

***Jones v. City of Los Angeles*: In Search of a Judicial Test of Anti-Homeless Ordinances**

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Introduction

The United States Court of Appeals for the Ninth Circuit issued a decision in *Jones v. City of Los Angeles*¹ declaring that enforcement of L.A., CAL., MUN. CODE § 41.18(d) (2005) violated Appellants' Eighth Amendment rights against cruel and unusual punishment. Appellants were homeless people who lived in the area of Los Angeles known as Skid Row.² Appellants' various sources of support from Social Security, General Relief, food stamps, and other programs left them unable to purchase housing in a hotel every night, and they were not always able to obtain a bed in a free shelter.³ The number of homeless in Skid Row in particular, and in Los Angeles generally, exceeded the number of available shelter beds.⁴ As a result of their inability to procure shelter, appellants were arrested and/or cited in violation of the aforementioned code, which prohibits any person from sitting, lying, or sleeping in or on any street, sidewalk, or other public way.⁵ The court held that in these specific circumstances—where the number of homeless people exceeded the number of available beds—enforcement of the ordinance would violate appellants' Eighth Amendment rights.⁶

Part I of this Article will illustrate the context for the *Jones*

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1. 444 F.3d 1118, 1138 (9th Cir. 2006).

2. *Id.* at 1124–25.

3. *Id.*

4. *Id.* at 1122.

5. *Id.* at 1123–25.

6. *Id.* at 1138.

decision through an examination of the history of homelessness, anti-homeless statutes, and the case law pertinent to an Eighth Amendment challenge for punishment of status. Part II will explain the *Jones* holding and its use of the precedents set forth in *Robinson v. California*,⁷ *Powell v. Texas*,⁸ and *Ingraham v. Wright*.⁹ Part III will examine the strength of the *Jones* holdings with regard to standing and protection of status, and criticize the applicability of the test formulated by the majority. It will argue that, in addition to formulating an unworkable test, the limits of the majority's holding effectively hamstrings future challenges to anti-homeless legislation by requiring a showing of a lack of available shelter while negatively implying that cities can effectively force homeless people into shelters. This Article will also examine the contention, advanced elsewhere, that a model exempting life-sustaining acts from criminal punishment is preferable to a judicial inquiry of the type undertaken in *Jones*.

I. The Law Prior to *Jones*

A. *The Evolving Problem of Homelessness in the United States*

Historically, homelessness has been targeted through the use of vagrancy statutes.¹⁰ The criminalization of vagrancy dates back to the fourteenth century enactment of the Statutes of Labourers.¹¹ In sixteenth and seventeenth century Europe, vagrants were beaten or confined with the aim of eliminating idleness and teaching the virtues of labor.¹² During the nineteenth century in the United States, the vagrants' presumed idle nature and potential criminality motivated the passage and

7. 370 U.S. 660 (1962).

8. 392 U.S. 514 (1968).

9. 430 U.S. 651 (1977).

10. See LEONARD C. FELDMAN, *CITIZENS WITHOUT SHELTER: HOMELESSNESS, DEMOCRACY, AND POLITICAL EXCLUSION* 30–31 (2004) (detailing vagrancy laws beginning in the sixteenth and seventeenth centuries).

11. Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From American Cities*, 66 TUL. L. REV. 631, 635 (1992).

12. *Id.* at 31; see also Donald E. Baker, "Anti-Homeless" Legislation: *Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417, 427 n.52 (1990) (noting the justifications for punishing vagrancy in the English common law).

enforcement of vagrancy statutes.¹³ Vagrancy laws remained in force in the United States through the first half of the twentieth century.¹⁴

The face of homelessness in the United States has changed significantly over the past 150 years.¹⁵ In the nineteenth century, the homeless population consisted largely of the unemployed or periodically employed, poor, men, and immigrants.¹⁶ Today the homeless population is demographically diverse.¹⁷ During the 1980s and 1990s, women and children were among the fastest growing segments of the homeless population.¹⁸ A survey of twenty-five cities in 2000 found that “single men” and “families with children” composed roughly equal portions of the homeless population, with “single women” and “unaccompanied youth” trailing behind.¹⁹

Due to either more detailed study of homelessness or as a result of the changing population, or perhaps a combination of both, the causes of homelessness also seem to have evolved. This does not mean that a certain event can be identified as the cause of any single person’s homelessness,²⁰ or that the causes of homelessness generally may be clearly delineated.²¹ A multitude of interdependent factors, such as the availability of affordable

13. See FELDMAN, *supra* note 10, at 31–32.

14. *Id.* at 34.

15. See GERALD P. DALY, *HOMELESS: POLICIES, STRATEGIES, AND LIVES ON THE STREET* 51–88 (1996) (giving an overview of the homeless population from the late nineteenth century through the mid-twentieth century); JEAN CALTERONE WILLIAMS, “A ROOF OVER MY HEAD”: *HOMELESS WOMEN AND THE SHELTER INDUSTRY* 1 (2003) (stating that women and children comprise a “surprising” subset of the “new” homeless).

16. See DALY, *supra* note 15, at 52–54 (discussing the composition of the homeless population in the late nineteenth and early twentieth centuries); WILLIAMS, *supra* note 15, at 1 (stating that the late nineteenth and early twentieth century homeless population consisted of “hobos and itinerant workers”).

17. Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL’Y REV. 1, 5–6 (1996); Jennifer E. Watson, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 506 (2003).

18. WILLIAMS, *supra* note 15, at 1.

19. See Watson, *supra* note 17, at 506 (“In 2000, the U.S. Conference of Mayors reported that, of the twenty-five cities surveyed, ‘single men comprise 44% of the homeless population, families with children 36%, single women 13%, and unaccompanied youth 7%.’”).

20. See WILLIAMS, *supra* note 15, at 19 (stating that it is “impossible to find one reason to explain each woman’s homelessness”).

21. MARTHA R. BURT ET AL., U.S. DEP’T OF HOUS. AND URBAN DEV., *STRATEGIES FOR PREVENTING HOMELESSNESS* xii–xiii (2005).

housing and government assistance, medical emergency, unemployment, drug use, and mental illness work to render single men and women, as well as families, homeless.²²

Congress has defined a "homeless person" as someone who "lacks a fixed, regular, and adequate nighttime residence," and whose primary nighttime residence is a privately or publicly operated shelter, an institution, or a "public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings."²³ This definition of a subset of the population entitled to receipt of assistance makes no reference to the reason the individual lacks an adequate residence.²⁴ That is, the text of the definition and description of assistance entitlements reveal no congressional conclusions about the voluntary or involuntary nature of homelessness.²⁵

B. Robinson, Powell, and the Problems of Status and Conduct

In 1962, the Supreme Court struck down a California law that made it illegal to "be addicted to the use of narcotics."²⁶ The decision in *Robinson* was based in the idea that the state may not criminalize status.²⁷ Accepting that the state has broad power to regulate narcotic drug traffic by a variety of means, the Court

22. KURT BORCHARD, *THE WORD ON THE STREET: HOMELESS MEN IN LAS VEGAS* 56-102 (2005); WILLIAMS, *supra* note 15, at 19-56. Borchard and Williams both identify several factors which contribute to the homelessness of one gender more than the other. For example, domestic violence and single motherhood often contribute to women's homeless condition, while many homeless men have recently been released from prison. BORCHARD, *supra* note 22, at 87; WILLIAMS, *supra* note 15, at 19-26, 34-35. In addition, while the homeless women in Williams' study typically had strong social networks of friends or family, the men in Borchard's study often did not. BORCHARD, *supra* note 22, at 89; WILLIAMS, *supra* note 15, at 47.

23. 42 U.S.C. § 11302(a) (2006).

24. *See id.* § 11302(b).

25. *Id.* § 11302 (2006).

26. *Robinson v. California*, 370 U.S. 660, 661 (1962) (citing CAL. HEALTH & SAFETY CODE § 11721).

27. *See* Christine L. Bella & David L. Lopez, *Quality of Life—At What Price?: Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN'S J. LEGAL COMMENT. 89, 101 (1994); Robert C. McConkey III, "Camping Ordinances" and the Homeless: Constitutional and Moral Issues Raised By Ordinances Prohibiting Sleeping in Public Areas, 26 CUMB. L. REV. 633, 641 (1996); Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J. L. & SOC. PROBS. 293, 309 (1995); Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-Or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1621 (1995).

observed that this law did not punish a person for any act, such as using or buying narcotics, or for undesirable behavior resulting from the use of narcotics.²⁸ Likening drug addiction to mental illness, leprosy, and venereal disease, the Court noted that “a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”²⁹ The Court concluded that a law that punishes a person solely on the basis of their addiction inflicts a cruel and unusual punishment.³⁰

After *Robinson*, if the state could not punish an individual for suffering from a disease, then it was unclear whether it was constitutional to punish an individual for acts caused by a disease.³¹ Six years later, *Powell* refined the *Robinson* doctrine. Noting that the defendant, Leroy Powell, had been convicted “not for being a chronic alcoholic, but for being in public while drunk,” the Court concluded that the state “has not sought to punish a mere status Rather, it has imposed upon appellant a criminal sanction for public behavior.”³²

The decision in *Powell* seems to limit the rejection of a statute for targeting a status only to those cases in which the state has failed to target an act or behavior,³³ however, the opinion was rendered by a divided court, and only four Justices signed on to the plurality opinion.³⁴ Justice White, who concurred in the result, and four dissenting Justices rejected the plurality’s interpretation of *Robinson*.³⁵ Justice Fortas, writing for the dissent, read *Robinson* as standing for the principle, that “[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.”³⁶ Justice White did not vote with the dissent because he doubted both that Powell was

28. *Robinson*, 370 U.S. at 664–66.

29. *Id.* at 666.

30. *Id.* at 667.

31. Kent Greenawalt, “Uncontrollable” Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927, 929 (1969). Greenawalt notes that lower courts were divided in their interpretations of the *Robinson* doctrine. *Id.* at 929 n.16.

32. *Powell v. Texas*, 392 U.S. 514, 532 (1968).

33. Walters, *supra* note 27, at 1624–25.

34. *Powell*, 392 U.S. at 516–17.

35. Smith, *supra* note 27, at 315–16; Walters, *supra* note 27, at 1625.

36. *Powell*, 392 U.S. at 567 (Fortas, J., dissenting).

physically compelled to drink³⁷ and that he could not have taken measures to prevent himself from appearing in public while drunk.³⁸ However, Justice White focused on the ability of Powell and other hypothetical alcoholics to resist the compulsion to drink and to control their movements while drunk.³⁹ In other words, Justice White and the dissent both focus on the volitional nature of the defendant's act.

Most significantly in the context of challenges to anti-homeless ordinances, Justice White included some language in his opinion which may be read to support challenges to ordinances that punish the homeless for life-sustaining acts:

Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment – the act of getting drunk.⁴⁰

Because of the divided opinion in *Powell*, lower courts have been left without clear direction in their treatment of laws that

37. *Id.* at 551 n.3 (White, J., concurring).

38. *Id.* at 553 (White, J., concurring); Walters, *supra* note 27, at 1626.

39. *See Powell*, 392 U.S. at 549–53 (White, J., concurring).

[T]he chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that he loses the power to control his movements and for that reason appears in public [N]othing in the record indicates that [Powell] could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street.

Id.

40. *Id.* at 551 (White, J., concurring). White's most revolutionary statements from the perspective of the post-Reagan "War on Drugs" era came in the opening sentences of his opinion: "If it cannot be a crime to have an irresistible compulsion to use narcotics (citation omitted), I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name." *Id.* at 548 (White, J., concurring).

target conduct “derivative of status.”⁴¹ Subsequent developments in vagrancy law, explored later on this Article, led cities to develop new strategies for managing homeless individuals in an attempt to avoid application of the *Robinson* doctrine.

C. Ingraham and the Limits of the Prohibition on Cruel and Unusual Punishment

Prior to the Supreme Court’s decision in *Ingraham*,⁴² legal scholars described the Eighth Amendment’s prohibition of cruel and unusual punishment as limiting the execution of the criminal law in three ways: limiting the methods of punishment, ensuring that punishment is proportionate to the crime, and requiring sentencing that is fair and not arbitrary such that one defendant does not receive a punishment far more severe than those imposed upon others who have committed the same crime.⁴³ At the same time, scholars recognized that the Court’s holding in *Robinson* “limited the states’ power to define crime,”⁴⁴ an interpretation drawn from Justice Douglas’s concurring opinion which acknowledged that the state lacked the “power to punish a person by fine or imprisonment for being sick” and that “cruel and unusual punishment results not from confinement, but from convicting the addict of a crime.”⁴⁵ *Ingraham*, in turn, changed how the limits imposed by the cruel and unusual punishment clause are defined.

Ingraham held that the Eighth Amendment’s prohibition against cruel and unusual punishment did not prohibit schools from inflicting physical punishment.⁴⁶ The Court first noted that the prohibition of cruel and unusual punishment derived from the English Bill of Rights of 1689, aimed at preventing judges from imposing excessive bail or fines, or illegal punishments.⁴⁷ When the Founders incorporated this language into their own state and federal constitutions, they “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

41. Smith, *supra* note 27, at 317.

42. *Ingraham v. Wright*, 430 U.S. 651, 683 (1977).

43. *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 635–36 (1966).

44. *Id.* at 646.

45. *Id.* (quoting *Robinson*, 370 U.S. at 676 (Douglas, J., concurring)).

46. *Ingraham*, 430 U.S. 651, 683 (1977).

47. *Id.* at 664–65.

laws.”⁴⁸ In either case, the Court concluded, the provision was intended to apply only to the criminal process.⁴⁹

The *Ingraham* Court then described three ways the Cruel and Unusual Punishment Clause limits the criminal process. First, it limits the type or method of punishment that can be imposed on convicted persons.⁵⁰ Second, it requires that punishment not be grossly disproportionate to the convicted crime.⁵¹ Third, it substantively limits “what can be made criminal and punished as such.”⁵² The Court qualified the third limitation by recognizing it “as one to be applied sparingly.”⁵³ In spite of the emphasis the Court placed on the infrequency with which the third limitation should be applied, courts have utilized the third branch of protection to invalidate vagrancy laws.⁵⁴ In the homeless context, the third branch has been used on several occasions to invalidate laws that punish life-sustaining acts, such as sleeping or eating in public.⁵⁵

D. Papachristou: *Shifting Laws and Subsequent Challenges*

In *Papachristou v. City of Jacksonville*,⁵⁶ the Supreme Court invalidated a Jacksonville ordinance that punished individuals classified as “vagrants” based on more than twenty different characteristics and behaviors, such as “rogues,” “vagabonds,” “common drunkards,” and “persons wandering or strolling around from place to place without any lawful purpose or object.”⁵⁷ Grounding the decision in the Fourteenth Amendment’s due process clause, the Court found the vagrancy law void for

48. *Id.* at 665.

49. *Id.* at 666.

50. *Id.* at 667.

51. *Id.*

52. *Id.*

53. *Id.*

54. *See, e.g.*, *Wheeler v. Goodman*, 306 F. Supp. 58, 64 (W.D.N.C. 1969), vacated on other grounds, 401 U.S. 987 (1971) (finding vagrancy law unconstitutional because it punishes mere status); *Alegata v. Commonwealth*, 231 N.E.2d 201, 207 (Mass.1967) (“Idleness and poverty should not be treated as a criminal offense.”)

55. *See, e.g.*, *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1556 (S.D. Fla. 1992) (arresting the homeless for life sustaining acts constitutes cruel and unusual punishment); *Church v. City of Huntsville*, 1993 U.S. Dist. LEXIS 20429, at *1-2 (N.D. Ala. Sept. 23, 1993), vacated on other grounds 30 F.3d 1332 (11th Cir. 1994) (enjoining the City from removing homeless people and from harassing them for actions, including sleeping, in public parks).

56. 405 U.S. 156 (1972).

57. *Id.* at 156-57.

vagueness because of it failed to give fair notice and it encouraged arbitrary arrests.⁵⁸

As a result of the decisions in *Robinson*, *Powell*, and *Papachristou*, cities began to shift their focus when drafting anti-homeless legislation. Contemporary anti-homeless efforts include laws that prohibit all sleeping in public places and those that restrict sleeping at certain times or in certain places, as well as coordinated efforts to simply remove homeless individuals from cities.⁵⁹ In addition, cities use "existing but often unenforced laws—such as prohibitions on loitering, littering, jaywalking, and carrying open containers—selectively against homeless people."⁶⁰

In response, advocates for the homeless have attacked these laws, both as applied and on their face, in different ways.⁶¹ For example, restrictions on panhandling have been primarily challenged as infringements on the First Amendment right to free expression.⁶² Courts are divided in both their treatment of these First Amendment challenges, as well as their answers to the prerequisite question of whether panhandling constitutes pure conduct or expression.⁶³ Panhandling ordinances have also been challenged on the basis of equal protection,⁶⁴ and some scholars have argued for the characterization of the homeless as a suspect class for purposes of review under the Equal Protection Clause.⁶⁵ Restrictions on the use of public space similar to the one at issue in *Jones* have been challenged on both Eighth Amendment grounds and as restrictions of the right to travel.⁶⁶

Several court claims have demonstrated that judicial conceptions of homeless individuals as either involuntarily relegated to that status, or arriving there as a consequence of their own voluntary acts, is a pivotal and sometimes determinative question.⁶⁷ In the 1980s, judges tended to view homeless individuals as responsible for their homelessness, but also helpless

58. Baker, *supra* note 12, at 428; Bella & Lopez, *supra* note 27, at 109.

59. Foscarinis, *supra* note 17, at 16–17.

60. *Id.* at 19.

61. *Id.* at 26–49.

62. Bella & Lopez, *supra* note 27, at 94–100; Foscarinis, *supra* note 17, at 27–30.

63. Foscarinis, *supra* note 17, at 27.

64. *Id.* at 31.

65. Bella & Lopez, *supra* note 27, at 113–21; Watson, *supra* note 17, at 508–11.

66. Bella & Lopez, *supra* note 27, at 100–107; Foscarinis, *supra* note 17, at 34–49.

67. FELDMAN, *supra* note 10, at 57.

to the extent that they were generally incapable of changing their current situation.⁶⁸ Following the failure of various initiatives that aimed to eliminate homelessness, subsequent reductions in program funding, and increasing criminalization of homelessness, judges began to view homelessness as not only a voluntarily contracted condition, but one in which individuals remained voluntarily.⁶⁹ An examination of more recent cases has revealed a link between a judge's view of homelessness as voluntary or involuntary and the ultimate decision in a case:

Courts that find homelessness to be involuntary will tend to strike down public-sleeping restrictions, making the particular argument that such restrictions punish the homeless for an involuntary status and thus constitute cruel and unusual punishment in violation of the Eighth Amendment. Courts that find homelessness not to be an involuntary status contend that it is entirely legitimate for governments to ban public sleeping and camping.⁷⁰

The judicial determination that homelessness was either voluntarily or involuntarily acquired may be bypassed if a court chooses to apply a standard exempting life-sustaining acts. Although this approach has been explored in a scholarly context,⁷¹ it has not been widely adopted.

II. *Jones v. City of Los Angeles*

Jones held that punishment of involuntary sitting, lying, or sleeping on public sidewalks constitutes cruel and unusual punishment prohibited by the Eighth Amendment.⁷² The Appellants', who lived in the Skid Row area between two and forty years,⁷³ descriptions of their lives revealed a broad spectrum of the causes of homelessness. Most had limited mobility or were unable to stay employed due to their own or their spouse's physical or mental deficiencies.⁷⁴ Some were either receiving benefits that were insufficient to pay for a room in a motel every night, or they

68. Wes Daniels, "Derelicts," *Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 695-96 (1997).

69. *Id.* at 697-98.

70. FELDMAN, *supra* note 10, at 57.

71. Walters, *supra* note 27, at 1641-45.

72. *Jones v. City of Los Angeles*, 444 F.3d 118, 1138 (9th Cir. 2006).

73. *Id.* at 1124-25.

74. *Id.*

had recently lost their benefits.⁷⁵ In light of these circumstances, the court concluded that appellants “are not on the streets of Skid Row by informed choice.”⁷⁶

To reach its conclusion, the court reviewed the availability of housing in Los Angeles and found that there was insufficient space available in hotels, shelters, and other housing, leaving more than 1,000 persons in Skid Row without shelter each night.⁷⁷ In fact, there were nearly 50,000 more homeless people than available shelter beds in all of Los Angeles County.⁷⁸ Next, the court determined that the district court’s grant of summary judgment to the city should be reviewed *de novo*.⁷⁹

In addition to challenging the Appellants’ claim that § 41.18(d) violated their Eighth Amendment right to be free from cruel and unusual punishment, the city challenged Appellants’ standing.⁸⁰ The city argued that Appellants lacked standing because they had not yet been convicted under the ordinance.⁸¹ The court noted that only the first two types of protections against cruel and unusual punishment described in *Ingraham* require a conviction.⁸² The third type of protection, which limits “what the state can criminalize,” applies prior to conviction.⁸³

The city presented an alternative challenge to the Appellants’ standing with the argument that if the appellants actually faced prosecution they had the option of raising a necessity defense.⁸⁴ The court found that the availability of the necessity defense did not obviate Appellants’ standing for three reasons. First, the pre-conviction harms suffered by Appellants, such as loss of personal property, established standing regardless of whether prosecution was pursued.⁸⁵ Second, the realities of homelessness, such as lack

75. *Id.*

76. *Id.* at 1123.

77. *Id.* at 1122.

78. *Id.*

79. *Id.* at 1125–26. The City disputed this point, arguing that because the district court denied a request for equitable relief, the abuse of discretion standard should apply. *Id.* at 1125.

80. *Id.* at 1126.

81. *Id.*

82. *Id.* at 1128.

83. *Id.* The court also noted that two of the six appellants had been convicted and sentenced for violation of § 41.18(d), and reasoned in the alternative that if a conviction was required, the convictions of two of the appellants established standing for them all. *Id.* at 1130.

84. *Id.* at 1126.

85. *Id.* at 1131.

of knowledge and access to counsel, a high incidence of mental illness, substance abuse problems, unemployment, and poverty made reliance on a necessity defense impractical, and these realities in combination with incentives to plead guilty in exchange for immediate release make resort to a necessity defense unlikely.⁸⁶ Finally, the court expressed a concern with "the policy of arresting, jailing, and prosecuting individuals whom the City Attorney concedes cannot be convicted due to a necessity defense."⁸⁷ Specifically, the court questioned whether such a concession amounted to an admission that the arrest and detainment of homeless people constituted "police harassment of a vulnerable population."⁸⁸

After establishing the Appellants' standing, the court then examined their claims that enforcement of § 41.18(d) violated the Eighth Amendment prohibition of cruel and unusual punishment. First, the court read *Robinson* as establishing that "[a]t a minimum . . . the state may not punish a person for who he is, independent of anything he has done."⁸⁹ Next, the court examined the plurality, concurring, and dissenting opinions in *Powell* and observed that "five Justices . . . 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."⁹⁰ Although the plurality opinion in *Powell* "interpreted *Robinson* to prohibit only the criminalization of pure status and not to limit the criminalization of conduct,"⁹¹ the four dissenting Justices as well as Justice White's concurrence focused on the voluntary or involuntary nature of the behavior.⁹² Following these readings of *Robinson* and *Powell*, the court articulated a two-part analysis for determining the limits of the Eighth Amendment on the state's power to criminalize. The behavior targeted by the statute or ordinance should be assessed as either pure status or pure conduct, and as either an involuntary act or condition or a voluntary one.⁹³

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1133.

90. *Id.* at 1135.

91. *Id.* at 1133.

92. *Id.* at 1133-34.

93. *Id.* at 1136.

After applying this test to the facts, the court found that “enforcement of section 41.18(d) at all times and in all places against homeless individuals who are sitting, lying, or sleeping in Los Angeles’s Skid Row because they cannot obtain shelter violates the Cruel and Unusual Punishment Clause.”⁹⁴ The court found the targeted behaviors to be involuntary regardless of whether they were termed “acts” or “conditions” because “they are universal and unavoidable consequences of being human.”⁹⁵ The behavior was also indistinguishable from status because “human beings are biologically compelled to rest” and homeless persons have no private place in which to do so.⁹⁶

In conclusion, the court emphasized that the holding was limited to the specific facts of the case.⁹⁷ The ordinance was not invalid on its face, and the court drew no conclusion about the enforcement of a similar ordinance when beds were available in shelters.⁹⁸ Appellants in this case “had no choice other than to be on the streets.”⁹⁹ The court stated, “so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce section 41.18(d) at all times and places throughout the City against homeless individuals for involuntarily sitting, lying, and sleeping in public.”¹⁰⁰

III. *Jones*: An Obstacle for the Homeless

Since the circuits conflict in their treatment of challenges to anti-homeless ordinances,¹⁰¹ in order to operate as persuasive authority favoring the rights of homeless persons, opinions that find these statutes inapplicable must be both grounded in precedent and logically reasonable. The *Jones* majority offers a well-founded interpretation of the standing issue, but its treatment of the status issue results in a test that is more oblique and confusing than the already conflicting precedent.

94. *Id.*

95. *Id.*

96. *Id.* at 1136.

97. *Id.* at 1137–38.

98. *Id.* at 1138.

99. *Id.* at 1137.

100. *Id.* at 1138.

101. Compare *Joyce v. City of San Francisco*, 846 F. Supp. 843, 856–58 (N.D. Cal. 1994) (holding that San Francisco’s Matrix Program targets conduct, not status, and the Eighth Amendment’s protections do not apply), with *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1556 (S.D. Fla. 1992) (holding that arresting the homeless for life-sustaining acts constitutes cruel and unusual punishment).

A. *The Majority's Disposition of the Standing Issues is Proper*

The majority rejected the city's claim that Appellants lacked standing because they had not been convicted¹⁰² and read *Ingraham* to support its conclusion that part of the Eighth Amendment's protections against cruel and unusual punishment apply prior to conviction. This conclusion, however, is not obvious from an initial reading of *Ingraham*. The court in *Ingraham* observed that "the principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments,"¹⁰³ and this observation laid the foundation for the *Ingraham* Court's ultimate conclusion that the Cruel and Unusual Punishment Clause, in addition to limiting the type and severity of punishment, limits the legislative definition of criminal acts.¹⁰⁴

The conclusion that the Eighth Amendment limits the legislative definition of crimes, however, does not answer the question of whether a person must be convicted of a crime to have standing to challenge the legislative definition. As the *Jones* majority noted, certain dicta in *Ingraham*, when taken out of context, support the conclusion that a conviction is necessary to invoke review under the Eighth Amendment.¹⁰⁵ For example, the *Ingraham* Court's initial premise in its review of the history of the Eighth Amendment was that "the proscription against cruel and unusual punishment . . . was designed to protect those convicted of crimes."¹⁰⁶ The Court also noted that "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt"¹⁰⁷

Read in isolation from the facts of *Ingraham* it would be easy to conclude from these statements that the Eighth Amendment's protections only extend to convicted persons. However, an intratextual reading of the opinion, emphasizing the facts of the case as detailed above, lends support to the opposite interpretation. The issue in *Ingraham* was "whether the paddling of students as a means of maintaining school discipline constitutes

102. See *Jones v. City of Los Angeles*, 444 F.3d 118, 1126 (9th Cir. 2006).

103. *Ingraham v. Wright*, 430 U.S. 651, 665 (1977).

104. See *id.* at 667.

105. *Jones*, 444 F.3d at 1128.

106. *Ingraham*, 430 U.S. at 664.

107. *Id.* at 671–72 n.40.

cruel and unusual punishment . . .,”¹⁰⁸ that is, whether *noncriminal* punishment is subject to the limits imposed by the Eighth Amendment. Therefore, the first statement should be read with emphasis on the requirement that a *crime* be involved, not that a conviction was obtained.¹⁰⁹ In support of this interpretation, the Court went on to state that “the exclusive concern of the English version was the conduct of judges in enforcing the criminal law,”¹¹⁰ and that “the subject to which [the cruel and unusual punishment clause] was intended to apply [was] the criminal process.”¹¹¹ With regard to the second statement, the “power to punish” proscribed by the first two phrases of the Court’s interpretation of the Cruel and Unusual Punishment Clause, which limit the type and severity of punishment, must be viewed as distinct from the power to criminalize, which is restricted by the third phrase’s limit on “what can be made criminal and punished as such.”¹¹² Once this distinction is made, the second statement merely confirms that the limits on the type and severity of punishment require a conviction.¹¹³

A conclusion that the Eighth Amendment was designed to protect only those persons convicted of crimes is contrary to the breadth of the *Ingraham* Court’s historical findings regarding the Founders’ purposes behind the Amendment. The *Ingraham* Court concluded that the Founders were concerned with the imposition of improper punishment not only by judges but also “by legislatures engaged in making the laws.”¹¹⁴ The *Jones* majority’s conclusion that the Plaintiffs had standing was based on a careful and insightful reading of *Ingraham*, but it was by no means obvious. In his dissent, Justice Rymer interpreted the same language examined above to conclude that a conviction was required for standing under the Eighth Amendment.¹¹⁵ The majority’s treatment of the issue may not generally cure the

108. *Id.* at 653.

109. *See id.* at 665–66 (discussing the distinction between the commission of a crime and the conviction of crime).

110. *Id.* at 665.

111. *Id.* at 666.

112. *Id.* at 667.

113. *See also* Jones v. City of Los Angeles, 444 F.3d 1118, 1128 (9th Cir. 2006) (quoting *Ingraham v. Wright*, 430 U.S. 651, 667) (1977)) (noting that the *Ingraham* decision “expressly recognizes that the Clause imposes substantive limits on what can be made criminal”).

114. *Ingraham*, 430 U.S. at 665.

115. *See Jones*, 444 F.3d at 1140–44 (Rymer, J., dissenting).

homeless plaintiffs' standing problems because in different factual circumstances courts have used a lack of standing to defeat homeless plaintiffs' claims,¹¹⁶ but the Court's analysis on the question of the requirement of a conviction is persuasive and may prove influential.

B. The Majority's Disposition of the Status Issue is Flawed

The *Jones* majority's reading of precedent on the status issue is as insightful as its reading on the standing issue. Yet, the problem with this opinion, both as a judicial tool and as a method for recognizing the rights of homeless persons, lies in the fact that the test the majority devises, though grounded in precedent, is confusing and difficult to apply.

The *Jones* Court compared the plurality, concurring, and dissenting opinions in *Powell* to divine the prevailing meaning of the *Robinson* decision,¹¹⁷ and legal scholars have similarly searched these opinions for a common thread and found more in common between the concurring and dissenting opinions than the plurality.¹¹⁸ The practice of discerning the legal principles adopted by a majority of justices, regardless of the functional holding in the case, is a well-established method of case analysis. Thus, while the decisiveness with which the *Jones* Court states its conclusion is not shared by all scholars and circuits,¹¹⁹ it is persuasive.

Justice White's concurrence in *Powell* is replete with references to the ability of alcoholics to choose not to drink and

116. See, e.g., *Church v. City of Huntsville*, 30 F.3d 1332, 1341 (11th Cir. 1994) (concluding that homeless plaintiffs did not have standing to enjoin the City's use of building codes and zoning ordinances to close homeless shelters).

117. See *Jones*, 444 F.3d at 1132–36.

118. See Greenawalt, *supra* note 31, at 931 (noting that “the dissent comes closer to stating the principles accepted by a majority of the Court”); Walters, *supra* note 27, at 1627 (noting that the *Powell* plurality is not binding precedent, and the plurality's emphasis on conduct is inconsistent with *Robinson*).

119. See *Joyce v. City of San Francisco*, 846 F. Supp. 843, 856–58 (N.D. Cal. 1994) (rejecting the Plaintiffs' contention that five Justices in *Powell* conducted an inquiry based on voluntariness, adopting the *Powell* plurality's status-condition test, and characterizing White's concurrence as largely dicta); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992) (distinguishing the facts of *Powell* by observing that the homeless Plaintiffs at issue “have no realistic choice but to live in public places,” and reading White's concurrence to support relief in such circumstances); Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual “Crimes”*, J. CRIM. L. & CRIMINOLOGY 329, 338–39 (2005) (noting that Justice White's concurrence conflicted with the plurality's limitation of *Robinson*, but concluding that the import of White's concurrence was inconclusive).

control themselves while drinking.¹²⁰ The dissent similarly emphasizes voluntariness.¹²¹ The *Jones* Court could have stopped with these observations and adopted a volitional inquiry by viewing *Powell* as a refinement or modification of *Robinson*. Instead it complicated its own inquiry by formulating a two-prong test based equally in these two cases, by analyzing the facts first for both their voluntary or involuntary nature and subsequently for their classification as either status or conduct.¹²²

The Court declared that application of this test to the facts produces clear results: the targeted behavior is punished in violation of the Cruel and Unusual Punishment Clause because it is involuntary and it is closer to pure status because it is conduct indistinguishable from status.¹²³ But even applying the majority's test, the dissent does not reach the same "clear" finding,¹²⁴ and the majority's own logic in reaching these conclusions is muddled.¹²⁵ The conclusion that conduct is indistinguishable from status does not dictate a finding that punishment of status is present,¹²⁶ and even if it does, the Court's opinion provides no guidelines for determining when conduct becomes indistinguishable from status. Without more, other courts or judges applying this test in the future are left to their own devices in determining whether a statutorily based prohibition constitutes status or conduct, unless the circumstances are identical to those present in *Jones*. This unguided inquiry into the distinction between conduct and status is, in effect, the same as having no judicial test at all.

C. A Derivative Inquiry: The Volitional Test

The majority's conclusion that the conduct at issue is indistinguishable from status stems from its determination that

120. See *supra* note 39.

121. See *supra* note 36.

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

123. See *id.* at 1136–37.

124. See *id.* at 1139 (Rymer, J., dissenting).

125. *Id.* at 1136–37 (concluding that conduct is involuntary because it is biologically compelled, and because the plaintiffs have no private place for this biologically compelled action, their conduct is indistinguishable from status).

126. See *id.* at 1139 (Rymer, J., dissenting) ("Neither the Supreme Court nor any other circuit court of appeals has ever held that conduct derivative of a status may not be criminalized."). But see *Powell v. Texas*, 392 U.S. 514, 551 (1968) (White, J., concurring) ("[For alcoholics without homes] resisting drunkenness is impossible and . . . avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment – the act of getting drunk.").

the condition is involuntary.¹²⁷ In light of this reasoning, it may be simpler to eliminate the test's second prong altogether, and instead use a volitional inquiry. Under the *Jones* majority's interpretation of *Powell*, five of nine Justices conducted a similar inquiry.¹²⁸ Nonetheless, a volitional test is not without its problems for both homeless plaintiffs, explored in Section E below, and for the courts. Most importantly, the question arises: Which voluntary or involuntary act should be the subject of the inquiry – that of acquiring the condition or status, or that of the proscribed act?

The *Powell* plurality made some inquiry into the voluntariness of the disease of alcoholism,¹²⁹ but that analysis was subsumed by the ultimate conclusion that an "act" was being punished.¹³⁰ White's concurrence implies an inquiry not into whether the homeless person could have avoided sleep, but into whether the homeless person could have avoided sleeping in public.¹³¹ In contrast, Black's concurrence rejects a voluntariness inquiry altogether.¹³² Finally, the dissent's conclusion that Powell's disease meant he could not be deterred by the statute¹³³ seems to translate in the context of homelessness into an inquiry of whether homeless people can avoid sleep.

These opinions do not provide courts guidance in choosing between focusing on the volitional nature of the initial cause of homelessness, of the particular act, or of the public nature of that act. Certainly courts have examined the initial causes of homelessness—but should homeless persons be treated differently depending on how they became homeless? Should a homeless person with physical or mental disabilities be given preferential treatment over a homeless person who ran out of money as the result of a drug addiction, or a homeless person who came up short

127. See *Jones*, 444 F.3d at 1136–37.

128. See *id.* at 1135.

129. *Powell*, 392 U.S. at 522–26 (plurality opinion) (discussing the indecision among medical experts about the characterization of alcoholism as a disease).

130. *Id.* at 532.

131. See *id.* at 551 (White, J., concurring).

132. *Id.* at 540 (Black, J., concurring) ("I could not, however, consider any findings that could be made with respect to 'voluntariness' or 'compulsion' controlling on the question [of] whether a specific instance of human behavior should be immune from punishment as a constitutional matter.").

133. *Id.* at 568 n.31 (Fortas, J., dissenting) ("I also read these findings to mean that appellant's disease is such that he cannot be deterred by Article 477 of the Texas Penal Code from drinking to excess and from appearing in public while intoxicated.").

on their rent because they lost her job or missed a deadline to receive government aid?

The consequences of this decision are far-reaching. Courts who focus on the volitional nature of the cause of the plaintiff's homelessness would render decisions based on acts of that plaintiff that are far removed from the targeted behavior—sometimes months or years in the past.¹³⁴ In light of this temporal disconnect between the cause of homelessness and the targeted behavior, placing sole emphasis on the voluntariness of becoming homeless is almost certainly impermissible.¹³⁵ Furthermore, narrowing the inquiry to the “cause of homelessness” does not clearly direct the court's examination. Rather, such an inquiry leaves courts to weigh the importance of a person's poor work performance against larger economic factors that could have effected their chances of losing their job, or to weigh the decision to try the addictive drug for the first time with the compulsion to continue and spend all you own to get it—investigations that require an assignment of a degree of culpability that not even experienced judges are qualified to make.

Courts focusing on the volitional nature of the particular targeted act would have to determine to what extent plaintiffs could resist the targeted behavior. This is a specialized inquiry that may require testimony from medical or psychiatric experts, and it risks the temptation to uphold a conviction because experts or data in these fields conflict.¹³⁶

Courts focusing on the volitional nature of the public character of the targeted behavior would need to focus on whether plaintiffs could have found a private place for these acts. Typically, this would require an extensive showing of the (un)availability of several discrete shelters, a hurdle which would

134. See, e.g., *id.* at 550 n.2 (White, J., concurring) (discussing *Robinson v. California* in which the Court dealt with “a statute which makes the ‘status’ of narcotic addiction a criminal offense” and stating that “[b]y precluding criminal conviction for such a ‘status’ the Court was dealing with 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.”) (citation omitted).

135. See *id.*

136. See, e.g., *id.* at 522–27 (plurality opinion) (surveying medical opinions as to whether alcoholism should be considered a disease, and determining there was no substantial consensus, referring to the medical community's knowledge on the subject as “primitive”).

be difficult for plaintiffs of modest resources to overcome.¹³⁷ Forcing a determination as to a plaintiff's culpability to turn on the government's decision to provide shelter could put the government in an untenable position when deciding how to allocate its budgetary expenditures.¹³⁸

Removing the conduct-status examination from the *Jones* test only eliminates part of the confusion. An examination of volition is also flawed, not because it is ambiguous, but because so many independent acts and factors result in a homeless person sleeping in the street and it is not clear on which of these acts courts should focus. While support for both a status inquiry and a volitional inquiry can be found in *Robinson* and *Powell*, the inability of courts to use these tests consistently brings their utility into question.

D. An Alternative Inquiry: The Life-Sustaining Acts Test

An alternative to both the conduct-status and the volitional inquiries is one based on the *necessity* of the conduct, that is, whether the act engaged in was life-sustaining. Edward J. Walters first described this life-sustaining act exemption.¹³⁹ Walters described application of these statutes in life-or-death situations as "manifestly cruel and unusual."¹⁴⁰ Where the homeless person, in so acting, is effectively choosing to stay alive, the choice is not meaningful and should not be punished.¹⁴¹ In Walter's view, introducing this exemption makes up for any lack of a necessity defense that had been available at common law.¹⁴² In Walter's formulation, courts would have to distinguish between a "seemingly compelled choice" and "no choice at all."¹⁴³ Not all acts of homeless people would be protected. For example, not only

137. See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1132 (9th Cir. 2006) (finding "a strong evidentiary showing of a substantial shortage of shelter."). But see *id.* at 1140 (Rymer, J., dissenting) (finding that the Plaintiffs had not produced a showing "that shelter was unavailable on the night[s]" Plaintiffs were apprehended).

138. *Id.* at 1139 (Rymer, J., dissenting) ("The ramifications of so holding are quite extraordinary. We do not—and should not—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.").

139. Walters, *supra* note 27, at 1620.

140. *Id.* at 1641.

141. *Id.*

142. *Id.* at 1644.

143. *Id.* at 1643.

would acts that were truly not life-or-death, such as panhandling or bathing in public, not be protected, but if sufficient shelter were available, homeless people choosing not to utilize the shelter would be subject to criminal punishment.¹⁴⁴ Walter justifies this exemption by noting first, that life-sustaining acts cannot be deterred, and second, that these acts are not morally blameworthy.¹⁴⁵

It is worth noting that, under Walter's life-sustaining act test, the *Jones* case would most likely have had the same result, with a majority finding that the Plaintiffs had shown a lack of available shelter and the dissent concluding that there was no showing of unavailability. This test thus does not seem to solve at least part of the problems associated with the volitional or the conduct-status test.¹⁴⁶ For this reason, a modified version of the life-sustaining act test is warranted: one for which truly life-sustaining acts are exempted from criminal sanction, without exception for cases in which public shelter was available. Of the tests already examined, this test may be characterized as the most protective of homeless rights of the tests already examined because it has the advantage of being clear, predictable, and subject to minimal judicial abuse. Judicial classification of an act as either life sustaining or not is presumably simpler than the classification of such an act as conduct, status, or conduct derivative of status.¹⁴⁷ In terms of advancing the interests of the homeless, it also serves as an incentive for cities to provide higher quality shelters for a greater number of homeless people.¹⁴⁸

144. *Id.* at 1643–44.

145. *Id.* at 1644.

146. See *supra* Part I.B. (noting that the absence of clear guidelines results in the majority and dissent in *Jones* come to opposite conclusions under the majority's test, and leaves future courts without aid in deciding whether a behavior is status or conduct).

147. See Walters, *supra* note 27, at 1646–48; see also *id.* at 1648 (characterizing the live-or-die standard as a "limiting principle for the status crimes doctrine").

148. If the availability of shelter does not determine whether or not homeless persons may be arrested for sleeping in public, cities will be forced to improve the quality of shelter to attract homeless persons. Homeless persons may choose not to seek room in a shelter for a variety of reasons. See *infra* note 151. Shelters may be undesirable because they charge daily fees, require users to leave during the day, and do not permit them to leave their property there. See Foscarinis, *supra* note 12, at 13.

E. Hollow Victory: The Limits and Contradictions of the Majority's Holding

The decision in *Jones* could impact future challenges to anti-homeless statutes in several ways. First, as noted above, the majority limited its holding to situations where petitioners can provide a strong showing that they had no choice other than to be on the streets, or *i.e.*, that there were no beds available in shelters.¹⁴⁹ Problems in making such a showing—illustrated by the fact that the majority finds “uncontested evidence” of such, while the dissent finds no showing at all—may hamstring future challenges, especially by a population with limited resources. Second, the negative implication of basing its decision on the showing of an unavailability of shelter is that cities could, in effect, force homeless persons into shelters if they provide enough beds and make sleeping in public a crime.¹⁵⁰ The Court made no such conclusion, but forced use of shelters could prove to be a serious problem for homeless persons, as the desirability of a shelter available to homeless persons depends on the rate of theft and assault and the personal comforts available.¹⁵¹ An extreme reading of this decision could force homeless persons into shelters where they enjoy less safety than they do on the streets.

Finally, this test is easy to manipulate based on judicial preferences for or against homeless persons. While a simpler way to deny Eighth Amendment protection to the homeless is to declare the prohibited behavior to be an act and not a status,¹⁵² a subtler way is to adopt an unclear test, the guidelines of which are indistinct.¹⁵³ As judicial decisions have changed with evolving

149. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1139 (9th Cir. 2006).

150. Posted by Steve Vladek to Prawfsblog, http://prawfsblawg.blogs.com/prawfsblawg/2006/04/is_homelessness.html (last visited Apr. 17, 2006).

151. Some homeless persons refuse to utilize drop-in shelters out of fear for their own safety or property. See *Joyce v. City of San Francisco*, 846 F. Supp. 843, 849 (N.D. Cal. 1994) (Plaintiff refused to sleep at a drop-in shelter because “[t]hese people that you’re laying next to, they’re not saints.”). Others do not use shelters due to the restrictions placed on them there. See *Church v. City of Huntsville*, 30 F.3d 1332, 1341 (11th Cir. 1994) (Plaintiff did not stay in shelters because he “had more rights in jail than he did there.”).

152. See *Joyce*, 846 F. Supp. 843 (holding that the Eighth Amendment protections did not apply because authorities were targeting conduct, not status).

153. See *Jones*, 444 F.3d at 1139 (Rymer J., dissenting) (finding that Plaintiffs’ challenge failed “even on the majority’s view of the law”). Using the *Jones* majority’s test, a court could, like the dissent, decide there is no showing of a lack of available housing in order to foreclose Eighth Amendment relief. *Id.* at 1139–40.

attitudes toward homelessness,¹⁵⁴ indistinct guidelines are particularly dangerous as homelessness is a particularly ambiguous area of law. While the result in *Jones* was positive for these particular Appellants, in future applications the test and the limits of the holding may present significant hurdles for homeless persons.

Conclusion

Jones represents yet another chapter in the litigation of anti-homeless statutes. While the Court in *Jones* seems predisposed to rule in favor of the homeless Plaintiffs, the test it develops is ambiguous and could be applied with equal ease to deny homeless claims as to grant them. The negative implications of the ruling—raising the evidentiary requirements of complaints made by the homeless and even requiring homeless persons to resort to city shelters if provided, no matter what the condition—may even exacerbate the plight of the homeless population. A test that is more protective of a homeless person's right to survive, providing a complete exemption for truly life-sustaining acts, is preferable in an area of law that is already confusing.

154. Daniels, *supra* note 68, at 695–98.

