.* at 518 (Marshall, J., plurality). Dr. David Wade, a Fellow of the American Medical Association, testified that he examined Powell and would classify him as a “chronic alcoholic,” who when intoxicated was not able to control his behavior. *Id.* Dr. Wade also noted that Powell reached this level of intoxication because his compulsion to drink was uncontrollable. *Id.*

the effect of deciding the case, as he agreed with the plurality that the defendant's conduct was voluntary.⁴²

Robinson and *Powell* are distinguishable from one another in that the former dealt with punishing mere status while the latter dealt with punishing conduct derivative of status. In criminalizing conduct derivative of status, the *Powell* plurality recognized the importance of placing limits on "public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public."⁴³

The *Powell* plurality also made the point that [t]he primary purpose of . . . [the Cruel and Unusual Punishment] clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed.⁴⁴

Even though a later case, *Ingraham v. Wright*,⁴⁵ stated that one of the three effects of the Cruel and Unusual Punishment Clause is that it "imposes substantive limits on what can be made criminal and punished as such," the plurality stressed that this limitation is to be used "sparingly."⁴⁶

IV. REASONING OF THE COURT

The *Jones* court dealt with the issue of whether the Eighth Amendment prohibits enforcement of the Ordinance as applied to homeless individuals "involuntarily sitting, lying, or sleeping on the street."⁴⁷ The court justified its decision based on the decisions in *Robinson* and *Powell*.⁴⁸

42. See *id.* at 553–54 (White, J., concurring).

43. *Id.* at 532 (Marshall, J., plurality).

44. *Id.* at 531–32 (citing *Trop v. Dulles*, 356 U.S. 86 (1958); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Weems v. United States*, 217 U.S. 349 (1910)).

45. *Ingraham v. Wright*, 430 U.S. 651 (1977).

46. *Id.* at 667.

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

48. See *id.* at 1138.

The court interpreted *Robinson* to support the idea that a “state cannot punish a person for certain conditions” arising from one’s own conduct, or for acts one is unable to avoid.⁴⁹

The *Jones* court relied on the dissent and Justice White’s concurrence in *Powell* to justify its holding. The court claimed that these separate opinions both suggest that the “Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the an unavoidable consequence of one’s status or being.”⁵⁰

The court read these two cases together to suggest that the involuntariness of the act or condition being criminalized is essential in “delineating a constitutionally cognizable status.”⁵¹ Based on these two cases, the court held that the Ordinance encroached upon the Appellant’s Eighth Amendment protection that “imposes substantive limits on what can be made criminal and punished as such.”⁵²

The court held that under *Robinson*, one could not be criminalized for one’s status, and that under *Powell*, one could not be criminalized for certain involuntary conduct.⁵³ The court stated that the conduct of the Appellants was involuntary and inseparable from their status. It reasoned that because biologically, people must rest,⁵⁴ and that for these people, sleeping on the streets was an unavoidable consequence of being homeless and without shelter in Los Angeles.⁵⁵ The court deemed the Appellants to be in a “chronic state that may have been acquired ‘innocently or involuntarily.’”⁵⁶ Based on these conclusions, the court found the Appellants had shown that they were not able to stay off the streets, and, therefore, enforcement of the Ordinance at night was cruel and unusual punishment in violation of the Eighth Amendment.⁵⁷ The court stated that as long as the number of homeless individuals in Los Angeles exceeds the number

49. *See id.* at 1133 (citing *Robinson v. California*, 370 U.S. 660, 666–67 (1962)).

50. *See id.* at 1135 (citing *Powell v. Texas*, 392 U.S. 548, 550 n.2, 551 (1968) (White, J., concurring); *Powell*, 392 U.S. at 567 (Fortas, J., dissenting)).

51. *See Jones*, 444 F.3d at 1132.

52. *Id.* at 1127.

53. *See id.* at 1133–35.

54. *Id.* at 1136.

55. *Id.* at 1138.

56. *Id.* at 1136 (quoting *Robinson v. California*, 370 U.S. 660, 667 (1962)).

57. *See id.*

of shelter beds in the City, the Ordinance shall not be enforced during sleeping hours.⁵⁸

V. ANALYSIS

A. *The Powell Dissent Should Be Limited to Its Facts*

The *Jones* majority did not conduct a thorough analysis of all the *Powell* opinions. The court thus reached a holding that is overbroad and does not directly follow from a close reading of White's determinative and narrow concurrence. The majority rationalized its disregard of the plurality opinion by noting that Justice White and the plurality did not agree on the meaning of the Cruel and Unusual Punishment Clause. The court thus limited the plurality opinion to its specific facts.⁵⁹ The court erred in failing to acknowledge that Justice White urged a stricter approach concerning involuntary conduct than that of the dissenters.⁶⁰ Hence, the *Jones* court should have also limited the breadth of the dissent to its specific facts and placed a greater emphasis on the standards set forth by Justice White.

B. *Because the Requirements Set Forth by Justice White in Powell Were Not Satisfied in Jones, the Court Incorrectly Relied on His Opinion*

On an analytical level, the stringent requirements advocated by Justice White were not satisfied by the circumstances presented in the *Jones* case. The *Jones* court concluded that the Appellants had no choice but to sleep on the streets. The court, however, did not refer or provide citation to the record to substantiate its conclusion.⁶¹ Rather, there was no indication that shelter was unavailable on the nights that the Appellants were cited for violating the Ordinance.⁶² In fact, evidence suggested that the Appellants, each in their own way, made an affirmative choice not to take advantage of Los Angeles shelters on the nights in question.⁶³ As in *Powell*, the

58. *Id.* at 1138.

59. *Id.* at 1135.

60. *See supra* notes 37–42 and accompanying text.

61. *See Jones*, 444 F.3d at 1124–25, 1137.

62. *Id.* at 1139–40 (Rymer, J., dissenting).

63. *See infra* notes 98–100 and accompanying text.

Appellants in *Jones* did not make an affirmative showing that it was impossible for them to stay off the streets on these specific nights.⁶⁴ Thus, the Appellants did not satisfy Justice White's standards for deeming conduct involuntary. The majority in *Jones* incorrectly fused the broader dissent with White's noticeably stricter opinion and, consequently, reached a conclusion that is not justified by the precedent set by *Powell*.

*C. Powell's View of Involuntariness Is Limited
to Situations Involving Disease and Addiction*

In addition, the *Jones* majority adopted a sweeping view of involuntariness that exceeds the limits advocated by the *Powell* plurality, dissent, and White's concurrence. The plurality expressly stated that the Appellant was not convicted due to his status as a chronic alcoholic, but rather for his conduct of being drunk in public. The plurality deemed the Appellant's conduct voluntary, which does not trigger an application of the Cruel and Unusual Punishment Clause under *Robinson*.⁶⁵ Thus, the *Jones* decision not only exceeds but directly rejects the plurality's interpretation of involuntariness.

The *Jones* court goes astray in its expansion of the *Powell* opinions on which it relies—namely the dissent and White's concurrence. These *Powell* justices, who advocate that certain conduct may not be criminalized, all seem to indicate that their considerations of voluntariness are limited to the realm of diseases and addictions, which create compulsive behaviors.⁶⁶ The dissenters focused on alcoholism as a disease, stressing that it depends on the "physiological or psychological make-up and history" of a person and is something he has no control over, in order to support their argument that Powell's conduct was involuntary.⁶⁷

64. *Id.*

65. See *Powell v. Texas*, 392 U.S. 514, 532 (1968) (Marshall, J., plurality).

66. Justice White, in his concurrence, discusses the use of narcotics and indicates that it can not be a crime to "yield to . . . a compulsion." *Id.* at 548 (White, J., concurring). However, White's opinion only evaluates the conduct of chronic alcoholics. *Id.* In his dissenting opinion, Justice Fortas acknowledges that the only issue in the case is whether one suffering from a disease can be penalized for a condition which is a characteristic "part of the pattern of his disease and due to a compulsion symptomatic of that disease." *Id.* at 559 n.2 (Fortas, J., dissenting). The opinion states there is a distinction between the condition of being drunk in public and other offenses which "require independent acts or conduct [where such acts] do not typically flow from and are not part of the syndrome of the disease." *Id.*

67. *Id.* at 561 (Fortas, J., dissenting).

The *Jones* court did not deal with a compulsion stemming from a disease, but rather conduct stemming from multiple causes, one of which was homelessness.⁶⁸ Homelessness may be considered, in some circumstances, a situation caused by economic hardship,⁶⁹ but is certainly not a disease. Thus, an extension of the rationale used by some of the Justices in *Powell* is not justified, as the situations underlying the cases are not analogous. The Justices in *Powell* vehemently disagreed as to whether conduct stemming from a disease should be considered involuntary. The *Jones* majority should have recognized the importance of the rift amongst the *Powell* court and the tenuous link between a case about a disease and a case about economic status. Had the *Jones* majority been more critical in its analysis of *Powell*, it seems likely the court would have affirmed the lower court's decision, thus allowing the Ordinance to remain in effect throughout the day.

The *Powell* dissent seems to immunize from punishment compulsive conduct caused by a disease. Consequently, extending the *Powell* decision to conduct caused by economic hardship presents a new set of dangers. The possible implications of the Court's decision, with respect to economic status, are discussed below in Section VI, subsection A. Relating to the issue specifically delineated in the case, it must be noted that various *Powell* Justices described the likely implications of immunizing from punishment those who suffer from compulsions.

The *Jones* court should have heeded the warnings set forth by the *Powell* plurality and in Justices Black and Harlan's concurrence, concerning the limitless application that may flow from the dissent's opinion.⁷⁰ Justices Black and Harlan felt that if conduct derivative of one's status is immunized from criminalization, states will not be able to punish people whose conduct is the product of a "compulsion."⁷¹ They suggested that sex offenders would not be punished if they were able to show their actions were involuntary and a symptom of a

68. See *infra* notes 97–100 and accompanying text.

69. See National Law Center on Homelessness & Poverty, http://www.nlchp.org/FA_HAPIA/ (last visited Feb. 15, 2007) (stating that the most common causes of homelessness are: lack of affordable housing, lagging incomes and decreasing governmental assistance).

70. See *Powell*, 392 U.S. at 534 (Marshall, J., plurality); see also *id.* at 545 (Black & Harlan, JJ., concurring).

71. *Id.* at 544 (Black & Harlan, JJ., concurring) (internal quotation marks omitted).

disease.⁷² The plurality indicated that, under the dissent's rationale, a person may not be punished for murder if that person "suffers from a 'compulsion' to kill."⁷³ These examples indicate the policy concerns regarding the potential broad readings that might stem from holding a defendant's conduct involuntary. These fears seemed to be a major consideration for four Justices in *Powell*. Hence, the same concerns should have been considered when the court made its decision in *Jones*. It seems that the majority in *Jones* ignored a key consideration in *Powell*—namely, that holding conduct derivative of status to be involuntary may open the flood gates to claims that a person's criminal conduct was involuntary due to the situation they were in at the time.

*D. The Powell Dissent and
White's Concurrence Misinterpret Robinson*

In *Powell*, the dissenters and Justice White based their conclusion about conduct on their interpretation of *Robinson*,⁷⁴ a case which dealt with a situation where no conduct or act was involved.⁷⁵ This reliance on *Robinson* was a stretch as the court only addressed criminalizing pure status, not conduct.⁷⁶ The dissenters and Justice White read a holding into *Robinson* that was not directly addressed by the court in its decision. Once again, the *Jones* court should have more closely analyzed the *Powell* dissent and White's concurrence before placing such reliance on them.

The interpretation of *Robinson* that is supported by the facts in the case is that criminal punishment can be imposed only if the accused has committed an act. *Robinson* does not directly address whether conduct cannot be constitutionally punished because it is "involuntary."⁷⁷ Here, the Appellants did commit an act: they slept

72. *Id.* at 545.

73. *Id.* at 534 (Marshall, J., plurality).

74. See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1143–44 (9th Cir. 2006); see also *Powell*, 392 U.S. at 548–54 (White, J., concurring); *id.* at 565–68 (Fortas, J., dissenting).

75. See *Robinson v. California*, 370 U.S. 660, 661–67 (1962).

76. *Id.*

77. See *Jones*, 444 F.3d at 1143–44 (Rymer, J., dissenting); see also Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 650–53 (1966). The interpretation of *Robinson* that most courts have adopted is that of a pure status theory. *Id.* at 650. Under this theory, "no law may criminally punish drug addiction unless addiction is defined to require the commission of acts." *Id.*

in public areas. As a result, *Jones* falls out of the purview of *Robinson*'s holding, which only applies to cases lacking an actus reus.⁷⁸ Thus, the court's reliance on *Robinson* was misplaced. This diluted string of inferences and lack of critical analysis suggests that the court simply decided its ends and did whatever it took to create a viable means to reach it.

The court in *Jones* should have used judicial restraint and recognized that it is a "rare type of case" that allows the Eighth Amendment to place substantive limits on what conduct can be made criminal.⁷⁹ If courts do not respect the limits set forth in *Robinson*, they will become "the ultimate arbiter of the standards of criminal responsibility,"⁸⁰ and states will not be able punish actions that result from something "involuntary," such as a compulsion.⁸¹ Further, the decision in *Jones* is the perfect example of the dangers that stem from a decision that "involuntary" conduct cannot be punished, when "involuntary" is not defined.

E. The Jones Court Ignored the Holding in Joyce

The majority in *Jones* concluded that being homeless is a status, rather than a condition.⁸² This was a key element of its argument that involuntary conduct derivative of status is constitutionally protected under the Eighth Amendment. In so holding, the majority in *Jones* ignored the precedent set in a U.S. District Court Case, *Joyce v. City and County of San Francisco*.⁸³ While *Joyce* is classified as persuasive authority, the similarities between its facts and those of the *Jones* case heighten *Joyce*'s relevance.

The *Joyce* court dealt with the constitutionality of a law enforcement plan called the "Matrix Program," which directed its

78. See *Robinson*, 370 U.S. at 660–67. It is also interesting to note that courts have followed this interpretation, as advocated by the *Powell* plurality. See, e.g., *United States v. Parga-Rosas*, 238 F.3d 1209, 1212 (9th Cir. 2001) (noting that the point of *Powell* and *Ayala* is that criminal penalties can be imposed only if the accused "has committed some actus reus"); *United States v. Ayala*, 35 F.3d 423, 426 (9th Cir. 1994) (citing *Powell*, 392 U.S. at 533 (Marshall, J., plurality)).

79. *Jones*, 444 F.3d at 1138 (Rymer, J., dissenting) (internal quotation marks omitted).

80. *Powell*, 392 U.S. at 533 (Marshall, J., plurality).

81. *Id.* at 544 (Black & Harlan, JJ., concurring).

82. See *Jones*, 444 F.3d at 1131 (noting that the district court erred in not conducting a more thorough analysis of *Robinson* and *Powell* when it held that "homelessness is not a constitutionally cognizable status").

83. 846 F. Supp. 843 (N.D. Cal. 1994).

efforts at ending street crime.⁸⁴ One aspect of the plan targeted sleeping in parks and prohibited putting up tents in public parks.⁸⁵ The court in *Jones* ignored the standard set forth in *Joyce* for a variety of unsupported reasons. The *Jones* court distinguished itself from *Joyce* because the plaintiffs in *Joyce* “did not make the strong evidentiary showing of a substantial shortage of shelter” that the Appellants made in *Jones*.⁸⁶ This distinction, however, is unsubstantiated as evidence suggested that the Appellants in *Jones* also did not prove a lack of shelter on the nights in question.⁸⁷ The *Jones* majority also claimed that the *Joyce* court did not enjoin enforcement of certain statutes against the homeless, including a statute which prohibited sleeping in public areas, because the injunction sought was too broad. The *Jones* majority thus claimed *Joyce* was “based on a very different factual underpinning.”⁸⁸

In reality, the *Jones* court focused on insignificant details to distinguish the cases and in doing so, completely ignored the strong similarities between the cases, including similar policy concerns. Both cases dealt with the issue of whether homelessness and sleeping on the streets can be considered involuntary conduct and the Eighth Amendment implications that flow from such a determination.⁸⁹ Like the court in *Jones*, the court in *Joyce* analyzed whether homelessness could be considered a status and determined that homelessness was not a status, but rather a condition.⁹⁰

The holding in *Joyce* that homelessness is not a status, as “status cannot be defined as a function of the discretionary acts of others,”⁹¹ should have played a role in deciding *Jones*, as the cases are in many ways analogous. This is supported by the fact that the Supreme Court has held that there is no constitutional right to shelter meeting

84. *Id.* at 845–46.

85. *Id.* at 846.

86. *Jones*, 444 F.3d at 1131–32.

87. *See infra* notes 97–100 and accompanying text.

88. *Jones*, 444 F.3d at 1131.

89. *See id.* at 1131–38; *Joyce*, 846 F. Supp. at 853–58.

90. *Joyce*, 846 F. Supp. at 857–58.

91. *See id.* at 857. Examples of status characteristics are: age, race, gender, national origin, and illness. *Id.* The court also notes that there is a difference between drug addiction and homelessness: “To argue that homelessness is a status and not a condition . . . is to deny the efficacy of acts of social intervention to change the condition of those currently homeless.” *Id.*

certain standards.⁹² "Being homeless . . . is a transitory state. Some people fall into it, others opt into it."⁹³ Classification as homeless changes on "a daily basis and can change depending upon income and opportunities for shelter."⁹⁴ No court has held that status (i.e., being homeless under the *Jones* decision) plus a condition (i.e., being without shelter) which subsists because of another's discretionary action, such as Los Angeles' failure to provide enough shelter, is an involuntary condition protected from penalization.⁹⁵ It seems that the *Jones* court reached an unsupported conclusion that the two cases presented very different factual situations, in order to avoid applying the *Joyce* holding to its case.

By not holding the homeless responsible for their conduct, the court effectively immunizes people from liability when they commit an act that results from a condition caused by the government's failure to provide a benefit.⁹⁶ Making a person immune from liability based on lack of aid by another may open the door to a variety of crimes that states will no longer be able to punish.

F. The Jones Court Did Not Make a Sufficient Showing That Shelter Was Unavailable on the Nights in Question

Additionally, the majority in *Jones* claimed that the failure to supply beds caused the prohibited act, but there was no showing that shelter was unavailable on those nights.⁹⁷ For example, with regard to Appellant, Robert Lee Purrie, there was no evidence presented which tended to show he was turned away from a shelter.⁹⁸ Appellant, Edward Jones, chose not to sleep in a shelter because the shelters segregate men and women, and his wife suffers from severe emotional distress when they are separated.⁹⁹ Appellants, Patricia and George Vinson, slept on the street on the night they were cited because they missed the bus to the shelter.¹⁰⁰ The dissent's view is

92. See *Lindsey v. Normet*, 405 U.S. 56 (1972).

93. *Jones*, 444 F.3d at 1146 (Rymer, J., dissenting).

94. *Id.*

95. See *id.* at 1139.

96. *Id.*

97. See *id.*

98. See *id.* at 1140.

99. See Appellees' Brief, *supra* note 14, at 5.

100. See *id.* at 6.

supported by Jan Perry, a councilwoman representing the Ninth District, who insists that “no one is arrested by the LAPD before being offered a bed for the night at a local shelter.”¹⁰¹ In reality, the Ordinance has been used very sparingly¹⁰² and has exposed criminal activities that would not have been discovered without the ability to enforce the Ordinance.¹⁰³ This discrepancy in the court’s reasoning, in conjunction with the various articles describing how the Ordinance is actually being used on the streets, illustrates that the City’s ability to provide stability by reducing crime in areas like Skid Row is contingent on having the resources necessary to effectuate plans of enforcement.

VI. IMPLICATIONS

A. The Legal Ramifications of Jones

Jones presents just the kind of situation where limits need to be placed on conduct. Allowing scores of people to sleep in public areas creates a serious threat to public health and safety. The legalized encampments that have resulted from the court’s decision have made the area more dangerous.¹⁰⁴ These tents now offer “private office space for dealers and pimps, and the police will be powerless to intervene.”¹⁰⁵ In order to provide safety within homeless communities and predictability to the courts, the court in *Jones* should have construed the “substantive limits” effect of the Eighth Amendment narrowly, as has been suggested by other courts.¹⁰⁶

The precedent set by *Jones* houses a variety of legal ramifications. Other cases have identified the possible impact of a decision similar to *Jones*. In *Joyce*, the court recognized the uncer-

101. Perry, *supra* note 1, at B11.

102. See Richard Winton & Patrick McGreevy, *Appeal of Skid Row Ruling is Urged*, L.A. TIMES, Apr. 19, 2006, at B4. According to the City’s Police Chief William J. Bratton, the no sleeping ordinance has only led to fifty eight arrests this year and “[t]he idea we [the LAPD] are somehow arresting dozens of people every day is garbage.” *Id.*

103. *Id.* Police Chief Bratton told the commission that the ability to arrest people for sleeping on the streets is a “very effective tool.” *Id.* Additionally, Captain Andy Smith, commander of the downtown area, said that the Ordinance is used for probable cause to question people. *Id.* This practice “has led to the discovery of other crimes.” *Id.*

104. Brady Westwater, *Handing Skid Row to the Drug Dealers*, L.A. TIMES, Sept. 20, 2006, at B15.

105. *Id.*

106. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

tainty that would result in upholding the plaintiff's claim that a statute should be invalid because it targets "life-sustaining activities such as sleeping, sitting or remaining in a public place."¹⁰⁷ The court stressed that such a determination would cause governments to be left blind as to what conduct would then be immunized from government regulation.¹⁰⁸ The court worried that other conduct such as "urinating and defecating in public and aggressive panhandling" could be considered "life sustaining activities."¹⁰⁹ This decision involves a dangerously broad reading of *Jones* and opens the floodgates as to what constitutes "involuntary" conduct.

If the *Jones* decision is read to require housing for the entire homeless population of Los Angeles and panhandling is one day considered "life sustaining" but prohibited by statute, the City may be required to provide sufficient food and money to all homeless individuals. Such a decision would certainly not bring Los Angeles any closer to ending homelessness altogether, which one can only hope is the ultimate goal.

B. *Jones's Impact in Los Angeles*

The constitutional basis for the decision in *Jones* is, at a minimum, shaky. However, it spreads an important message to Los Angeles and its varied communities—namely, that homelessness is a problem that Los Angeles and the nation can no longer ignore. The court's decision broadened the scope of the Eighth Amendment, and at the same time, stymied law enforcement from fighting crime and blight on Skid Row. Since the court's decision in April, the Los Angeles Police Department's ("LAPD") count of homeless individuals living on the streets of Skid Row has skyrocketed, and the number of tents present on Skid Row has become stifling.¹¹⁰

107. *Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 851 (N.D. Cal. 1994) (quoting Plaintiffs' Proposed Order Granting Mot. for Prel. Inj., *Joyce v. City and County of San Francisco*, No. C-93-4149 (N.D. Cal. 1994)).

108. *See id.* at 851.

109. *Id.*; *cf. Glasheen v. City of Austin*, 840 F. Supp. 62 (W.D. Tex. 1993) (upholding city ordinance designed to reduce aggressive panhandling); *Young v. N.Y. City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990) (reversing lower court injunction enjoining the defendant from prohibiting panhandling)).

110. Winton, *supra* note 2. Before the *Jones* decision, the LAPD count found there to be 1345 homeless individuals living on Skid Row and 187 tents. *Id.* On July 25, 2006 the number of homeless individuals living on Skid Row rose to 1527, and 539 tents were counted. Then, on September 18, 2006 the count rose again to 1876 homeless people and 518 tents. *Id.*

Additionally, drug dealing and violent crime in communities near Skid Row has “explode[d]” since the April decision.¹¹¹ So, while the ACLU’s suit was undoubtedly filed with the noble intention of helping the situation of the Los Angeles homeless community, it seems that the decision has had the opposite effect.

The court’s decision only reinforces the notion that Los Angeles’s Skid Row is the dumping ground for the region’s homeless.¹¹² The number of homeless on Skid Row is multiplying, and Los Angeles is left without a means to do anything about it. The decision in *Jones* was undoubtedly reached with the goal of immediately bettering the situation for homeless individuals in Los Angeles. The long term goal, however, which should be to end homelessness and keep the City’s homeless population as safe as possible, is certainly not advanced by this decision.¹¹³

Unable to crack down on the homelessness and drug problem on Skid Row, the City Police Chief, William Bratton, and the Mayor of Los Angeles, Antonio Villaraigosa, have been pushing for a settlement with the ACLU.¹¹⁴ In late September, the Los Angeles City Council voted ten to three, in a closed session, to reject the proposed settlement.¹¹⁵ The settlement would have allowed the homeless to sleep on the streets of Skid Row from 9:00 p.m. until 6:00 a.m.¹¹⁶ It is unfortunate that the city of Los Angeles will continue to spend limited funds on a legal defense rather than putting that money toward social projects to combat homelessness.

Additionally, the settlement exposed yet another possible consequence of the Ninth Circuit’s decision. One of the reasons that

111. Westwater, *supra* note 104 (statement made by Brady Westwater, a neighborhood council activist and writer for www.citywatchla.com).

112. Perry, *supra* note 1. Two thirds of the cities in the Los Angeles region do not even allow shelters, which is a violation of state law. “The . . . decision will only reinforce the view of law enforcement authorities and mental health officials from outside Los Angeles that public drunks, drug users, homeless people and those suffering from mental illness belong not in their city, but in downtown L.A.” *Id.*

113. See Westwater, *supra* note 104 (“Legalizing encampments will only make it harder to get the homeless off the streets, while making their lives more dangerous. During the police-free hours every night, the tents will offer private office space for dealers and pimps, and the police will be powerless to intervene. During the day, these tents will be folded up and leaned against a fence until the clock strikes 9 p.m.”).

114. See *id.*; see also Steve Hyman & Richard Winton, *Attempt to Settle Skid Row Suit Fails*, L.A. TIMES, Sept. 21, 2006, at A1.

115. Hyman & Winton, *supra* note 114.

116. *Id.*

the Council denied the settlement was due to fear that the ACLU would make similar arguments for other parts of the City, "setting a precedent that could result in people sleeping on sidewalks in Hollywood, Venice and elsewhere."¹¹⁷ Such a settlement would likely continue to draw homeless individuals from other communities in the region to Los Angeles, which may further paralyze the City's fight against homelessness.¹¹⁸

Though the ACLU and the city of Los Angeles have very different takes on the proper path to end homelessness, especially with regard to short term efforts, it is safe to say that both sides want to see homelessness come to an end. Ending homelessness is a goal on which this comment does not purport to hypothesize. However, it seems that both the ACLU and the city of Los Angeles, by choice or not, have focused their energy on plans that do not bring such goals into view. While putting the homeless in jail for sleeping on the streets is certainly not the answer, using shoddy constitutional reasoning to block an ordinance that gives law enforcement officers "tools to work with,"¹¹⁹ is not the answer either.

VI. CONCLUSION

Los Angeles cannot be expected to house the region's entire homeless population, which exceeds 80,000 people.¹²⁰ The entire region needs to work together.¹²¹ "[E]fforts to improve the district have focused too narrowly on public safety and policing, rather than including issues such as housing, supportive services and moving homeless services out of downtown."¹²² Homelessness has not

117. *Id.*; see also Westwater, *supra* note 104 ("Keeping this bad decision on the books opens up the likelihood that someone will use the same legal reasoning to erect tent cities on the sidewalks of Venice, Hollywood or anywhere else a homeless 'advocate' can complain about insufficient shelter beds."). The article also notes the danger in locking the city into a "process that will create permanently protected havens for drug dealers. We can't let the ACLU forcibly privatize public sidewalks for anyone who wishes to live on them." Westwater, *supra* note 104; see also Winton, *supra* note 2 ("Any settlement that leaves people living on the street in filthy conditions and permits chaos from 9 to 6 every night in one critical area of the city is unacceptable," said Carol Schatz, president and chief executive of the Central City Assn.).

118. See Hyman & Winton, *supra* note 114.

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

120. See Perry, *supra* note 1.

121. See *id.*

122. DiMassa & Winton, *supra* note 119.

always been the pervasive social problem that it is today. The government, with the help of organizations, such as the ACLU, and cities, such as Los Angeles, can help undo the crisis. Creating more low income housing, treatment on demand for substance abuse and mental illness, and providing a living wage for workers would be a start.¹²³

On the other hand, this case and its controversial decision may have brought to the problem of homelessness a sense of urgency that was not present before. Police Chief Bratton is considering a plan that would crack down on the lawlessness present on Skid Row by “flooding downtown with police officers and surveillance cameras and establishing a zero-tolerance mind-set.”¹²⁴ These are hopeful signs that the city is changing and reworking its policies. One can only hope that this momentum does not fade with the lengthy appeals process that seems inevitable.¹²⁵

123. See Editorial, *Homeless and Sleepless*, BOSTON GLOBE, Apr. 24, 2006, at A10.

124. Editorial, *Finding a Way Home: Right Result, Wrong Reason*, L.A. TIMES, Apr. 18, 2006, at B10.

125. See *id.*

