CONSTITUTIONAL LAW — EIGHTH AMENDMENT — NINTH CIRCUIT HOLDS THAT "INVOLUNTARY" CONDUCT CANNOT BE PUNISHED. — *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006).

In *Ingraham v. Wright*,[1] the Supreme Court explained that the Eighth Amendment's Cruel and Unusual Punishment Clause not only regulates the kinds of punishment that the state may impose and the proportional severity of punishment to crime, but also "imposes substantive limits on what can be made criminal."[2] The nature of these substantive limits is not especially clear. In *Robinson v. California*,[3] the Court held that a statute punishing persons for being "addicted to the use of narcotics"[4] violated the Eighth Amendment.[5] In *Powell v. Texas*,[6] however, the Justices disagreed over whether the principle underlying *Robinson* was that crimes must involve an actus reus or that the state may not punish involuntary conduct.[7] Recently, in *Jones v. City of Los Angeles*,[8] the Ninth Circuit weighed in on the question, holding that the Eighth Amendment forbids punishing involuntary conduct and that Los Angeles therefore could not punish homeless people for sleeping on the streets.[9] In so holding, however, the Ninth Circuit relied on a conception of involuntariness that potentially includes everything a person is or does and that therefore threatens to undermine criminal law generally.

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[1] 430 U.S. 651 (1977).

[2] *Id.* at 667.

[3] 370 U.S. 660 (1962).

[4] *Id.* at 660 n.1 (quoting CAL. HEALTH & SAFETY CODE § 11721 (West 1962)).

[5] *See id.* at 667.

[6] 392 U.S. 514 (1968). In *Powell*, a "chronic alcoholic," *id.* at 518 (Marshall, J., plurality opinion) (internal quotation marks omitted), appealed his conviction for violating a statute punishing "[w]hoever shall get drunk or be found in a state of intoxication in any public place," *id.* at 517 (quoting TEX. PENAL CODE ANN. § 477 (Vernon 1952)) (internal quotation mark omitted). The Court affirmed his conviction. *Id.* at 537.

[7] *Compare id.* at 533 ("The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus."), *with id.* at 548–49 (White, J., concurring in the result) ("Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law."), *and id.* at 567 (Fortas, J., dissenting) ("*Robinson* stands upon [the] principle [that] . . . [c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."). For an argument that Justice White and the four dissenters were substantially in agreement, see Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 STAN. L. REV. 201, 219 (1981) ("[T]he consensus [of Justice White and the dissenting Justices] was that an involuntary act does not suffice for criminal liability.").

[8] 444 F.3d 1118 (9th Cir. 2006).

[9] *Id.* at 1132.

Between November 20, 2002, and January 14, 2003, Edward Jones, Patricia Vinson, George Vinson, Thomas Cash, Stanley Barger, and Robert Lee Purrie were homeless and living in an area of Los Angeles, California, known as Skid Row.[10] Each was cited or arrested for violating Los Angeles Municipal Code section 41.18(d),[11] which provides that "[n]o person shall sit, lie, or sleep in or upon any street, sidewalk, or other public way."[12]

On February 19, 2003, Jones, the Vinsons, Cash, Barger, and Purrie filed a complaint pursuant to 42 U.S.C. § 1983 in the U.S. District Court for the Central District of California.[13] They asked the court to enjoin the City of Los Angeles's enforcement of section 41.18(d) between the hours of 9:00 p.m. and 6:30 a.m. on the ground that, by enforcing the ordinance during those times, the City was "criminalizing the status of homelessness" in violation of the Cruel and Unusual Punishment Clause.[14] The district court granted summary judgment for the City, concluding that section 41.18(d) criminalizes conduct, not status, and therefore does not run afoul of the Eighth Amendment.[15]

The Ninth Circuit reversed and remanded. Writing for the panel, Judge Wardlaw[16] first asserted that the plaintiffs had standing to seek prospective injunctive relief.[17] The City had argued that the plaintiffs lacked standing because Eighth Amendment harms can occur only after conviction and the plaintiffs had not demonstrated an imminent threat of being convicted.[18] Citing *Ingraham*, however, the court held that with respect "to a criminal statute alleged to transgress the [Cruel and Unusual Punishment] Clause's substantive limits on criminalization, all that is required for standing is some direct injury — for example, . . . arrest — resulting from the plaintiff[s'] subjection to the criminal process."[19] Therefore, the court reasoned, the plaintiffs had standing because they had shown an imminent threat of being cited or arrested under an allegedly unconstitutional statute.[20] In any event,

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[10] *Id.* at 1124–25.

[11] L.A., CAL., MUN. CODE § 41.18(d) (2005).

[12] *Id.* Section 41.18(d) immunizes "persons sitting on the curb portion of any sidewalk or street while attending or viewing any parade . . . [and] persons sitting upon benches or other seating facilities provided for such purpose by municipal authority." *Id.*

[13] *Jones*, 444 F.3d at 1125.

[14] *Id.*

[15] *Id.*

[16] Judge Reed joined Judge Wardlaw's opinion.

[17] *Jones*, 444 F.3d at 1126.

[18] *Id.* at 1127.

[19] *Id.* at 1129.

[20] *Id.* at 1127. For similar reasons, the court dismissed the City's contention that the plaintiffs lacked standing because they could raise a necessity defense to prosecution: "[P]reconviction harms, some of which occur immediately upon citation or arrest, suffice to establish standing." *Id.* at 1131.

the court maintained, even if conviction were necessary for standing, the plaintiffs would have standing because two of them were in fact convicted for violating section 41.18(d).[21]

Turning to the merits of the case, the court criticized the district court's analysis of *Robinson* and *Powell*, stating that *Robinson* not only established that "the state may not punish a person for who he is, independent of anything he has done," but "also support[ed] the principle that the state cannot punish a person for certain conditions . . . *or acts* that he is powerless to avoid."[22] According to the court, a majority of the *Powell* Justices — the four dissenters and Justice White — agreed that "*Robinson* . . . stand[s] 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."[23] Here, the plaintiffs "may have [become homeless] 'innocently or involuntarily.'"[24] Moreover, they "are biologically compelled to rest, whether by sitting, lying, or sleeping," and "these acts can only be done in public"[25] because "the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times."[26] Thus, section 41.18(d) violated the Eighth Amendment by "punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being . . . homeless."[27]

Judge Rymer dissented, reasoning that the plaintiffs lacked standing because "Eighth Amendment protections apply [only] to those who are convicted."[28] Further, Judge Rymer insisted that "[n]either the Supreme Court nor any other circuit court of appeals has ever held that *conduct derivative of a status* may not be criminalized."[29] Indeed, Judge Rymer continued, the Supreme Court and the Ninth Circuit have "limited the applicability of *Robinson* to crimes that [unlike section 41.18(d)] do not involve an actus reus."[30] Judge Rymer further distinguished *Robinson* and *Powell* as involving statuses which, unlike homelessness, are "internal affliction[s]" rather than "transitory

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[21] *Id.* at 1130.

[22] *Id.* at 1133 (emphasis added).

[23] *Id.* at 1135.

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

[25] *Id.*

[26] *Id.* at 1132. Skid Row had 11,000 to 12,000 homeless people and 9000 to 10,000 shelter beds. *Id.* at 1122.

[27] *Id.* at 1138.

[28] *Id.* at 1140 (Rymer, J., dissenting). Judge Rymer added that the plaintiffs had not shown a likelihood of future conviction because California recognized a necessity-due-to-homelessness defense. *Id.* at 1148 (citing *In re* Eichorn, 81 Cal. Rptr. 2d 535 (Ct. App. 1998)).

[29] *Id.* at 1139 (emphasis added).

[30] *Id.* at 1145 (quoting United States v. Ayala, 35 F.3d 423, 426 (9th Cir. 1994)) (internal quotation mark omitted).

state[s]."[31] Finally, Judge Rymer reasoned, even if a majority of the *Powell* Justices (the four dissenters and Justice White) had interpreted *Robinson* to prohibit the criminalization of certain kinds of conduct, a different majority (the plurality and Justice White) refused to apply Eighth Amendment protections without specific evidence that the violator was unable to avoid breaking the law.[32] Here, "there [was] no showing . . . that shelter was unavailable on the night that any of the six [plaintiffs] was apprehended."[33] Thus, the plaintiffs' "challenge should fail even on the majority's view of the law."[34]

In holding that the plaintiffs' sleeping on the street was involuntary, the Ninth Circuit relied on a conception of Eighth Amendment involuntariness that is open-ended in two senses. First, contrary to Justice Marshall's view in *Powell* that the Eighth Amendment protects status but not conduct, it puts no restrictions on what sort of outcomes may count as involuntary. Second, unlike the conception of involuntariness that the Supreme Court adopted in the Fifth Amendment context, it puts no restrictions on what causal factors may be relevant to determining whether a certain outcome was involuntary. The upshot of this open-ended conception is that potentially all outcomes are involuntary and, because the Eighth Amendment prohibits punishing involuntary outcomes, constitutionally unpunishable. The court should have heeded Justice Marshall's warning that unless the Eighth Amendment's protections are confined to status, there can be no principled way to limit the scope of those protections,[35] or else it should have proven Justice Marshall wrong by articulating some other conception of Eighth Amendment involuntariness that excludes most of what seems uncontroversially criminal.

The Ninth Circuit explicitly rejected Justice Marshall's view that the Eighth Amendment protects status but not conduct,[36] a view grounded in Justice Marshall's fear that a broad conception of Eighth Amendment involuntariness could undermine large portions of criminal law:

> [N]othing in the logic of the dissent would limit its application to chronic alcoholics. If Leroy Powell cannot be convicted of public intoxication, it is

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[31] *Id.* at 1146 (emphasis omitted). Judge Rymer cautioned against "immuniz[ing] 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." *Id.* at 1139.

[32] *Id.* at 1146–47. Judge Rymer emphasized that "Justice White ended up concurring in the result because Powell 'made no showing that he was unable to stay off the streets on the night in question.'" *Id.* (quoting Powell v. Texas, 392 U.S. 514, 554 (1968) (White., J., concurring in the result)).

[33] *Id.* at 1139.

[34] *Id.*

[35] *See Powell*, 392 U.S. at 534 (Marshall, J., plurality opinion).

[36] *See Jones*, 444 F.3d at 1135–36.

> difficult to see how a State can convict an individual for murder, if that individual . . . suffers from a "compulsion" to kill, which is an "exceedingly strong influence" . . . .[37]

In essence, Justice Marshall recognized that a sufficiently detailed account of a person's circumstances — one that described his physical and mental states, past experiences, interpersonal relationships, and other causal factors — could almost always make it appear that the person could not have avoided being who he was or doing what he did.[38] Indeed, a sufficiently detailed account could make it appear that even a violent felon could not have avoided committing his crime. On this conception of involuntariness, of course, a rule that prohibits punishing involuntary outcomes would undermine criminal law generally.[39] Justice Marshall avoided that result by restricting the set of outcomes that could be considered involuntary, and hence unpunishable under the Eighth Amendment, to statuses; for Justice Marshall, the Eighth Amendment "does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary.'"[40] Thus, by rejecting Justice Marshall's view, the Ninth Circuit gave new life to the danger that the Eighth Amendment might undermine criminal law generally.

Even after rejecting Justice Marshall's view, the Ninth Circuit could have avoided that danger by identifying a narrow set of causal factors one or more of which must exist for an outcome to be involuntary for Eighth Amendment purposes. The Supreme Court relied on this approach in an analogous context in *Colorado v. Connelly*,[41] in which it held that a schizophrenic's confession, induced by "command hallucinations," did not violate the Fifth or Fourteenth Amendment.[42] The trial court had excluded the confession because the defendant "did not exercise free will in choosing to talk to the police" and "at the time of the confession had absolutely . . . no volition or choice to make."[43]

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[37] *Powell*, 392 U.S. at 534 (Marshall, J., plurality opinion).

[38] Along these lines, some philosophers have argued that *all* outcomes are involuntary. For if the laws of nature, together with past events, completely determine the future, then given the past and the laws of nature, a person could not have been or done anything other than what he in fact was or did. *See, e.g.*, BENSON MATES, SKEPTICAL ESSAYS 59–60 (1981).

[39] *See* Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47, 63 (1986); *cf.* MATES, *supra* note 38, at 60 (describing the philosophical problem in terms of moral responsibility).

[40] *Powell*, 392 U.S. at 533 (Marshall, J., plurality opinion). To be sure, Justice Marshall's solution is not unassailable; in particular, it leaves open the hard question of how to distinguish status from conduct. Justice White, for one, thought the distinction illusory. *See id.* at 548–49, 550 n.2 (White, J., concurring in the result).

[41] 479 U.S. 157 (1986).

[42] *Id.* at 161, 167, 169.

[43] *Id.* at 175 (Brennan, J., dissenting) (quoting Appendix at 47, *Connelly*, 479 U.S. 157 (No. 85-660)).

The Court, however, held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause."[44] The Court emphasized that the Constitution "is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'"[45] In *Connelly*, of course, the danger was not that the Eighth Amendment would undermine criminal law generally but rather that the Fifth Amendment would forbid the use of confessions generally. The Court's solution was to articulate the narrow rule that a confession is involuntary for the purposes of the Fifth Amendment only if it occurs in the presence of a certain causal factor,[46] specifically, coercive police activity.

In *Jones*, however, the Ninth Circuit failed to follow *Connelly*'s lead in articulating a narrow conception of involuntariness. On the contrary, in order to justify its conclusion that the plaintiffs' sleeping on the street was involuntary, the court went into great detail about the plaintiffs' individual circumstances.[47] The court stressed, for example, that Cash had "severe kidney problems, which cause[d] swelling of his legs . . . making it difficult for him to walk";[48] that Jones's wife "suffer[ed] serious physical and mental afflictions," making it necessary for Jones to take care of her, "which limit[ed] his ability to find full-time work";[49] and that on the night they were cited, the Vinsons, whose government assistance payments had run out, "missed a bus that would have taken them to a shelter."[50] The implications, of course, are that Cash could not have gotten himself to a shelter, Jones could not have earned a living wage, and the Vinsons could not have slept anywhere other than on the street. But these are precisely the sorts of circumstances that can make it appear that even a violent felon could not have avoided committing his crime. Because the court

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[44] *Id.* at 167 (majority opinion).

[45] *Connelly*, 479 U.S. at 170 (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)). In dissent, Justice Brennan lamented the Court's "refusal to acknowledge free will as a value of constitutional consequence." *Id.* at 176 (Brennan, J., dissenting).

[46] A theory on which a person has free will when he acts in the absence of certain kinds of causal constraints is a theory on which free will is compatible with determinism. *See* A.J. AYER, PHILOSOPHICAL ESSAYS 282 (1954) ("[F]rom the fact that my behavior is capable of being explained, in the sense that it can be subsumed under some natural law, it does not follow that I am acting under constraint.").

[47] *See Jones*, 444 F.3d at 1121–26. Other courts that have relied on *Robinson* to invalidate laws targeting the conduct of homeless people have taken a similar tack. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1563–65 (S.D. Fla. 1992); Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 390–91, 393 (Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995).

[48] *Jones*, 444 F.3d at 1124.

[49] *Id.*

[50] *Id.* at 1125.

imposed no restrictions on its involuntariness inquiry, it is not clear how it can distinguish between Jones and the violent felon.[51]

On a more charitable interpretation, the court's repeated invocation of two prominent facts — that the plaintiffs were "biologically compelled to rest"[52] and that Los Angeles has more homeless people than shelter beds[53] — suggests that it implicitly relied on the view that Eighth Amendment involuntariness results from the joint operation of two causal factors: the urge to fulfill basic biological functions and the circumstance of being a member of a group whose members cannot all simultaneously participate in a certain activity. Arguably, this implicit conception of involuntariness could distinguish Jones from a violent felon. Nonetheless, contrary to the court's suggestions,[54] on this conception Los Angeles cannot punish homeless people for urinating on the sidewalk because human beings need to urinate and the City has more homeless people than public bathrooms. Similarly, despite the court's explicit statement that the Eighth Amendment does not prevent the state from criminalizing panhandling,[55] it would seem that Los Angeles could not punish homeless people for panhandling if the City did not have enough food for all of them since human beings need to eat. In short, even if the court's implicit conception of involuntariness avoids the most serious dangers of the open-ended conception, it still immunizes far more conduct than the court appeared to recognize.

To be sure, it is easy to feel sorry for the plaintiffs, who not only were unfortunate enough to be homeless, but also were targeted by Los Angeles's surprisingly harsh ordinance. Nevertheless, the court should not have invoked a potentially all-encompassing conception of Eighth Amendment involuntariness. Instead, it should have confined the Eighth Amendment's protections to status or restricted the set of causal factors that are relevant to the involuntariness inquiry. To the extent that such narrow conceptions of involuntariness fail to cover the plaintiffs' case, the Eighth Amendment may be the wrong tool for nullifying an overly harsh ordinance.[56]

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[51] *Cf.* Weinreb, *supra* note 39, at 63 (noting that whenever "the defendant relies on a defense that constitutes an excuse from responsibility," it is possible to "ask on what basis, consistently with other cases, the law adopts one standpoint or the other").

[52] *Jones*, 444 F.3d at 1136; *see also id.* at 1132, 1136–38.

[53] *See id.* at 1122, 1124, 1130 n.4, 1131–32, 1138.

[54] *See id.* at 1132 (distinguishing Joyce v. City and County of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994), on the ground that invalidating the ordinance at issue in that case would have prevented the city from enforcing bans on "such antisocial conduct as public urination").

[55] *Id.* at 1137.

[56] *See* Powell v. Texas, 392 U.S. 514, 533 (1968) (Marshall, J., plurality opinion) ("The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.").