14A.50.020 Camping Prohibited on Public Property and Public Rights of Way. - Printable Version

A. As used in this Section:

1. "To camp" means to set up, or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary place to live.

2. "Campsite" means any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

B. It is unlawful for any person to camp in or upon any public property or public right of way, unless otherwise specifically authorized by this Code or by declaration by the Mayor in emergency circumstances.

C. The violation of this Section is punishable, upon conviction, by a fine of not more than $100 or by imprisonment for a period not to exceed 30 days or both.

2) Camping ban Re-enacted after being overturned?

Camping ban overturned
Landmark decision by Multnomah County Judge Stephen Gallagher overturns Portland's nineteen-year-old anti-camping ordinance

Portland, Oregon
October 2000
By Remona Cowles

Homeless people in Portland, Oregon have finally received much needed relief. For nineteen years Portland's Anti-Camping Ordinance made it criminal to sleep outdoors—in public, on private property, or in vehicles. The ordinance was ruled unconstitutional on September 27 by Multnomah County Judge Stephen Gallagher, who felt it was cruel and unusual punishment.

Judge Gallagher found the ordinance to be in violation of the United States Constitution because those without homes are punished for the status of being homeless. The ordinance was also found to be in violation of equal protection and the fundamental right to travel by denying homeless people the opportunity to possess their belongings with them while traveling throughout the city.
The case was brought by the State of Oregon against Norman Wickes, Sr. and his son, Norman Wickes, Jr., who had been living in their vehicle, parked nightly at various locations in Portland to sleep. Portland police had, over a short period of time, given the Wickes over forty citations for camping in their vehicle. Interestingly, it would have been legal for the Wickes to sleep in their truck had they had a home to live in. This disparity is one of the issues that made Judge Gallagher's ruling possible.

Judge Gallagher spoke eloquently and thoughtfully on behalf of homeless people. Demonstrating a keen knowledge of the issues faced by homeless people

in their daily struggle to survive, Judge Gallagher offered a point by point explanation for his ruling.

In response to the question whether enforcement of the ordinance constitutes cruel and unusual punishment, and is therefore unconstitutional under the Oregon and United States Constitutions, Judge Gallagher wrote, "The court finds it impossible to separate the fact of being homeless from the necessary 'acts' that go with it, such as sleeping. The act of sleeping or eating in a shelter away from the elements cannot be considered intentional, avoidable conduct. This conduct is ordinary activity required to sustain life. Due to the fact that they are homeless, persons seek out shelter to perform these daily routines. Yet the City considers this location to be a campsite if the homeless person maintains any bedding. The homeless are being punished for behavior indistinguishable from the mere fact that they are homeless. Therefore, those without homes are being punished for the status of being homeless...This court does not accept the notion that the life decisions of an individual, albeit seemingly voluntary decisions, necessarily deprive that person of the status of being homeless."

Judge Gallagher also found that the ordinance burdens homeless people's fundamental right to travel. "The homeless carry their belongings with them or store them in a location to which they have access. Those belongings necessarily include the tools required to participate in the basic necessities of life‹bedding for sleeping and a stove for food preparation. If a homeless person is traveling through our city, or traveling within our city looking for work and a permanent place to reside, he is not allowed to remain in his vehicle or lean-to without being in violation of the ordinance. By denying defendants the ability to partake in simple necessities of life, the ordinance restricts their freedom of movement. Homeless choosing to travel through our city are not allowed to stop without being in violation. Those homeless who are trying to make a life in the city are in constant violation."

In response to the City's argument that homeless people camping pose health and safety dangers, Judge Gallagher argued, "Although protecting the health and safety of the citizens of this city may very well be compelling, there are less restrictive means to address the problem. The Wickes found themselves living out of their car due to their inability to find adequate and affordable housing. Rather than slapping a homeless person with a citation for maintaining life in a public place, the city could first explore avenues of providing sufficient housing for all individuals. Adequate services should also be in place to help individuals find housing and jobs...There are a great number of alternatives regarding housing, job training, mental health services, etc., that should be put in place to both minimize the effect of homelessness, and eliminate homelessness altogether, before our city resorts to arresting individuals for sleeping and eating in the only locations available to them."

Judge Gallagher concluded, "Individuals without a home must carry what belongings are necessary to survive, such as bedding and food, with them at all times, or store them in a place to which they have access. The place where these belongings are kept is by law deemed to be a campsite. Every time a homeless person remains at that location, he is in violation...Those without homes are impermissibly punished for the status of being homeless. Performing such life sustaining acts as sleeping with bedding is a necessary action for someone without a home. This act of sleeping is not conduct that

can be separated from the fact of the individual's status of being homeless. Portland's anti-camping ordinance punishes the status of being homeless."

Understandably, Mr. Wickes Sr. responded to Judge Gallagher's ruling with elation. "It was absolutely necessary to get that mean-spirited law overturned. Don't stereotype those who are homeless. I wanted to do it the right way. I choose not to commit crimes to resolve my situation. I hung on. A lot of people get worn out-I was on the verge of being worn out, but I endured and prayed. My son and I—we have moxy. I would suggest Mayor Vera Katz be homeless for two or three months to see what it feels like to not be able to bathe when you need to, change your clothes, go to the restroom, or any of the normal things that everybody takes for granted. Being homeless is not a crime, and it's demeaning to the police who are forced to spend time they could use to fight real crime to roust homeless people. Mayor Vera Katz needs to leave it alone and accept the defeat. This country was founded by people who camped and now we're too good for that. Judge Gallagher made the right decision."

With the help of Northwest Pilot Projects, JOIN, and the generosity of Durham Construction Co., Mr. Wickes, Sr. and his son are now housed. Wickes, Jr. is now attending school, where he is studying computer technology in a special program that will be followed by a new job in the local computer industry. Expressing his relief, Mr. Wickes commented, "You know what I did last night? I took a bubble bath—just because I could. It felt great!"

Mayor Vera Katz responded with frustration to Judge Gallagher's ruling, promising to use other violations to continue the City's efforts to keep homeless people off the streets. Some of the violations often used to keep homeless people on the move are trespassing, loitering, and public nuisance. An increase in these kinds of violations could be expected if Mayor Katz's strategy is put into effect. Mayor Katz hopes that the District Attorney will appeal the decision, and that the ordinance can continue to be enforced until the case is heard again—a process that may take as long as a year.

The decision of some homeless people to remain living outdoors, when examined more closely, is not a decision to be homeless, but rather a decision to stop head-butting the brick wall of barriers to obtaining a home in a housing market that has no mercy. This ruling may mean the dissolution of some of those barriers. Social service workers who help homeless people find housing are hoping this will mean that their clients' criminal records will be cleared of anti-camping violations—ironically, one of the many barriers to obtaining housing for their clients.

For the full article and related information, go to:
http://www.streetroot.org/archives/2000/10/gallagherruling.html

U.S. Supreme Court

KOLENDER v. LAWSON, 461 U.S. 352 (1983)

461 U.S. 352

KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. v. LAWSON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1320.

Argued November 8, 1982
Decided May 2, 1983

A California statute requires persons who loiter or wander on the streets to identify themselves and to account for their presence when requested by a peace officer. The California Court of Appeal has construed the statute to require a person to provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a stop under the standards of Terry v. Ohio, 392 U.S. 1. The California court has defined "credible and reliable" identification as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Appellee, who had been arrested and convicted under the statute, brought an action in Federal District Court challenging the statute's constitutionality. The District Court held the statute unconstitutional and enjoined its enforcement, and the Court of Appeals affirmed.

Held:

The statute, as drafted and as construed by the state court, is unconstitutionally vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. Pp. 355-361.

658 F.2d 1362, affirmed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, post, p. 362. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 369.

A. Wells Petersen, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were George Deukmejian, Attorney General, Robert H. Philibosian, Chief

Assistant Attorney General, Daniel J. [461 U.S. 352, 353] Kremer, Assistant Attorney General, and Jay M. Bloom, Deputy Attorney General.

Mark D. Rosenbaum, by invitation of the Court, 459 U.S. 964, argued the cause as amicus curiae in support of the judgment below. With him on the brief were Dennis M. Perluss, Fred Okrand, Mary Ellen Gale, Robert H. Lynn, and Charles S. Sims. *

[Footnote *] Briefs of amici curiae urging reversal were filed by William L. Cahalan, Edward Reilly Wilson, and Timothy A. Baughman for the Wayne County Prosecutor's Office; and by Wayne W. Schmidt, James P. Manak, and Fred E. Inbau for Americans for Effective Law Enforcement, Inc., et al. Briefs of amici curiae urging affirmance were filed by Eugene G. Iredale for the California Attorneys for Criminal Justice; and by Michael Ratner for the Center for Constitutional Rights. Briefs of amici curiae were filed by John K. Van de Kamp, Harry B. Sondheim, and John W. Messer for the Appellate Committee of the California District Attorneys Association; by Dan Stormer, John Huerta, and Peter Schey for the National Lawyers Guild et al.; and by Quin Denvir and William Blum for the State Public Defender of California.

JUSTICE O'CONNOR delivered the opinion of the Court.

This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of Terry v. Ohio, 392 U.S. 1 (1968). 1 We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated [461 U.S. 352, 354] by the requirement that a suspect provide a "credible and reliable" identification. Accordingly, we affirm the judgment of the court below.

I

Appellee Edward Lawson was detained or arrested on approximately 15 occasions between March 1975 and January 1977 pursuant to Cal. Penal Code Ann. 647(e) (West 1970). 2 Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

Lawson then brought a civil action in the District Court for the Southern District of California seeking a declaratory judgment that 647(e) is unconstitutional, a mandatory injunction to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The District Court found that 647(e) was overbroad because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." App. to Juris. Statement A-78. The District Court enjoined enforcement of the statute, but held that Lawson could not recover damages because the officers involved acted in the good-faith belief that each detention or arrest was lawful.

Appellant H. A. Porazzo, Deputy Chief Commander of the California Highway Patrol, appealed the District Court decision to the Court of Appeals for the Ninth Circuit. Lawson [461 U.S. 352, 355] cross-appealed, arguing that he was entitled to a jury trial on the issue of damages against

the officers. The Court of Appeals affirmed the District Court determination as to the unconstitutionality of 647(e). 658 F.2d 1362 (1981). The appellate court determined that the statute was unconstitutional in that it violates the Fourth Amendment's proscription against unreasonable searches and seizures, it contains a vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited. Finally, the Court of Appeals reversed the District Court as to its holding that Lawson was not entitled to a jury trial to determine the good faith of the officers in his damages action against them, and remanded the case to the District Court for trial.

The officers appealed to this Court from that portion of the judgment of the Court of Appeals which declared 647(e) unconstitutional and which enjoined its enforcement. We noted probable jurisdiction pursuant to 28 U.S.C. 1254(2). 455 U.S. 999 (1982).

II

In the courts below, Lawson mounted an attack on the facial validity of 647(e). 3 "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, n. 5 (1982). As construed by the California Court of Appeal, 4 647(e) requires that an individual [461 U.S. 352, 356] provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a Terry detention. 5 People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 [461 U.S. 352, 357] (1973). "Credible and reliable" identification is defined by the State Court of Appeal as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Id., at 438, 108 Cal. Rptr., at 873. In addition, a suspect may be required to "account for his presence . . . to the extent that it assists in producing credible and reliable identification . . . ." Id., at 438, 108 Cal. Rptr., at 872. Under the terms of the statute, failure of the individual to provide "credible and reliable" identification permits the arrest. 6

III

Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, Substantive Criminal Law 53 (1978).

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra; Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Connally v. General Construction Co., 269 U.S. 385 (1926). Although the doctrine focuses [461 U.S. 352, 358] both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine - the requirement that a legislature

establish minimal guidelines to govern law enforcement." Smith, 415 U.S., at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id., at 575. 7

Section 647(e), as presently drafted and as construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under 647(e). Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965). Our concern here is based upon the "potential for arbitrarily suppressing First Amendment liberties . . . ." Id., at 91. In addition, 647(e) implicates consideration of the constitutional right to freedom of movement. See Kent v. Dulles, 357 U.S. 116, 126 (1958); Aptheker v. Secretary of State, 378 U.S. 500, 505 -506 (1964). 8 [461 U.S. 352, 359]

Section 647(e) is not simply a "stop-and-identify" statute. Rather, the statute requires that the individual provide a "credible and reliable" identification that carries a "reasonable assurance" of its authenticity, and that provides "means for later getting in touch with the person who has identified himself." Solomon, 33 Cal. App. 3d, at 438, 108 Cal. Rptr., at 872-873. In addition, the suspect may also have to account for his presence "to the extent it assists in producing [461 U.S. 352, 360] credible and reliable identification." Id., at 438, 108 Cal. Rptr., at 872.

At oral argument, the appellants confirmed that a suspect violates 647(e) unless "the officer [is] satisfied that the identification is reliable." Tr. of Oral Arg. 6. In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him, 9 or could satisfy the identification requirement simply by reciting his name and address. See id., at 6-10.

It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "entrust[s] lawmaking `to the moment-to-moment judgment of the policeman on his beat.'" Smith, supra, at 575 (quoting Gregory v. Chicago, 394 U.S. 111, 120 (1969) (Black, J., concurring)). Section 647(e) "furnishes a convenient tool for `harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'" Papachristou, 405 U.S., at 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97 -98 (1940)), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (POWELL, J., concurring in result). In providing that a detention under 647(e) may occur only where there is the level of suspicion sufficient to justify a Terry stop, the State ensures the existence of "neutral limitations on the conduct of individual officers." Brown v. Texas, 443 Page 361 U.S., at 51. Although the initial detention is justified, the State

fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. See Lanzetta v. New Jersey, 306 U.S. 451 (1939). Section 647(e), as presently construed, requires that "suspicious" persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require "impossible standards" of clarity, see United States v. Petrillo, 332 U.S. 1, 7-8 (1947), this is not a case where further precision in the statutory language is either impossible or impractical.

IV

We conclude 647(e) is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. 10 Accordingly, the judgment of [461 U.S. 352, 362] the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Footnotes

[Footnote 1] California Penal Code Ann. 647(e) (West 1970) provides: "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

[Footnote 2] The District Court failed to find facts concerning the particular occasions on which Lawson was detained or arrested under 647(e). However, the trial transcript contains numerous descriptions of the stops given both by Lawson and by the police officers who detained him. For example, one police officer testified that he stopped Lawson while walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area. Tr. 266-267. Another officer testified that he detained Lawson, who was walking at a late hour in a business area where some businesses were still open, and asked for identification because burglaries had been committed by unknown persons in the general area. Id., at 207. The appellee states that he has never been stopped by police for any reason apart from his detentions under 647(e).

[Footnote 3] The appellants have apparently never challenged the propriety of declaratory and injunctive relief in this case. See Steffel v. Thompson, 415 U.S. 452 (1974). Nor have appellants ever challenged Lawson's standing to seek such relief. We note that Lawson has been stopped on approximately 15 occasions pursuant to 647(e), and that these 15 stops occurred in a period of

less than two years. Thus, there is a "credible threat" that Lawson might be detained again under 647(e). See Ellis v. Dyson, 421 U.S. 426, 434 (1975).

[Footnote 4] In Wainwright v. Stone, 414 U.S. 21, 22 -23 (1973), we held that "[f]or the purpose of determining whether a state statute is too vague and [461 U.S. 352, 356] indefinite to constitute valid legislation `we must take the statute as though it read precisely as the highest court of the State has interpreted it.' Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273 (1940)." The Court of Appeals for the Ninth Circuit noted in its decision that the state intermediate appellate court has construed the statute in People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973), that the State Supreme Court has refused review, and that Solomon has been the law of California for nine years. In these circumstances, we agree with the Ninth Circuit that the Solomon opinion is authoritative for purposes of defining the meaning of 647(e). See 658 F.2d 1362, 1364-1365, n. 3 (1981).

[Footnote 5] The Solomon court apparently read Terry v. Ohio, 392 U.S. 1 (1968), to hold that the test for a Terry detention was whether the officer had information that would lead a reasonable man to believe that the intrusion was appropriate. The Ninth Circuit noted that according to Terry, the applicable test under the Fourth Amendment requires that the police officer making a detention "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S., at 21 . The Ninth Circuit then held that although what Solomon articulated as the Terry standard differed from what Terry actually held, "[w]e believe that the Solomon court meant to incorporate in principle the standards enunciated in Terry." 658 F.2d, at 1366, n. 8. We agree with that interpretation of Solomon. Of course, if the Solomon court misread Terry and interpreted 647(e) to permit investigative detentions in situations where the officers lack a reasonable suspicion of criminal activity based on objective facts, Fourth Amendment concerns would be implicated. See Brown v. Texas, 443 U.S. 47 (1979). In addition, the Solomon court appeared to believe that both the Terry detention and frisk were proper under the standard for Terry detentions, and since the frisk was more intrusive than the request for identification, the request for identification must be proper under Terry. See 33 Cal. App. 3d, at 435, 108 Cal. Rptr., at 870-871. The Ninth Circuit observed that the Solomon analysis was "slightly askew." 658 F.2d, at 1366, n. 9. The court reasoned that under Terry, the frisk, as opposed to the detention, is proper only if the detaining officer reasonably believes that the suspect may be armed and dangerous, in addition to having an articulable suspicion that criminal activity is afoot.

[Footnote 6] In People v. Caylor, 6 Cal. App. 3d 51, 56, 85 Cal. Rptr. 497, 501 (1970), the court suggested that the State must prove that a suspect detained under 647(e) was loitering or wandering for "evil purposes." However, in Solomon, which the court below and the parties concede is "authoritative" in the absence of a California Supreme Court decision on the issue, there is no discussion of any requirement that the State prove "evil purposes."

[Footnote 7] Our concern for minimal guidelines finds its roots as far back as our decision in United States v. Reese, 92 U.S. 214, 221 (1876): "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts

to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

[Footnote 8] In his dissent, JUSTICE WHITE claims that "[t]he upshot of our cases . . . is that whether or not a statute purports to regulate constitutionally [461 U.S. 352, 59] protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." Post, at 370. The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982). Second, where a statute imposes criminal penalties, the standard of certainty is higher. See Winters v. New York, 333 U.S. 507, 515 (1948). This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. See, e. g., Colautti v. Franklin, 439 U.S. 379, 394 -401 (1979); Lanzetta v. New Jersey, 306 U.S. 451 (1939). The dissent concedes that "the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment . . . ." Post, at 371. However, in the dissent's view, one may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." Post, at 370. But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. See, e. g., Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967); NAACP v. Button, 371 U.S. 415, 433 (1963). See also Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 110-113 (1960). No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. The dissent relies heavily on Parker v. Levy, 417 U.S. 733 (1974), but in that case we deliberately applied a less stringent vagueness analysis "[b]ecause of the factors differentiating military society from civilian society." Id., at 756. Hoffman Estates, supra, also relied upon by the dissent, does not support its position. In addition to reaffirming the validity of facial challenges in situations where free speech or free association are affected, see 455 U.S., at 494 , 495, 498-499, the Court emphasized that the ordinance in Hoffman Estates "simply regulates business behavior" and that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." Id., at 499, 498.

[Footnote 9] To the extent that 647(e) criminalizes a suspect's failure to answer such questions put to him by police officers, Fifth Amendment concerns are implicated. It is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." Davis v. Mississippi, 394 U.S. 721, 727 , n. 6 (1969).

[Footnote 10] Because we affirm the judgment of the court below on this ground, we find it unnecessary to decide the other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. See Burton v. United States, 196 U.S. 283, 295 (1905); Liverpool, N. Y. & P. S. S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). See also Ashwander v. TVA, 297 U.S. 288, 346 -347 (1936) (Brandeis, J., concurring). The remaining issues raised by the parties include whether 647(e) implicates Fourth Amendment concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under Terry, whether the requirement that an individual identify himself during a Terry stop violates the Fifth

Amendment protection against compelled testimony, and whether inclusion of the Terry standard as part of a criminal [461 U.S. 352, 362] statute creates other vagueness problems. The appellee also argues that 647(e) permits arrests on less than probable cause. See Michigan v. DeFillippo, 443 U.S. 31, 36 (1979).

JUSTICE BRENNAN, concurring.

I join the Court's opinion; it demonstrates convincingly that the California statute at issue in this case, Cal. Penal Code Ann. 647(e) (West 1970), as interpreted by California courts, is unconstitutionally vague. Even if the defect identified by the Court were cured, however, I would hold that this statute violates the Fourth Amendment. 1 Merely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes, States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer. [461 U.S. 352, 363]

It has long been settled that the Fourth Amendment prohibits the seizure and detention or search of an individual's person unless there is probable cause to believe that he has committed a crime, except under certain conditions strictly defined by the legitimate requirements of law enforcement and by the limited extent of the resulting intrusion on individual liberty and privacy. See Davis v. Mississippi, 394 U.S. 721, 726 -727 (1969). The scope of that exception to the probable-cause requirement for seizures of the person has been defined by a series of cases, beginning with Terry v. Ohio, 392 U.S. 1 (1968), holding that a police officer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect briefly for purposes of limited questioning and, in so doing, may conduct a brief "frisk" of the suspect to protect himself from concealed weapons. See, e. g., United States v. Brignoni-Ponce, 422 U.S. 873, 880 -884 (1975); Adams v. Williams, 407 U.S. 143, 145 -146 (1972). Where probable cause is lacking, we have expressly declined to allow significantly more intrusive detentions or searches on the Terry rationale, despite the assertion of compelling law enforcement interests. "For all but those narrowly defined intrusions, the requisite `balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are `reasonable' only if supported by probable cause." Dunaway v. New York, 442 U.S. 200, 214 (1979). 2 [461 U.S. 352, 364]

Terry and the cases following it give full recognition to law enforcement officers' need for an "intermediate" response, short of arrest, to suspicious circumstances; the power to effect a brief detention for the purpose of questioning is a powerful tool for the investigation and prevention of crimes. Any person may, of course, direct a question to another person in passing. The Terry doctrine permits police officers to do far more: If they have the requisite reasonable suspicion, they may use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official "show of authority," the use of physical force to restrain him, and a search of the person for weapons. Terry v. Ohio, supra, at 19, n. 16; see Florida v. Royer, 460 U.S. 491, 498 -499 (1983) (opinion of WHITE, J.); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). During such an encounter, few people will ever feel free not to cooperate fully with the police by answering their questions. Cf. 3 W. LaFave, Search and Seizure 9.2, pp. 53-55 (1978). Our case reports are replete with examples of suspects' cooperation during Terry encounters, even when the suspects have a great

deal to lose by co-operating. See, e. g., Sibron v. New York, 392 U.S. 40, 45 (1968); Florida v. Royer, supra, at 493-495.

The price of that effectiveness, however, is intrusion on individual interests protected by the Fourth Amendment. We have held that the intrusiveness of even these brief stops for purposes of questioning is sufficient to render them "seizures" under the Fourth Amendment. See Terry v. Ohio, 392 U.S., at 16. For precisely that reason, the scope of seizures of the person on less than probable cause that Terry [461 U.S. 352, 365] permits is strictly circumscribed to limit the degree of intrusion they cause. Terry encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him.

> "[T]he person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." Id., at 34 (WHITE, J., concurring).

Failure to observe these limitations converts a Terry encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. See Florida v. Royer, 460 U.S., at 501 (opinion of WHITE, J.); id., at 509-511 (BRENNAN, J., concurring in result); Dunaway v. New York, supra, at 216.

The power to arrest - or otherwise to prolong a seizure until a suspect had responded to the satisfaction of the police officers - would undoubtedly elicit cooperation from a high percentage of even those very few individuals not sufficiently coerced by a show of authority, brief physical detention, and a frisk. We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. See, e. g., Brown v. Texas, 443 U.S. 47, 52 (1979). But the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion. See Dunaway v. New York, supra; United States v. Brignoni-Ponce, 422 U.S., at 878. Detention beyond the limits [461 U.S. 352, 366] of Terry without probable cause would improve the effectiveness of legitimate police investigations by only a small margin, but it would expose individual members of the public to exponential increases in both the intrusiveness of the encounter and the risk that police officers would abuse their discretion for improper ends. Furthermore, regular expansion of Terry encounters into more intrusive detentions, without a clear connection to any specific underlying crimes, is likely to exacerbate ongoing tensions, where they exist, between the police and the public. See Report of the National Advisory Commission on Civil Disorders 157-168 (1968).

In sum, under the Fourth Amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions. 3 They may ask their questions in a way calculated to obtain an answer. But they may not compel an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they

have acquired during the encounter has given them probable cause sufficient to justify an arrest. 4

California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a [461 U.S. 352, 367] Terry encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody. To begin, the statute at issue in this case could not be constitutional unless the intrusions on Fourth Amendment rights it occasions were necessary to advance some specific, legitimate state interest not already taken into account by the constitutional analysis described above. Yet appellants do not claim that 647(e) advances any interest other than general facilitation of police investigation and preservation of public order - factors addressed at length in Terry, Davis, and Dunaway. Nor do appellants show that the power to arrest and to impose a criminal sanction, in addition to the power to detain and to pose questions under the aegis of state authority, is so necessary in pursuit of the State's legitimate interests as to justify the substantial additional intrusion on individuals' rights. Compare Brief for Appellants 18-19 (asserting that 647(e) is justified by state interest in "detecting and preventing crime" and "protecting the citizenry from criminal acts"), and People v. Solomon, 33 Cal. App. 3d 429, 436-437, 108 Cal. Rptr. 867, 872 (1973) (647(e) justified by "the public need involved," i. e., "protection of society against crime"), with United States v. Brignoni-Ponce, supra, at 884 (federal interest in immigration control permits stops at the border itself without reasonable suspicion), and California v. Byers, 402 U.S. 424, 456 -458 (1971) (Harlan, J., concurring in judgment) (state interest in regulating automobiles justifies making it a crime to refuse to stop after an automobile accident and report it). Thus, because the State's interests extend only so far as to justify the limited searches and seizures defined by Terry, the balance of interests described in that case and its progeny must control.

Second, it goes without saying that arrest and the threat of a criminal sanction have a substantial impact on interests protected by the Fourth Amendment, far more severe than [461 U.S. 352, 368] we have ever permitted on less than probable cause. Furthermore, the likelihood that innocent persons accosted by law enforcement officers under authority of 647(e) will have no realistic means to protect their rights compounds the severity of the intrusions on individual liberty that this statute will occasion. The arrests it authorizes make a mockery of the right enforced in Brown v. Texas, 443 U.S. 47 (1979), in which we held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion. 5 If 647(e) remains in force, the validity of such arrests will be open to challenge only after the fact, in individual prosecutions for failure to produce identification. Such case-by-case scrutiny cannot vindicate the Fourth Amendment rights of persons like appellee, many of whom will not even be prosecuted after they are arrested, see ante, at 354. A pedestrian approached by police officers has no way of knowing whether the officers have "reasonable suspicion" - without which they may not demand identification even under 647(e), ante, at 356, and n. 5 - because that condition depends solely on the objective facts known to the officers and evaluated in light of their experience, see Terry v. Ohio, 392 U.S., at 30 ; United States v. Brignoni-Ponce, 422 U.S., at 884 -885. The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bail bondsmen, firsthand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution. 6 The only response to be [461 U.S. 352, 369] expected is

compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma. 7

By defining as a crime the failure to respond to requests for personal information during a Terry encounter, and by permitting arrests upon commission of that crime, California attempts in this statute to compel what may not be compelled under the Constitution. Even if 647(e) were not unconstitutionally vague, the Fourth Amendment would prohibit its enforcement.

[Footnote 1] We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." Sibron v. New York, 392 U.S. 40, 61 (1968). In Sibron, and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. See Los Angeles v. Lyons, ante, at 105-109; Gomez v. Layton, 129 U.S. App. D.C. 289, 394 F.2d 764 (1968). It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

[Footnote 2] A brief detention is usually sufficient as a practical matter to accomplish all legitimate law enforcement objectives with respect to individuals whom the police do not have probable cause to arrest. For longer detentions, even though they fall short of a full arrest, we have demanded not only a high standard of law enforcement necessity, but also objective indications that an individual would not consider the detention significantly intrusive. Compare Dunaway v. New York, 442 U.S., at 212 -216 (seizure of suspect without probable cause and custodial interrogation in police station violates Fourth Amendment), and Davis v. Mississippi, 394 U.S. 721, 727 -728 (1969) (suspect may not be summarily detained and taken to police station for fingerprinting but may be ordered to appear at a specific time), [461 U.S. 352, 364] with Michigan v. Summers, 452 U.S. 692, 701 -705 (1981) (suspect may be detained in his own home without probable cause for time necessary to search the premises pursuant to a valid warrant supported by probable cause). See also Florida v. Royer, 460 U.S. 491, 500 (1983) (opinion of WHITE, J.) ("least intrusive means" requirement for searches not supported by probable cause).

[Footnote 3] Police officers may have a similar power with respect to persons whom they reasonably believe to be material witnesses to a specific crime. See, e. g., ALI Model Code of Pre-Arraignment Procedure 110.2(1)(b) (Proposed Official Draft 1975).

[Footnote 4] Of course, some reactions by individuals to a properly limited Terry encounter, e. g., violence toward a police officer, in and of themselves furnish valid grounds for arrest. Other reactions, such as flight, may often provide the necessary information, in addition to that which

the officers already possess, to constitute probable cause. In some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions once detained, viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause. A court confronted with such a claim, however, would have to evaluate it carefully to make certain that the person arrested was not being penalized for the exercise of his right to refuse to answer.

[Footnote 5] In Brown we had no need to consider whether the State can make it a crime to refuse to provide identification on demand during a seizure permitted by Terry, when the police have reasonable suspicion but not probable cause. See 443 U.S., at 53 , n. 3.

[Footnote 6] Even after arrest, however, he may not be forced to answer questions against his will, and - in contrast to what appears to be normal procedure during Terry encounters - he will be so informed. See Miranda v. Arizona, 384 U.S. 436 (1966). In fact, if he indicates a desire to remain silent, the police should cease questioning him altogether. Id., at 473-474.

[Footnote 7] When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the State and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed, even if charges are dismissed or the individual is acquitted. Such individuals may be arrested, and they may not resist. But probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in Terry, including either arrest or the need to answer questions that the individual does not want to answer in order to avoid arrest or end a detention.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, e. g., United States v. Mazurie, 419 U.S. 544, 550 (1975); United States v. Powell, 423 U.S. 87, 92 -93 (1975). If the actor is given sufficient notice that his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases "suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to [461 U.S. 352, 370] attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756 (1974). The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982).

These general rules are equally applicable to cases where First Amendment or other "fundamental" interests are involved. The Court has held that in such circumstances "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression," Parker v. Levy, supra, at 756; a "greater degree of specificity" is demanded than

in other contexts. Smith v. Goguen, 415 U.S. 566, 573 (1974). But the difference in such cases "relates to how strict a test of vagueness shall be applied in judging a particular criminal statute." Parker v. Levy, 417 U.S., at 756. It does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own. See ibid. Of course, if his own actions are themselves protected by the First Amendment or other constitutional provision, or if the statute does not fairly warn that it is proscribed, he may not be convicted. But it would be unavailing for him to claim that although he knew his own conduct was unprotected and was plainly enough forbidden by the statute, others may be in doubt as to whether their acts are banned by the law.

The upshot of our cases, therefore, is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications. If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the [461 U.S. 352, 371] law, the enactment is not unconstitutional on its face and should not be vulnerable to a facial attack in a declaratory judgment action such as is involved in this case. Under our cases, this would be true, even though as applied to other conduct the provision would fail to give the constitutionally required notice of illegality.

Of course, the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment; and, as I have indicated, I also agree that in First Amendment cases the vagueness analysis may be more demanding. But to imply, as the majority does, ante, at 358-359, n. 8, that the overbreadth doctrine requires facial invalidation of a statute which is not vague as applied to a defendant's conduct but which is vague as applied to other acts is to confound vagueness and overbreadth, contrary to Parker v. Levy, supra.

If there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the lawbreaker know is clearly barred by the statute, it seems to me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstance the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers with respect to other conduct should be dealt with in those situations. See, e. g., Hoffman Estates, supra, at 504. It is no basis for fashioning a further brand of "overbreadth" and invalidating the statute on its face, thus forbidding its application to identifiable conduct that is within the State's power to sanction.

I would agree with the majority in this case if it made at least some sense to conclude that the requirement to provide "credible and reliable identification" after a valid stop on reasonable suspicion of criminal conduct is "impermissibly vague in all of its applications." Hoffman Estates v. Flipside, [461 U.S. 352, 372] supra, at 495. * But the statute is not vulnerable on this ground; and the majority, it seems to me, fails to demonstrate that it is. Suppose, for example, an officer requests identification information from a suspect during a valid Terry stop and the suspect answers: "Who I am is just none of your business." Surely the suspect would know from the statute that a refusal to provide any information at all would constitute a violation. It would

be absurd to suggest that in such a situation only the unfettered discretion of a police officer, who has legally stopped a person on reasonable suspicion, would serve to determine whether a violation of the statute has occurred.

> "It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [a failure to provide credible and reliable identification] and that would be covered by the statute . . . . In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed [to have failed to meet the statute's requirements] by the State, but unpredictability in those situations does not change the certainty in others." Smith v. Goguen, 415 U.S., at 584 (WHITE, J., concurring in judgment).

See id., at 590 (BLACKMUN, J., joined by BURGER, C. J., agreeing with WHITE, J., on the vagueness issue). Thus, even if, as the majority cryptically asserts, the statute here [461 U.S. 352, 373] implicates First Amendment interests, it is not vague on its face, however more strictly the vagueness doctrine should be applied. The judgment below should therefore not be affirmed but reversed and appellee Lawson remitted to challenging the statute as it has been or will be applied to him.

The majority finds that the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a `credible and reliable' identification." Ante, at 358. At the same time, the majority concedes that "credible and reliable" has been defined by the state court to mean identification that carries reasonable assurance that the identification is authentic and that provides means for later getting in touch with the person. The narrowing construction given this statute by the state court cannot be likened to the "standardless" statutes involved in the cases cited by the majority. For example, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), involved a statute that made it a crime to be a "vagrant." The statute provided:

> "`Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, . . . common drunkards, common night walkers, . . . lewd, wanton and lascivious persons, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . shall be deemed vagrants.'" Id., at 156-157, n. 1.

In Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974), the statute at issue made it a crime "`for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" The present statute, as construed by the state courts, does not fall in the same category.

The statutes in Lewis v. City of New Orleans and Smith v. Goguen, supra, as well as other cases cited by the majority clearly involved threatened infringements of First Amendment [461 U.S. 352, 374] freedoms. A stricter test of vagueness was therefore warranted. Here, the majority makes a vague reference to potential suppression of First Amendment liberties, but the precise nature of the liberties threatened is never mentioned. Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965), is cited, but that case dealt with an ordinance making it a crime to "`stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on,'" id., at

90, and the First Amendment concerns implicated by the statute were adequately explained by the Court's reference to Lovell v. City of Griffin, 303 U.S. 444 (1938), and Schneider v. State, 308 U.S. 147 (1939), which dealt with the First Amendment right to distribute leaflets on city streets and sidewalks. There are no such concerns in the present case.

Of course, if the statute on its face violates the Fourth or Fifth Amendment - and I express no views about that question - the Court would be justified in striking it down. But the majority apparently cannot bring itself to take this course. It resorts instead to the vagueness doctrine to invalidate a statute that is clear in many of its applications but which is somehow distasteful to the majority. As here construed and applied, the doctrine serves as an open-ended authority to oversee the States' legislative choices in the criminal law area and in this case leaves the State in a quandary as to how to draft a statute that will pass constitutional muster.

I would reverse the judgment of the Court of Appeals.

[Footnote *] The majority attempts to underplay the conflict between its decision today and the decision last Term in Hoffman Estates v. Flipside, Hoffman Estates, Inc., by suggesting that we applied a "less strict vagueness test" because economic regulations were at issue. The Court there also found that the ordinances challenged might be characterized as quasi-criminal or criminal in nature and held that because at least some of respondent's conduct clearly was covered by the ordinance, the facial challenge was unavailing even under the "relatively strict test" applicable to criminal laws. 455 U.S., at 499 -500. [461 U.S. 352, 375]

United States Court of Appeals,Ninth Circuit.

BELL v. CITY OF BOISE

Janet F. BELL; Brian S. Carson; Robert Martin; Lawrence Lee Smith; Robert Anderson; Pamela S. Hawkes; James M. Godfrey; Basil E. Humphrey, Plaintiffs–Appellants, v. CITY OF BOISE; Boise Police Department; Michael Masterson, in his official capacity as Chief of Police, Defendants–Appellees.

No. 11–35674.

Argued and Submitted Aug. 7, 2012. -- March 07, 2013

Before SUSAN H. BLACK,SUSAN P. GRABER, and JOHNNIE B. RAWLINSON, Circuit Judges.*

Howard A. Belodoff, Idaho Legal Aid Services, Inc., Boise, ID, for Plaintiffs–Appellants.Scott B. Muir, Assistant City Attorney, Boise City Attorney's Office, Boise, ID, for Defendants–Appellees.

OPINION

Plaintiffs appeal the court's[1] order granting summary judgment to Defendants City of Boise, Boise Police Department, and Michael Masterson in his official capacity as Chief of Police. Plaintiffs' amended complaint, brought pursuant to 42 U.S.C. § 1983, alleged Defendants enforced two local ordinances in violation of the Eighth Amendment to the Constitution. The court held the Rooker–Feldman[2] doctrine deprived it of subject matter jurisdiction over Plaintiffs' claims for retrospective relief. The court also found Plaintiffs' claims for prospective injunctive and declaratory relief "largely moot" because the City of Boise amended one ordinance and the Chief of Police issued an internal policy regarding the enforcement of both ordinances.

We reverse the dismissal of Plaintiffs' claims for retrospective relief because those claims are not barred by the Rooker–Feldman doctrine. We also reverse the dismissal of Plaintiffs' claims for prospective relief because those claims have not been mooted by Defendants' voluntary conduct. In reversing, we do not reach the merits of Plaintiffs' Eighth Amendment challenges. Rather, we hold that jurisdiction exists as to Plaintiffs' Eighth Amendment claims and remand for a consideration of the merits in the first instance.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs Robert Anderson, Janet Bell, Brian Carson, Pamela Hawkes, Basil Humphrey, Robert Martin, and Lawrence Lee Smith are individuals who either are or have been homeless in Boise. Plaintiffs have all been cited or arrested for violating one or both of the local ordinances at issue on appeal.[3]

Between 2006 and 2009, Plaintiffs Anderson, Bell, Hawkes, Humphrey, Martin, and Smith were cited or arrested for violating Boise City Code § 9–10–02 (1993) (the Camping Ordinance). During that period, the Camping Ordinance provided:

It shall be unlawful for any person to use any of the streets, sidewalks, parks or public places as a camping place at any time . provided that this section shall not prohibit the operation of a sidewalk cafe pursuant to a permit issued by the City Clerk.

Boise City Code § 9–10–02 (1993). Violation of the Camping Ordinance was (and is) a misdemeanor. Boise City Code § 9–10–20.[4]

Between 2007 and 2009, Plaintiffs Carson, Hawkes, and Martin were cited for violating Boise City Code § 6–01–05(A) (the Sleeping Ordinance). The Sleeping Ordinance criminalizes as a misdemeanor "disorderly conduct," which includes "[o]ccupying, lodging or sleeping in any building, structure or place, whether public or private, or in any motor vehicle without the permission of the owner or person entitled to possession or in control thereof." Boise City Code § 6–01–05(A).

On June 28, 2010, Plaintiffs filed an amended complaint challenging the Camping and Sleeping Ordinances (collectively, the Ordinances) and seeking relief pursuant to 42 U.S.C. § 1983. Plaintiffs' amended complaint alleged that Defendants used the Ordinances "to cite and arrest individuals who cannot avoid violating these laws because they are homeless." Plaintiffs contended that Defendants' policy, custom, and practice in enforcing these ordinances "has the effect of 'criminalizing' homelessness" and constitutes "cruel and unusual punishment in violation of Plaintiffs' well established rights under the Eighth Amendment." Plaintiffs sought declaratory and injunctive relief to enjoin enforcement of the Ordinances. Plaintiffs also sought an order (1) "compelling the City of Boise authorities to seek expungement of the records of any homeless individuals unlawfully cited or arrested" under the Ordinances, and (2) requiring the reimbursement of any criminal fines or costs of incarceration paid by homeless individuals as a result of unlawful citations and arrests. Plaintiffs further sought an "[a]ward of damages according to proof."

Central to Plaintiffs' claims is the alleged unavailability of overnight space in Boise's homeless shelters. Three primary homeless shelters operate in Boise. Boise Rescue Mission (BRM) operates two of the shelters—City Light for Women and Children (City Light) and River of Life. During the summer, both BRM shelters restrict the length of time a person may stay without participating in certain programs. City Light provides shelter for women and children, while River of Life provides shelter for men. Interfaith Sanctuary (Sanctuary) operates the third shelter. Sanctuary cannot guarantee shelter for every person who requests it, and frequently turns away people when full. However, Sanctuary employs a reservation system for those who have stayed the prior evening. People who stayed the previous night are guaranteed the same beds, provided

they "show up by 9:00 pm or make special arrangements." Otherwise, the beds are given to those on the wait list. Sanctuary does not appear to restrict a person's length of stay, given that Plaintiff Anderson spent three years living at Sanctuary.

On November 10, 2009, after this litigation had commenced,[5] the City amended the Camping Ordinance by adding a definition of "camp" and "camping":

> The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

Boise City Code § 9–10–02 (2009).

No changes were made to the Sleeping Ordinance. However, the Boise Police Department's Chief of Police issued a "Special Order," with instructions to post the order in the 2009 Policy Manual accompanied by a handwritten note that the policy regarding enforcement of the Ordinances "is modified by Special Order 10–03, effective at 0001 hours on January 1, 2010." The Special Order is not referenced or incorporated into the Ordinances. Although the record is vague as to exactly how the Special Order was created, it is clear from the record that the Chief of Police has the exclusive authority to establish policy for the Boise Police Department.

The Special Order prohibits officers from enforcing the Camping and Sleeping Ordinances when a person is on public property and there is no available overnight shelter. The Special Order defines "available overnight shelter" as "a public or private shelter, with an available overnight space, open to an individual or family unit experiencing homelessness at no charge. To qualify as available, the space must take into account sex, marital and familial status, and disabilities." The Special Order further provides that, if an individual cannot use available space because of a disability or a shelter's length-of-stay restrictions, the space should not be considered available. The space will be considered available if the individual cannot use the space "due to voluntary actions such as intoxication, drug use or unruly behavior."

All three homeless shelters agreed to report voluntarily to Boise State University Dispatch on evenings they determined their shelters were "full."[6] Boise State University agreed to then send an e-mail to the Boise Police Department advising officers that a shelter had reported being full. No written agreement exists between Defendants and the shelters.

After extensive discovery, the amendment of the Camping Ordinance, and the adoption of the Special Order, the court granted Defendants' motion for summary judgment. The court, citing Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir.2006), vacated, 505 F.3d 1006 (9th Cir.2007) (order), recognized that a legal basis existed for Plaintiffs' Eighth Amendment

challenge to the Ordinances.[7] The court then concluded Plaintiffs' Eighth Amendment claims for prospective relief were "mooted in part and otherwise fail as a matter of law."

In analyzing Plaintiffs' Eighth Amendment claims for prospective relief, the court distinguished between daytime enforcement of the Sleeping Ordinance and nighttime enforcement of the Sleeping and Camping Ordinances. With respect to the daytime enforcement of the Sleeping Ordinance, it determined "the undisputed facts reflect that the homeless may sleep in the parks during the day (whether or not shelter space is available)." Accordingly, the court concluded the daytime aspect of Plaintiffs' Eighth Amendment claims failed as a matter of law.

With respect to nighttime enforcement of both Ordinances, the court held that Plaintiffs' Eighth Amendment claims for prospective relief were mooted by the adoption of the Special Order. The court reasoned that the adoption of the Special Order allowed the homeless to sleep in parks at night if shelter space was unavailable, which made it "no longer reasonable to expect that the Boise Police Department will enforce the . Ordinances against homeless people at night when shelter space is unavailable." Accordingly, the court found that adoption of the Special Order mooted the nighttime enforcement aspect of Plaintiffs' Eighth Amendment claims for prospective relief. The court noted that its "decision does not bar Plaintiffs from bringing a future action contending that Defendants are not following the policy set forth in the Special Order."

The court also concluded that the Rooker–Feldman doctrine barred consideration of Plaintiffs' claims for retrospective relief, including Plaintiffs' request for an order compelling expungement of Plaintiffs' criminal records and Plaintiffs' request for damages. The court reasoned that because Plaintiffs' requested relief was "designed to compensate Plaintiffs for the injuries occasioned by the state-court judgments," their retrospective claims "would serve as an end-run around the state court appellate process," and "serve as a de facto appeal from the state court." Further, Plaintiffs' claims would have required the court "to review and reject [the] judgment in each Plaintiff's [criminal] case." Thus, the court found Rooker–Feldman prohibited examination of the merits of Plaintiffs' retrospective claims.

The court granted summary judgment to Defendants on the remainder of Plaintiffs' claims and dismissed the amended complaint. This timely appeal followed. Plaintiffs do not appeal the court's decision that their Eighth Amendment claims concerning daytime enforcement of the Sleeping Ordinance failed as a matter of law. See Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1137 n. 13 (9th Cir.2012) (noting that an appellant waives appeal of an issue not raised in an opening brief).[8] Rather, Plaintiffs' appeal focuses on the court's findings with regard to mootness and the RookerFeldman doctrine.

STANDARD OF REVIEW

We review an application of the Rooker–Feldman doctrine de novo. Carmona v. Carmona, 603 F.3d 1041, 1050 (9th Cir.2010). We also review de novo questions of Article III justiciability, including mootness. Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1176 (9th Cir.2011). Factual determinations underlying the district court's decision are reviewed for clear error. Wolfson v. Brammer, 616 F.3d 1045, 1053 (9th Cir.2010).

DISCUSSION

We first discuss the court's dismissal of Plaintiffs' Eighth Amendment claims for retrospective relief under the RookerFeldman doctrine. We determine the Rooker–Feldman doctrine is inapplicable because Plaintiffs' suit is not a forbidden de facto appeal. We then discuss the court's dismissal of Plaintiffs' Eighth Amendment claims for prospective relief on mootness grounds. We conclude Defendants have failed to meet their heavy burden of demonstrating that the Special Order eliminates all reasonable expectations of recurrence of the allegedly unconstitutional enforcement of the Ordinances. Because we hold that jurisdiction exists over Plaintiffs' Eighth Amendment claims for retrospective and prospective relief, we remand for a consideration of the merits of these claims.[9]

A. Rooker–Feldman

The court dismissed Plaintiffs' claims for retrospective relief under the Rooker–Feldman doctrine after finding those "requests for relief are designed to compensate Plaintiffs for the injuries occasioned by the state-court judgments." On appeal, Plaintiffs contend the court incorrectly applied the Rooker–Feldman doctrine. We agree.

The Rooker–Feldman doctrine forbids a losing party in state court from filing suit in federal district court complaining of an injury caused by a state court judgment, and seeking federal court review and rejection of that judgment. Skinner v. Switzer, —— U.S. ——, 131 S.Ct. 1289, 1297, 179 L.Ed.2d 233 (2011). To determine whether the Rooker–Feldman bar is applicable, a district court first must determine whether the action contains a forbidden de facto appeal of a state court decision. Noel v. Hall, 341 F.3d 1148, 1158 (9th Cir.2003).[10] A de facto appeal exists when "a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision." Id. at 1164. In contrast, if "a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, Rooker–Feldman does not bar jurisdiction." Id. Thus, even if a plaintiff seeks relief from a state court judgment, such a suit is a forbidden de facto appeal only if the plaintiff also alleges a legal error by the state court. Maldonado v. Harris, 370 F.3d 945, 950 (9th Cir.2004); Kougasian v. TMSL, Inc., 359 F.3d 1136, 1140 (9th Cir.2004) ("[A] plaintiff must seek not only to set aside a state court judgment; he or she must also allege a legal error by the state court as the basis for that relief").

If "a federal plaintiff seeks to bring a forbidden de facto appeal, . that federal plaintiff may not seek to litigate an issue that is 'inextricably intertwined' with the state court judicial decision from which the forbidden de facto appeal is brought." Noel, 341 F.3d at 1158. The "inextricably intertwined" language from Feldman is not a test to determine whether a claim is a de facto appeal, but is rather a second and distinct step in the Rooker–Feldman analysis. See id. Should the action not contain a forbidden de facto appeal, the Rooker–Feldman inquiry ends. See Manufactured Home Cmtys. Inc. v. City of San Jose, 420 F.3d 1022, 1030 (9th Cir.2005).

The court erred by dismissing Plaintiffs' claims for retrospective relief under the Rooker–Feldman doctrine. Although Plaintiffs sought relief designed to remedy injuries suffered from a state court judgment, they did not allege before the court that the state court committed legal

error, nor did they seek relief from the state court judgment itself. Rather, Plaintiffs assert "as a legal wrong an allegedly illegal act . by an adverse party"—the City's allegedly unconstitutional enforcement of the Ordinances. Noel, 341 F.3d at 1164. Without a direct challenge to a state court's factual or legal conclusion, Plaintiffs' suit is not a forbidden de facto appeal, and Rooker–Feldman is inapplicable. See Manufactured Home Cmtys., 420 F.3d at 1030 ("MHC's complaint does not directly challenge a state court's factual or legal conclusion. MHC's complaint to the district court is, therefore, not a forbidden appeal under Rooker–Feldman."); see also Maldonado, 370 F.3d at 950; Kougasian, 359 F.3d at 1140. We therefore reverse the dismissal of Plaintiffs' claims for retrospective relief.[11]

B. Mootness

The court dismissed Plaintiffs' claims for prospective relief as moot after concluding the Special Order was "sufficient to foreclose any reasonable expectation that the alleged illegal action will recur." Specifically, the court found it was no longer reasonable to expect the Ordinances would be enforced against the homeless at night when shelter space was unavailable. On appeal, Plaintiffs argue the court failed to apply the stringent standard for evaluating whether a defendant's voluntary cessation of a challenged practice renders a case moot. Defendants contend Plaintiffs' claims have been mooted by the Special Order.[12]

"The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." Knox v. Serv. Emps. Int'l Union, Local 1000, —— U.S. ——, 132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012); see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189, 120 S.Ct. 693, 708, 145 L.Ed.2d 610 (2000) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (internal quotation marks omitted)). The standard for determining whether a defendant's voluntary conduct moots a case is "stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, 528 U.S. at 189, 120 S.Ct. at 708 (internal quotation marks omitted); see also White v. Lee, 227 F.3d 1214, 1242–44 (9th Cir.2000). The "heavy burden" lies with the party asserting mootness to demonstrate that, after a voluntary cessation, "the challenged conduct cannot reasonably be expected to start up again." Friends of the Earth, 528 U.S. at 189, 120 S.Ct. at 708 (internal quotation marks omitted). This heavy burden applies to a government entity that voluntarily ceases allegedly illegal conduct. White, 227 F.3d at 1243–44.[13]

The court's mootness analysis relied upon our decision in Native Village of Noatak v. Blatchford, 38 F.3d 1505 (9th Cir.1994). Noatak, however, involved Alaska's repeal of a challenged statute and was "not a case where a defendant voluntarily ceases challenged action in response to a lawsuit." Id. at 1508, 1511. Noatak recognized the general principle that, "if a challenged law is repealed or expires, the case becomes moot." Id. at 1510.

Noatak's general principle narrowing the voluntary cessation exception is limited to "state legislative enactments that otherwise moot a controversy." See Chem. Producers & Distribs. Ass'n v. Helliker, 463 F.3d 871, 878 (9th Cir.2006) (noting the voluntary cessation exception has

been narrowed in these circumstances). For state legislative enactments, " '[a] statutory change . is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.' " Id. (quoting Noatak, 38 F.3d at 1510). By contrast, however, repeal or amendment of an ordinance by a local government or agency does not necessarily "deprive a federal court of its power to determine the legality of the practice." Id. (internal quotation marks omitted).

We are not presented with a change to a state legislative enactment, nor are we presented with the repeal of the challenged Ordinances. Defendants rely on the adoption of the Special Order, which is not analogous to either a state or local legislative enactment. Generally speaking, a statute is "[a] law passed by a legislative body." Black's Law Dictionary 1542 (9th ed.2009). Idaho's statutes are codified in the Idaho Code, and the legislative power to enact the laws of the State is vested in a senate and house of representatives. Idaho Const. art. III § 1. The Idaho Constitution provides that "no bill shall become a law without the concurrence of a majority of the members present," id. § 15, and the people of Idaho reserve "the power to approve or reject at the polls any act or measure passed by the legislature," id. § 1.

Similarly, the City of Boise defines ordinances as "formal legislative acts of the Council [to be] used whenever the Council intends to pass a regulatory measure, especially when it provides a penalty for a violation." City of Boise, http://cityclerk.cityofboise.org/city-code/ (last visited Dec. 18, 2012). The procedures for adopting an ordinance are outlined in the Idaho Code and "must be strictly followed." Id. A majority vote of the city council is required to pass or adopt an ordinance, and the subject of the ordinance must be clearly expressed in the title. Idaho Code. § 50–902. The Idaho Code also imposes certain publication requirements before an ordinance may take effect. Idaho Code §§ 50–901, 50–901A.

The Special Order is not governed by any analogous procedures. Although policies in the Boise Police Department Policy Manual may be created by a "policy committee," the Chief of Police has the ultimate, and exclusive, authority to "establish policy and to direct all actions of the Department and its employees." See Masterson Dep. 27: 1–4, 28: 6–8, Aug. 12, 2010. The Special Order was issued by the Boise Police Department's Chief of Police with instructions to post the order in the 2009 Policy Manual. Employees were then instructed to include a handwritten note that the policy regarding enforcement of the Ordinances "is modified by Special Order 10–03, effective at 0001 hours on January 1, 2010." The record is vague as to exactly how the Special Order was created. We do not know what function, if any, the policy committee served in creating the Special Order. What we do know is that the Chief of Police, and only the Chief of Police, has the "authority to establish policy for the police department." Masterson Dep. 28: 10–11.

The Special Order is an internal policy that purports to curb the discretion of officers to enforce the Ordinances when "[t]here is no available overnight shelter." It is not a formal written enactment of a legislative body and thus was not subject to any procedures that would typically accompany the enactment of a law. Nor is the Special Order referenced or incorporated in the Ordinances.[14] Even assuming Defendants have no intention to alter or abandon the Special Order, the ease with which the Chief of Police could do so counsels against a finding of mootness, as "a case is not easily mooted where the government is otherwise unconstrained

should it later desire to reenact the provision." Coral Constr. Co. v. King Cnty., 941 F.2d 910, 928 (9th Cir.1991).

The Special Order is also distinguishable from the "entrenched" and "permanent" policy issued in White. 227 F.3d at 1243. In White, the Department of Housing and Urban Development (HUD) adopted a new policy in response to the plaintiffs' allegations that HUD investigators violated their First Amendment rights. Id. at 1225. The new policy was designed to protect the First Amendment rights of parties subject to HUD investigations, and the policy was circulated in a memorandum, announced by press release, and incorporated into a field handbook. Id. at 1242. We found the policy change to be "permanent" based on the broad scope and unequivocal tone of the new policy. Id. at 1243. We also noted the new policy, which had been renewed on an annual basis and in place for more than five years, was "fully supportive of First Amendment rights," "addresse[d] all of the objectionable measures that HUD officials took against the plaintiffs," and "even confesse[d] that [plaintiffs'] case was the catalyst for the agency's adoption of the new policy." Id. & n. 25. Based on these facts, we held HUD had met its heavy burden of proving the challenged conduct could not reasonably be expected to recur, such that the plaintiffs' claims were mooted by the new policy. Id. at 1244.

Although White establishes that a policy change may be sufficient to meet the stringent standard for proving a case has been mooted by a defendant's voluntary conduct, id. at 1243–44, the Special Order lacks the assurances present in White. Significantly, in White, the new policy addressed "all of the objectionable measures that HUD officials took against the plaintiffs." Id. at 1243 (emphasis added). In contrast, the Special Order fails to fully address Plaintiffs' allegations in their amended complaint with regard to Defendants' nighttime enforcement of the Ordinances. Moreover, as discussed above, the authority to establish policy for the Boise Police Department is vested entirely in the Chief of Police, such that the new policy regarding enforcement of the Ordinances could be easily abandoned or altered in the future. Coral Constr. Co., 941 F.2d at 928. Simply put, Defendants have failed to establish with the clarity present in White that the new policy is the kind of permanent change that proves voluntary cessation.

On the record before us, we conclude the implementation of the Special Order is insufficient to moot Plaintiffs' Eighth Amendment claims for prospective relief.[15] Defendants have failed to meet their heavy burden to make it "absolutely clear that the allegedly wrongful behavior"—the alleged unconstitutional enforcement of the Ordinances—"could not reasonably be expected to recur." Friends of the Earth, 528 U.S. at 189, 120 S.Ct. at 708 (internal quotation marks omitted); see also DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 963 n. 1 (9th Cir.1999) (adopting the reasoning of Sefick v. Gardner, 164 F.3d 370, 372 (7th Cir.1998), which concluded a changed policy was insufficient to moot a controversy because the policy, adopted after the commencement of the suit, was " 'not implemented by statute or regulation and could be changed again' "); Gluth v. Kangas, 951 F.2d 1504, 1507 (9th Cir.1991) (concluding a vague policy enacted during litigation did "not deprive the court of a justiciable controversy").

CONCLUSION

We reverse the court's dismissal of Plaintiffs' claims for retrospective relief because those claims are not barred by the Rooker–Feldman doctrine. Further, we conclude jurisdiction exists as to

Plaintiffs' claims for prospective relief regarding the nighttime enforcement of the Ordinances. We remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

BLACK, Circuit Judge:

United States Court of Appeals,Ninth Circuit.

JONES v. CITY OF LOS ANGELES

Edward JONES; Patricia Vinson; George Vinson; Thomas Cash; Stanley Barger; Robert Lee Purrie, Plaintiffs-Appellants, v. CITY OF LOS ANGELES; William Bratton, Chief; Charles Beck, Captain, in their official capacity, Defendants-Appellees.

No. 04-55324.

Argued and Submitted Dec. 6, 2005. -- April 14, 2006

Before RYMER and WARDLAW, Circuit Judges, and REED,District Judge.*

Ben Wizner, Peter Eliasberg, and Mark D. Rosenbaum, ACLU Foundation of Southern California, Los Angeles, CA; Carol A. Sobel, Law Offices of Carol A. Sobel, Santa Monica, CA; and Adam B. Wolf, ACLU Drug Law Reform Project, Santa Cruz, CA, for Plaintiffs-Appellants.Amy Jo Field, Deputy City Attorney, Los Angeles, CA, for Defendants-Appellees.

Six homeless individuals, unable to obtain shelter on the night each was cited or arrested, filed this Eighth Amendment challenge to the enforcement of a City of Los Angeles ordinance that criminalizes sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within Los Angeles's city limits. Appellants seek limited injunctive relief from enforcement of the ordinance during nighttime hours, i.e., between 9:00 p.m. and 6:30 a.m., or at any time against the temporarily infirm or permanently disabled. We must decide whether the Eighth Amendment right to be free from cruel and unusual punishment prohibits enforcement of that law as applied to homeless individuals involuntarily sitting, lying, or sleeping on the street due to the unavailability of shelter in Los Angeles.

I. Facts and Procedural Background

The facts underlying this appeal are largely undisputed. Edward Jones, Patricia Vinson, George Vinson, Thomas Cash, Stanley Barger, and Robert Lee Purrie ("Appellants") are homeless individuals who live on the streets of Los Angeles's Skid Row district. Appellees are the City of Los Angeles, Los Angeles Police Department ("L.A.P.D.") Chief William Bratton, and Captain Charles Beck ("Appellees" or "the City"). Federal law defines the term "homeless individual" to include

(1) an individual who lacks a fixed, regular, and adequate nighttime residence; and

(2) an individual who has a primary nighttime residence that is-

(A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(B) an institution that provides a temporary residence for individuals intended to be institutionalized; or

(C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

Stewart B. McKinney Homeless Assistance Act of 1987 § 103(a), 42 U.S.C. § 11302(a) (2000). Appellants are six of the more than 80,000 homeless individuals in Los Angeles County on any given night. See L.A. Homeless Servs. Auth., Los Angeles Continuum of Care, Exhibit 1 Narrative, at 2-17 (2001); see also Patrick Burns et al., Econ. Roundtable, Homeless in LA: A Working Paper for the 10-Year Plan To End Homelessness in Los Angeles County (2003) (estimating that more than 253,000 individuals were homeless in Los Angeles County at some point during 2002).

The term "Skid Row" derives from the lumber industry practice of building a road or track made of logs laid crosswise over which other logs were slid. Christine Ammer, The American Heritage Dictionary of Idioms 382 (paperback ed.2003). By the 1930s, the term was used to describe the area of town frequented by loggers and densely populated with bars and brothels. Id. Beginning around the end of the nineteenth century, the area now known as Los Angeles's Skid Row became home to a transient population of seasonal laborers as residential hotels began to develop. See Mayor's Citizens' Task Force on Cent. City East, To Build a Community 5 (1988). For decades Skid Row has been home for "the down and out, the drifters, the unemployed, and the chronic alcoholic[s]" of Los Angeles. Id. Covering fifty city blocks immediately east of downtown Los Angeles, Skid Row is bordered by Third Street to the north, Seventh Street to the south, Alameda Street to the east, and Main Street to the west.

Los Angeles's Skid Row has the highest concentration of homeless individuals in the United States. Charlie LeDuff, In Los Angeles, Skid Row Resists an Upgrade, N.Y. Times, July 15, 2003, at A1. According to the declaration of Michael Alvidrez, a manager of single-room-occupancy ("SRO") hotels in Skid Row owned by the Skid Row Housing Trust, since the mid-1970s Los Angeles has chosen to centralize homeless services in Skid Row. See also Edward G. Goetz, Land Use and Homeless Policy in Los Angeles, 16 Int'l. J. Urb. & Regional Res. 540, 543 (1992) (discussing the City's long-standing "policy of concentrating and containing the homeless in the Skid Row area"). The area is now largely comprised of SRO hotels (multi-unit housing for very low income persons typically consisting of a single room with shared bathroom), shelters, and other facilities for the homeless.

Skid Row is a place of desperate poverty, drug use, and crime, where Porta-Potties serve as sleeping quarters and houses of prostitution. Steve Lopez, A Corner Where L.A. Hits Rock Bottom, L.A. Times, Oct. 17, 2005, at A1. Recently, it has been reported that local hospitals and law enforcement agencies from nearby suburban areas have been caught "dumping" homeless individuals in Skid Row upon their release. Cara Mia DiMassa & Richard Winton, Dumping of

Homeless Suspected Downtown, L.A. Times, Sept. 23, 2005, at A1. This led Los Angeles Mayor Antonio Villaraigosa to order an investigation into the phenomenon in September 2005. Cara Mia DiMassa & Richard Fausset, Mayor Orders Probe of Skid Row Dumping, L.A. Times, Sept. 27, 2005, at B1. L.A.P.D. Chief William Bratton, insisting that the Department does not target the homeless but only people who violate city ordinances (presumably including the ordinance at issue), has stated:

"If the behavior is aberrant, in the sense that it breaks the law, then there are city ordinances. You arrest them, prosecute them. Put them in jail. And if they do it again, you arrest them, prosecute them, and put them in jail. It's that simple."

Cara Mia DiMassa & Stuart Pfeifer, 2 Strategies on Policing Homeless, L.A. Times, Oct. 6, 2005, at A1 [hereinafter DiMassa, Policing Homeless] (omission in original) (quoting Chief Bratton). This has not always been City policy. The ordinance at issue was adopted in 1968. See L.A., Cal., Ordinance 137,269 (Sept. 11, 1968). In the late 1980s, James K. Hahn, who served as Los Angeles City Attorney from 1985 to 2001 and subsequently as Mayor, refused to prosecute the homeless for sleeping in public unless the City provided them with an alternative to the streets. Frederick M. Muir, No Place Like Home: A Year After Camp Was Closed, Despair Still Reigns on Skid Row, L.A. Times, Sept. 25, 1988, § 2 (Metro), at 1.

For the approximately 11,000-12,000 homeless individuals in Skid Row, space is available in SRO hotels, shelters, and other temporary or transitional housing for only 9000 to 10,000, leaving more than 1000 people unable to find shelter each night. See Mayor's Citizens' Task Force, supra, at 5. In the County as a whole, there are almost 50,000 more homeless people than available beds. See L.A. Homeless Servs. Auth., supra, at 2-14. In 1999, the fair market rent for an SRO room in Los Angeles was $379 per month. L.A. Housing Crisis Task Force, In Short Supply 6 (2000). Yet the monthly welfare stipend for single adults in Los Angeles County is only $221. See L.A. Homeless Servs. Auth., supra, at 2-10. Wait-lists for public housing and for housing assistance vouchers in Los Angeles are three- to ten-years long. See The U.S. Conference of Mayors, A Status Report on Hunger and Homelessness in America's Cities 101, 105 (2002) [hereinafter Homelessness Report]; [1] L.A. Housing Crisis Task Force, supra, at 7.

The result, in City officials' own words, is that " '[t]he gap between the homeless population needing a shelter bed and the inventory of shelter beds is severely large.' " Homelessness Report, supra, at 80. As Los Angeles's homeless population has grown, see id. at 109 (estimating annualized growth of ten percent in Los Angeles's homeless population in the years up to and including 2003), the availability of low-income housing in Skid Row has shrunk, according to the declaration of Alice Callaghan, director of a Skid Row community center and board member of the Skid Row Housing Trust. According to Callaghan's declaration, at night in Skid Row, SRO hotels, shelters, and other temporary or transitional housing are the only alternatives to sleeping on the street; during the day, two small parks are open to the public. Thus, for many in Skid Row without the resources or luck to obtain shelter, sidewalks are the only place to be.

As will be discussed below, Appellants' declarations demonstrate that they are not on the streets of Skid Row by informed choice. In addition, the Institute for the Study of Homelessness and

Poverty reports that homelessness results from mental illness, substance abuse, domestic violence, low-paying jobs, and, most significantly, the chronic lack of affordable housing. Inst. for the Study of Homelessness and Poverty, "Who Is Homeless in Los Angeles?" 3 (2000). It also reports that between 33% and 50% of the homeless in Los Angeles are mentally ill, and 76% percent of homeless adults in 1990 had been employed for some or all of the two years prior to becoming homeless. Id. at 2; see also Grace R. Dyrness et al., Crisis on the Streets: Homeless Women and Children in Los Angeles 14 (2003) (noting that approximately 14% of homeless individuals in Los Angeles are victims of domestic violence).

Against this background, the City asserts the constitutionality of enforcing Los Angeles Municipal Code section 41.18(d) against those involuntarily on the streets during nighttime hours, such as Appellants. It provides:

No person shall sit, lie or sleep in or upon any street, sidewalk or other public way.

The provisions of this subsection shall not apply to persons sitting on the curb portion of any sidewalk or street while attending or viewing any parade permitted under the provisions of Section 103.111 of Article 2, Chapter X of this Code; nor shall the provisions of this subsection supply [sic] to persons sitting upon benches or other seating facilities provided for such purpose by municipal authority by this Code.

L.A., Cal., Mun.Code § 41.18(d) (2005). A violation of section 41.18(d) is punishable by a fine of up to $1000 and/or imprisonment of up to six months. Id. § 11.00(m).

Section 41.18(d) is one of the most restrictive municipal laws regulating public spaces in the United States. The City can secure a conviction under the ordinance against anyone who merely sits, lies, or sleeps in a public way at any time of day. Other cities' ordinances similarly directed at the homeless provide ways to avoid criminalizing the status of homelessness by making an element of the crime some conduct in combination with sitting, lying, or sleeping in a state of homelessness. For example, Las Vegas prohibits standing or lying in a public way only when it obstructs pedestrian or vehicular traffic. See, e.g., Las Vegas, Nev., Mun.Code § 10.47.020 (2005) ("It is unlawful to intentionally obstruct pedestrian or vehicular traffic."). Others, such as Portland, prohibit "camping" in or upon any public property or public right of way. See, e.g., Portland, Or., Mun.Code §§ 14A.50.020, .030 (2006) (prohibiting obstruction of public sidewalks in a designated area or camping on public property). Still others contain safe harbor provisions such as limiting the hours of enforcement. See, e.g., Seattle, Wash., Mun.Code § 15.48.040 (2005) ("No person shall sit or lie down upon a public sidewalk . during the hours between seven (7:00) a.m. and nine (9:00) p.m. in the following zones."); Tucson, Ariz., Mun.Code § 11-36.2(a) (2005) (same, except prohibition extended to 10:00 p.m.); Houston, Tex., Mun.Code § 40-352(a) (2006) (same, except prohibition extended to 11:00 p.m.). Other cities include as a required element sitting, lying, or sleeping in clearly defined and limited zones. See, e.g., Philadelphia, Pa., Mun.Code § 10-611(1)(b)-(c), (2)(g)-(h) (2005) (prohibiting sitting or lying in certain designated zones only); Reno, Nev., Mun.Code § 8.12.015(b) (2005) (similar); Seattle, Wash., Mun.Code § 15.48.040 (similar). As a result of the expansive reach of section 41.18(d), the extreme lack of available shelter in Los Angeles, and the large homeless population, thousands of people violate the Los Angeles ordinance every day

and night, and many are arrested, losing what few possessions they may have.[2] Appellants are among them.

Robert Lee Purrie is in his early sixties. He has lived in the Skid Row area for four decades. Purrie sleeps on the streets because he cannot afford a room in an SRO hotel and is often unable to find an open bed in a shelter. Early in the morning of December 5, 2002, Purrie declares that he was sleeping on the sidewalk at Sixth Street and Towne Avenue because he "had nowhere else to sleep." At 5:20 a.m., L.A.P.D. officers cited Purrie for violating section 41.18(d). He could not afford to pay the resulting fine.

Purrie was sleeping in the same location on January 14, 2003, when police officers woke him early in the morning and searched, handcuffed, and arrested him pursuant to a warrant for failing to pay the fine from his earlier citation. The police removed his property from his tent, broke it down, and threw all of his property, including the tent, into the street. The officers also removed the property and tents of other homeless individuals sleeping near Purrie. After spending the night in jail, Purrie was convicted of violating section 41.18(d), given a twelve-month suspended sentence, and ordered to pay $195 in restitution and attorneys' fees. Purrie was also ordered to stay away from the location of his arrest. Upon his release, Purrie returned to the corner where he had been sleeping on the night of his arrest to find that all the belongings he had left behind, including blankets, clothes, cooking utensils, a hygiene kit, and other personal effects, were gone.

Stanley Barger suffered a brain injury in a car accident in 1998 and subsequently lost his Social Security Disability Insurance. His total monthly income consists of food stamps and $221 in welfare payments. According to Barger's declaration, he "want[s] to be off the street" but can only rarely afford shelter. At 5:00 a.m. on December 24, 2002, Barger was sleeping on the sidewalk at Sixth and Towne when L.A.P.D. officers arrested him. Barger was jailed, convicted of violating section 41.18(d), and sentenced to two days time served.

When Thomas Cash was cited for violating section 41.18(d), he had not worked for approximately two years since breaking his foot and losing his job, and had been sleeping on the street or in a Skid Row SRO hotel. Cash suffers from severe kidney problems, which cause swelling of his legs and shortness of breath, making it difficult for him to walk. At approximately noon on January 10, 2003, Cash tired as he walked to the SRO hotel where he was staying. He was resting on a tree stump when L.A.P.D. officers cited him.

Edward Jones's wife, Janet, suffers serious physical and mental afflictions. Edward takes care of her, which limits his ability to find full-time work, though he has held various minimum wage jobs. The Joneses receive $375 per month from the Los Angeles County General Relief program, enabling them to stay in Skid Row SRO hotels for the first two weeks of each month. Because shelters separate men and women, and Janet's disabilities require Edward to care for her, the Joneses are forced to sleep on the streets every month after their General Relief monies run out. At 6:30 a.m. on November 20, 2002, Edward and Janet Jones were sleeping on the sidewalk at the corner of Industrial and Alameda Streets when the L.A.P.D. cited them for violating section 41.18(d).

Patricia and George Vinson, a married couple, were looking for work and a permanent place to live when they were cited for violating section 41.18(d). They use their General Relief payments to stay in motels for part of every month and try to stay in shelters when their money runs out. On the night of December 2, 2002, they missed a bus that would have taken them to a shelter and had to sleep on the sidewalk near the corner of Hope and Washington Streets instead. At 5:30 a.m. the next morning, L.A.P.D. officers cited the Vinsons for violating section 41.18(d).

The record before us includes declarations and supporting documentation from nearly four dozen other homeless individuals living in Skid Row who have been searched, ordered to move, cited, arrested, and/or prosecuted for, and in some cases convicted of, violating section 41.18(d). Many of these declarants lost much or all of their personal property when they were arrested.

On February 19, 2003, Appellants filed a complaint in the United States District Court for the Central District of California pursuant to 42 U.S.C. § 1983. They seek a permanent injunction against the City of Los Angeles and L.A.P.D. Chief William Bratton and Captain Charles Beck (in their official capacities), barring them from enforcing section 41.18(d) in Skid Row between the hours of 9:00 p.m. and 6:30 a.m. Appellants allege that by enforcing section 41.18(d) twenty-four hours a day against persons with nowhere else to sit, lie, or sleep, other than on public streets and sidewalks, the City is criminalizing the status of homelessness in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution, and Article I, sections 7 and 17 of the California Constitution, see Cal. Const. art I, § 7 (guaranteeing due process and equal protection); id. § 17 (prohibiting cruel and unusual punishment). Appellants abandoned their second claim pursuant to 42 U.S.C. § 1983, alleging violations of a Fourteenth Amendment substantive due process right to treatment for chronic illnesses while in police custody, in the district court. On cross-motions for summary judgment, the district court granted judgment in favor of the City. Relying heavily on Joyce v. City and County of San Francisco, 846 F.Supp. 843 (N.D.Cal.1994), the district court held that enforcement of the ordinance does not violate the Eighth Amendment because it penalizes conduct, not status. This appeal timely followed.

II. Standard of Review

The parties dispute the appropriate standard of review. Appellants argue that the district court's denial of summary judgment should be reviewed de novo, while the City argues that the abuse of discretion standard applies because the district court denied a request for equitable relief. Although we review a district court's summary judgment order granting or denying a permanent injunction for abuse of discretion, Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d 1075, 1079 (9th Cir.2004), we review any determination underlying the court's decision under the standard applicable to that determination, United States v. Alisal Water Corp., 431 F.3d 643, 654 (9th Cir.2005). Therefore, we review de novo the district court's legal determination that a statute is constitutional, United States v. Labrada-Bustamante, 428 F.3d 1252, 1262 (9th Cir.2005), and we review for clear error the district court's findings of fact, Metropolitan Life Ins. Co. v. Parker, 436 F.3d 1109, 1113 (9th Cir.2006). We also review de novo the district court's decision to grant or deny summary judgment. United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir.2003).

III. Discussion

A. Standing

The City challenges Appellants' standing for the first time on appeal. We nevertheless consider this challenge because the question of standing is jurisdictional and may be raised at any time by the parties, Laub v. U.S. Dep't of Interior, 342 F.3d 1080, 1085 (9th Cir.2003), or sua sponte, see RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1056 (9th Cir.2002) (raising issue of standing, but remanding for further development of the record). We conclude that Appellants have standing to bring this action.

The City's contention that standing requires Appellants to have been convicted under the ordinance ignores established standing principles. The City also argues Appellants lack standing because, after being arrested, jailed, and losing their belongings, Appellants could theoretically raise a necessity defense if they were prosecuted. This argument is legally, factually, and realistically untenable.[3]

Article III of the Constitution requires a plaintiff seeking to invoke the jurisdiction of the federal courts to allege an actual case or controversy. To satisfy the case or controversy requirement, the party invoking a court's jurisdiction must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (citation and internal quotation marks omitted). In a suit for prospective injunctive relief, a plaintiff is required to demonstrate a real and immediate threat of future injury. City of Los Angeles v. Lyons, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (holding that the threat must be " 'real and immediate' " as opposed to " 'conjectural' or 'hypothetical' "). The key issue is whether the plaintiff is "likely to suffer future injury." Id. at 105, 103 S.Ct. 1660; see also O'Shea v. Littleton, 414 U.S. 488, 496, 498, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974).

Where the plaintiff seeks to enjoin criminal law enforcement activities against him, standing depends on the plaintiff's ability to avoid engaging in the illegal conduct in the future. See Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1041 (9th Cir.1999) (en banc) (citing Spencer v. Kemna, 523 U.S. 1, 15, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998)). The plaintiff need only establish that there is a reasonable expectation that his conduct will recur, triggering the alleged harm; he need not show that such recurrence is probable. See Honig v. Doe, 484 U.S. 305, 318 & n. 6, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988); id. at 320, 108 S.Ct. 592 (distinguishing, inter alia, Lyons, 461 U.S. at 105-06, 103 S.Ct. 1660). Avoiding illegal conduct may be impossible when the underlying criminal statute is unconstitutional. See O'Shea, 414 U.S. at 496, 94 S.Ct. 669 (noting that plaintiffs may have had standing had they alleged that the laws under which they feared prosecution in the future were unconstitutional); Perez v. Ledesma, 401 U.S. 82, 101-02, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) (Brennan, J., concurring in part and dissenting in part) (noting prior aggressive prosecution under an allegedly unconstitutional law as a factor for finding sufficient controversy for declaratory relief). Past exposure to allegedly unlawful state action, while not alone sufficient to establish a present case or controversy, is "evidence bearing on whether there is a real and immediate threat of repeated injury." Lyons, 461 U.S. at 102, 103 S.Ct. 1660 (internal quotation marks omitted).

Appellants seek only prospective injunctive relief, not damages. They do not ask for section 41.18(d) to be declared facially unconstitutional; they seek only to have its enforcement enjoined in a small area of the city during nighttime hours. Appellants have demonstrated both past injuries and a real and immediate threat of future injury: namely, they have been and are likely to be fined, arrested, incarcerated, prosecuted, and/or convicted for involuntarily violating section 41.18(d) at night in Skid Row. These law enforcement actions restrict Appellants' personal liberty, deprive them of property, and cause them to suffer shame and stigma. In the absence of any indication that the enormous gap between the number of available beds and the number of homeless individuals in Los Angeles generally and Skid Row in particular has closed, Appellants are certain to continue sitting, lying, and sleeping in public thoroughfares and, as a result, will suffer direct and irreparable injury from enforcement of section 41.18(d). As L.A.P.D. Chief Bratton has promised, they will be arrested, prosecuted, and put in jail repeatedly, if necessary. See DiMassa, Policing Homeless, supra. Appellants have therefore alleged an actual case or controversy and have standing to bring this suit.

In arguing that Appellants lack standing, the City misrelies upon dicta in Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), for the proposition that the Cruel and Unusual Punishment Clause attaches only postconviction. It contends that Appellants have suffered a constitutionally cognizable harm only if they have been convicted and/or face an imminent threat of future conviction. The City asserts that Appellants have not adequately demonstrated that they have been convicted and/or are likely to be convicted in the future under section 41.18(d).

Ingraham addressed a claim that the Cruel and Unusual Punishment Clause bars the use of disciplinary corporal punishment in public schools. Id. at 668, 97 S.Ct. 1401. The Court explained that the Clause places three distinct limits on the state's criminal law powers:

First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such.

Id. at 667, 97 S.Ct. 1401 (citations omitted). Reviewing the history of the Eighth Amendment, the Ingraham Court concluded that the Clause does not regulate state action "outside the criminal process." Id. at 667-68, 97 S.Ct. 1401. It reasoned that because the context of disciplining schoolchildren is "wholly different" from that of punishing criminals, disciplinary corporal punishment is not subject to Eighth Amendment scrutiny. Id. at 669-71, 97 S.Ct. 1401.

Ingraham rests on the distinction between state action inside and "outside the criminal process," id. at 667, 97 S.Ct. 1401, not on any distinction between criminal convictions and preconviction law enforcement measures such as arrest, jailing, and prosecution. See id. at 686, 97 S.Ct. 1401 (White, J., dissenting) (explaining that the Court's reasoning depends on the "distinction between criminal and noncriminal punishment"). Thus, contrary to the City's and the dissent's argument, Ingraham does not establish that the Cruel and Unusual Punishment Clause only attaches postconviction. In fact, the Ingraham decision expressly recognizes that the Clause "imposes substantive limits on what can be made criminal," id. at 667, 97 S.Ct. 1401 (Powell, J., majority

opinion), a protection that attaches before conviction, and the very one Appellants seek in this case.

The City and the dissent advance out of context the following dicta from Ingraham to support their contention that a conviction is necessary before one has standing to invoke our jurisdiction: "[the Cruel and Unusual Punishment Clause] was designed to protect those convicted of crimes," id. at 664, 97 S.Ct. 1401; and "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 in accordance with due process of law," id. at 671 n. 40, 97 S.Ct. 1401. However, that language is relevant only to the first two of the three circumscriptions on the criminal process identified by the Ingraham Court: limits on the kind and proportionality of punishment permissible postconviction. That language is inapplicable when the challenge is based on the third category of limitations, "on what can be made criminal and punished as such." Id. at 667, 97 S.Ct. 1401.

The Clause's first two protections govern the particulars of criminal punishment, "what kind" and "how much," covering only those who have been convicted of a criminal violation and face punitive sanctions. A plaintiff alleging violations of the first or second protections, therefore, has not suffered constitutionally cognizable harm unless he has been convicted. See, e.g., City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 243-44, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983) (holding that the Eighth Amendment does not apply to a claim involving deliberate indifference by government officials to the medical needs of an injured suspect before his arrest). Thus, in Hawkins v. Comparet-Cassani, we relied upon the above Ingraham dicta in holding that plaintiffs who had not been convicted lacked standing under the Eighth Amendment to challenge the use of electric stun belts during court proceedings, a claim that arose under the first two protections of the Clause. 251 F.3d 1230, 1238 (9th Cir.2001).

The Cruel and Unusual Punishment Clause's third protection, however, differs from the first two in that it limits what the state can criminalize, not how it can punish. See Ingraham, 430 U.S. at 667, 97 S.Ct. 1401. This protection governs the criminal law process as a whole, not only the imposition of punishment postconviction. See, e.g., Robinson v. California, 370 U.S. 660, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) ("[A] law which made a criminal offense of . a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment ."); see also Ingraham, 430 U.S. at 664, 666, 97 S.Ct. 1401 (explaining that the Eighth Amendment concerns "the criminal process" and seeks "to limit the power of those entrusted with the criminal-law function of government"). If the state transgresses this limit, a person suffers constitutionally cognizable harm as soon as he is subjected to the criminal process. This may begin well before conviction: at arrest, see, e.g., McNabb v. United States, 318 U.S. 332, 343-44, 63 S.Ct. 608, 87 L.Ed. 819 (1943) (the requirement "that the police must with reasonable promptness show legal cause for detaining arrested persons" is part of the "process of criminal justice"); at citation, see, e.g., Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, I.L.G.W.U., 605 F.2d 1228, 1249-50 (2d Cir.1979) (issuance by the police of an "Appearance Ticket" compelling an individual to appear in court commenced the criminal process); or even earlier, see Dickey v. Florida, 398 U.S. 30, 43, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) (the criminal process may begin pre-arrest, as soon as the state decides to prosecute an individual and amasses evidence against him).

A more restrictive approach to standing, one that made conviction a prerequisite for any type of Cruel and Unusual Punishment Clause challenge, would allow the state to criminalize a protected behavior or condition and cite, arrest, jail, and even prosecute individuals for violations, so long as no conviction resulted. Under this approach, the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the Clause cannot be subject to the criminal process. But the Clause's third protection limits the state's ability to criminalize certain behaviors or conditions, not merely its ability to convict and then punish post conviction.

Accordingly, to bring an as-applied challenge to a criminal statute alleged to transgress the Clause's substantive limits on criminalization, all that is required for standing is some direct injury-for example, a deprivation of property, such as a fine, or a deprivation of liberty, such as an arrest-resulting from the plaintiff's subjection to the criminal process due to violating the statute. Cf. Lyons, 461 U.S. at 101-02, 103 S.Ct. 1660 (standing requires a direct injury). At least one other court hearing a challenge by homeless plaintiffs to municipal ordinances alleged to violate the Clause's substantive limits on criminalization has recognized this principle. See Joyce, 846 F.Supp. at 853-54 (noting that an attempt to read Ingraham to restrict Eighth Amendment standing to those convicted of crimes "is refuted by the express language of Ingraham," and holding that the fact that one of the plaintiffs had been cited and paid a fine "suffice[d] to invoke consideration of the Eighth Amendment"). Other courts likewise appear to have reached the merits of similar suits where homeless plaintiffs had not suffered convictions. See Church v. City of Huntsville, 30 F.3d 1332, 1339 (11th Cir.1994) (opinion suggests but does not state that plaintiffs had not suffered convictions); Pottinger v. City of Miami, 810 F.Supp. 1551, 1559-60 (S.D.Fla.1992) (same), remanded for limited purposes, 40 F.3d 1155 (11th Cir.1994).

Notwithstanding this well-established Supreme Court authority, the City urges us to follow the Fifth Circuit, which has based its rejection of an Eighth Amendment challenge by homeless persons on the absence of a conviction. See Johnson v. City of Dallas, 61 F.3d 442, 443-45 (5th Cir.1995). There, the district court had found that there was insufficient shelter in Dallas and enjoined enforcement of an ordinance prohibiting sleeping in public against homeless individuals with no other place to be. Johnson v. City of Dallas, 860 F.Supp. 344, 350 (N.D.Tex.1994), rev'd on standing grounds, 61 F.3d 442. Plaintiffs had been ticketed for violating the ordinance but none had been convicted. Johnson, 61 F.3d at 444. The Fifth Circuit reversed, reasoning that the very dicta from Ingraham that the City now relies on required a conviction for standing. Id. at 444-45. In focusing on this lack of a conviction, the Fifth Circuit, the City, and the dissent all fail to recognize the distinction between the Cruel and Unusual Punishment Clause's first two protections and its third. Moreover, they ignore the imminent threat of conviction and the evidence of actual convictions presented here.

Although a conviction is not required to establish standing for prospective relief from enforcement of a criminal law against a status or behavior that may not be criminalized under the Eighth Amendment, here, two of the six Appellants, Purrie and Barger, have in fact been convicted and sentenced for violating section 41.18(d). Documents in the record demonstrate that judgment was pronounced and Barger was sentenced by the Los Angeles County Superior Court to time served on December 26, 2002. Similarly, judgment was pronounced and Purrie

was given a twelve-month suspended sentence on January 15, 2003 with the condition that he "stay away from location of arrest."[4] If a conviction is constitutionally required, the fact that two of the six plaintiffs were convicted suffices to establish standing for all. See Leonard v. Clark, 12 F.3d 885, 888 (9th Cir.1993), as amended. Thus the City's argument that Appellants lack standing because a conviction is required fails on the facts as well as the law.

The City next argues that Appellants lack standing because they could assert a necessity defense. In support of this argument, the City relies on In re Eichorn, 69 Cal.App.4th 382, 81 Cal.Rptr.2d 535, 539-40 (1998), in which the California Court of Appeal held that a homeless defendant may raise a necessity defense to violation of a municipal anti-camping ordinance. This argument also lacks merit.

A criminal defendant may assert a necessity defense if he has committed an offense to prevent an imminent harm that he could not have otherwise prevented. E.g., United States v. Arellano-Rivera, 244 F.3d 1119, 1125 (9th Cir.2001). Under California law, a court must instruct the jury on the necessity defense if there is

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

People v. Pepper, 41 Cal.App.4th 1029, 48 Cal.Rptr.2d 877, 880 (1996).

It is undisputed, however, that Appellants have been and in the future will probably be fined, arrested, imprisoned, and/or prosecuted, as well as suffer the loss of their personal property, for involuntarily violating section 41.18(d). These preconviction harms, some of which occur immediately upon citation or arrest, suffice to establish standing and are not salved by the potential availability of a necessity defense. The loss of Appellants' possessions when they are arrested and held in custody is particularly injurious because they have so few resources and may find that everything they own has disappeared by the time they return to the street.

Moreover, the practical realities of homelessness make the necessity defense a false promise for those charged with violating section 41.18(d). Homeless individuals, who may suffer from mental illness, substance abuse problems, unemployment, and poverty, are unlikely to have the knowledge or resources to assert a necessity defense to a section 41.18(d) charge, much less to have access to counsel when they are arrested and arraigned. Furthermore, even counseled homeless individuals are unlikely to subject themselves to further jail time and a trial when they can plead guilty in return for a sentence of time served and immediate release. Finally, one must question the policy of arresting, jailing, and prosecuting individuals whom the City Attorney concedes cannot be convicted due to a necessity defense. If there is no offense for which the homeless can be convicted, is the City admitting that all that comes before is merely police harassment of a vulnerable population?

B. The Eighth Amendment Prohibition on Cruel and Unusual Punishment

The district court erred by not engaging in a more thorough analysis of Eighth Amendment jurisprudence under Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), and Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), when it held that the only relevant inquiry is whether the ordinance at issue punishes status as opposed to conduct, and that homelessness is not a constitutionally cognizable status.

The district court relied exclusively on the analysis of Robinson and Powell by another district court in Joyce v. City and County of San Francisco, in which plaintiffs challenged certain aspects of San Francisco's comprehensive homelessness program on Eighth Amendment grounds. 846 F.Supp. 843 (N.D.Cal.1994). Joyce, however, was based on a very different factual underpinning than is present here. Called the "Matrix Program," the homelessness program was " 'an interdepartmental effort . [utilizing] social workers and health workers . [and] offering shelter, medical care, information about services and general assistance.' " Id. at 847 (alterations and omissions in original). One element of the program consisted of the "Night Shelter Referral" program conducted by the Police Department, which handed out "referrals" to temporary shelters. Id. at 848. The City demonstrated that of 3820 referral slips offered to men, only 1866 were taken and only 678 used. Id.

The Joyce plaintiffs made only the conclusory allegation that there was insufficient shelter, id. at 849; they did not make the strong evidentiary showing of a substantial shortage of shelter Appellants make here. Moreover, the preliminary injunction plaintiffs sought in Joyce was so broad as to enjoin enforcement of prohibitions on camping or lodging in public parks and on " 'life-sustaining activities such as sleeping, sitting or remaining in a public place,' " which might also include such antisocial conduct as public urination and aggressive panhandling. Id. at 851 (emphasis added). Reasoning that plaintiffs' requested injunction was too broad and too difficult to enforce, and noting the preliminary nature of its findings based on the record at an early stage in the proceedings, the district court denied the injunction. Id. at 851-53. The Joyce court also concluded that homelessness was not a status protectable under the Eighth Amendment, holding that it was merely a constitutionally noncognizable "condition." Id. at 857-58.

We disagree with the analysis of Robinson and Powell conducted by both the district court in Joyce and the district court in the case at bar. The City could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status. Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless. A closer analysis of Robinson and Powell instructs that the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment.

Our analysis begins with Robinson, which announced limits on what the state can criminalize consistent with the Eighth Amendment. In Robinson, the Supreme Court considered whether a

state may convict an individual for violating a statute making it a criminal offense to " 'be addicted to the use of narcotics.' " 370 U.S. at 660, 82 S.Ct. 1417 (quoting Cal. Health & Safety Code § 11721). The trial judge had instructed the jury that

"[t]o be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. All that the People must show is . that while in the City of Los Angeles [Robinson] was addicted to the use of narcotics."

Id. at 662-63, 82 S.Ct. 1417 (second alteration and third omission in original). The Supreme Court reversed Robinson's conviction, reasoning:

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. [I]n the light of contemporary human knowledge, 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.

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.

Id. at 666-67, 82 S.Ct. 1417 (citation and footnotes omitted).

The Court did not articulate the principles that undergird its holding. At a minimum, Robinson establishes that the state may not criminalize "being"; that is, the state may not punish a person for who he is, independent of anything he has done. See, e.g., Powell, 392 U.S. at 533, 88 S.Ct. 2145 (Marshall, J., plurality opinion) (stating that Robinson requires an actus reus before the state may punish). However, as five Justices would later make clear in Powell, Robinson also supports the principle that the state cannot punish a person for certain conditions, either arising from his own acts or contracted involuntarily, or acts that he is powerless to avoid. Powell, 392 U.S. at 567, 88 S.Ct. 2145 (Fortas, J., dissenting) (endorsing this reading of Robinson); id. at 550 n. 2, 88 S.Ct. 2145 (White, J., concurring in the judgment) (same, but only where acts predicate to the condition are remote in time); see Robinson, 370 U.S. at 666-67, 82 S.Ct. 1417 (stating that punishing a person for having a venereal disease would be unconstitutional, and noting that drug addiction "may be contracted innocently or involuntarily").

Six years after its decision in Robinson, the Supreme Court considered the case of Leroy Powell, who had been charged with violating a Texas statute making it a crime to " 'get drunk or be found in a state of intoxication in any public place.' " Powell, 392 U.S. at 517, 88 S.Ct. 2145 (Marshall, J., plurality opinion) (quoting Tex. Penal Code Ann. art. 477 (Vernon 1952)). The trial court found that Powell suffered from the disease of chronic alcoholism, which " 'destroys

the afflicted person's will' " to resist drinking and leads him to appear drunk in public involuntarily. Id. at 521, 88 S.Ct. 2145. Nevertheless, the trial court summarily rejected Powell's constitutional defense and found him guilty. See id. at 558, 88 S.Ct. 2145 (Fortas, J., dissenting). On appeal to the United States Supreme Court, Powell argued that the Eighth Amendment prohibited "punish[ing] an ill person for conduct over which he has no control." Brief for Appellant at 6, Powell, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (No. 405), 1967 WL 113841.

In a 4-1-4 decision, the Court affirmed Powell's conviction. The four Justices joining the plurality opinion interpreted Robinson to prohibit only the criminalization of pure status and not to limit the criminalization of conduct. Powell, 392 U.S. at 533, 88 S.Ct. 2145 (Marshall, J., plurality opinion). The plurality then declined to extend the Cruel and Unusual Punishment Clause's protections to any involuntary conduct, citing slippery slope concerns, id. at 534-35, 88 S.Ct. 2145, and considerations of federalism and personal accountability, id. at 535-36, 88 S.Ct. 2145. Because Powell was convicted not for his status as a chronic alcoholic, but rather for his acts of becoming intoxicated and appearing in public, the Powell plurality concluded that the Clause as interpreted by Robinson did not protect him. Id. at 532, 88 S.Ct. 2145.

In contrast, the four Justices in dissent read Robinson to stand for the proposition that "[c]riminal penalties may not be inflicted on a person for being in a condition he is powerless to change." Id. at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Applying Robinson to the facts of Powell's case, the dissenters first described the predicate for Powell's conviction as "the mere condition of being intoxicated in public" rather than any "acts," such as getting drunk and appearing in public. Id. at 559, 88 S.Ct. 2145. Next and more significantly, the dissenters addressed the involuntariness of Powell's behavior, noting that Powell had " 'an uncontrollable compulsion to drink' to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places." Id. at 568, 88 S.Ct. 2145. Having found that the Cruel and Unusual Punishment Clause, as interpreted by Robinson, protects against the criminalization of being in a condition one is powerless to avoid, see id. at 567, 88 S.Ct. 2145, and because Powell was powerless to avoid public drunkenness, the dissenters concluded that his conviction should be reversed, see id. at 569-70, 88 S.Ct. 2145.

In his separate opinion, Justice White rejected the plurality's proposed status-conduct distinction, finding it similar to "forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion." Id. at 548-49, 88 S.Ct. 2145 (White, J., concurring in the judgment). Justice White read Robinson to stand for the principle that "it cannot be a crime to have an irresistible compulsion to use narcotics," id. at 548, 88 S.Ct. 2145, and concluded that "[t]he proper subject of inquiry is whether volitional acts [sufficiently proximate to the condition] brought about the" criminalized conduct or condition, id. at 550 n. 2, 88 S.Ct. 2145.

Justice White concluded that given the holding in Robinson, "the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or being drunk." Id. at 549, 88 S.Ct. 2145. For those chronic alcoholics who lack homes,

a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment-the act of getting drunk.

Id. at 551, 88 S.Ct. 2145. This position is consistent with that of the Powell dissenters, who quoted and agreed with Justice White's standard, see id. at 568 n. 31, 88 S.Ct. 2145 (Fortas, J., dissenting), and stated that Powell's conviction should be reversed because his public drunkenness was involuntary, id. at 570, 88 S.Ct. 2145.

Justice White's Powell opinion also echoes his prior dissent in Robinson. In Robinson, Justice White found no Eighth Amendment violation for two reasons: First, because he did "not consider [Robinson's] conviction to be a punishment for having an illness or for simply being in some status or condition, but rather a conviction for the regular, repeated or habitual use of narcotics immediately prior to his arrest," Robinson, 370 U.S. at 686, 82 S.Ct. 1417 & nn. 2-3 (White, J., dissenting) (discussing jury instructions regarding addiction and substantial evidence of Robinson's frequent narcotics use in the days prior to his arrest); and second, and most importantly, for understanding his opinion in Powell, because the record did not suggest that Robinson's drug addiction was involuntary, see id. at 685, 82 S.Ct. 1417. According to Justice White, "if [Robinson] was convicted for being an addict who had lost his power of self-control, I would have other thoughts about this case." Id.

Justice White and the Powell dissenters shared a common view of the importance of involuntariness to the Eighth Amendment inquiry. They differed only on two issues. First, unlike the dissenters, Justice White believed Powell had not demonstrated that his public drunkenness was involuntary. Compare Powell, 392 U.S. at 553, 88 S.Ct. 2145 (White, J., concurring in the judgment) ("[N]othing in the record indicates that [Powell] could not have done his drinking in private. Powell had a home and wife, and if there were reasons why he had to drink in public or be drunk there, they do not appear in the record."), with id. at 568 n. 31, 88 S.Ct. 2145 (Fortas, J., dissenting) ("I believe these findings must fairly be read to encompass facts that my Brother White agrees would require reversal, that is, that for appellant Powell, 'resisting drunkenness' and 'avoiding public places when intoxicated' on the occasion in question were 'impossible.' ").

Second, Justice White rejected the dissent's attempt to distinguish conditions from acts for Eighth Amendment purposes. See id. at 550 n. 2, 88 S.Ct. 2145 (White, J., concurring in the judgment). We agree with Justice White that analysis of the Eighth Amendment's substantive limits on criminalization "is not advanced by preoccupation with the label 'condition.' " Id. One could define many acts as being in the condition of engaging in those acts, for example, the act of sleeping on the sidewalk is indistinguishable from the condition of being asleep on the sidewalk. " 'Being' drunk in public is not far removed in time from the acts of 'getting' drunk and 'going' into public," and there is no meaningful "line between the man who appears in public drunk and that same man five minutes later who is then 'being' drunk in public." Id. The dissenters themselves undermine their proposed distinction by suggesting that criminalizing involuntary acts that "typically flow from . the disease of chronic alcoholism" would violate the Eighth Amendment, as well as by stating that "[i]f an alcoholic should be convicted for criminal

conduct which is not a characteristic and involuntary part of the pattern of the disease as it afflicts him, nothing herein would prevent his punishment." Id. at 559 n. 2, 88 S.Ct. 2145 (Fortas, J., dissenting) (emphasis added).

Notwithstanding these differences, five Justices in Powell understood Robinson to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being. See id. at 548, 550 n. 2, 551, 88 S.Ct. 2145 (White, J., concurring in the judgment); id. at 567, 88 S.Ct. 2145 (Fortas, J., dissenting); see also Robert L. Misner, The New Attempt Laws: Unsuspected Threat to the Fourth Amendment, 33 Stan. L.Rev. 201, 219 (1981) ("[T]he consensus [of White and the dissenters apparently] was that an involuntary act does not suffice for criminal liability."). Although this principle did not determine the outcome in Powell, it garnered the considered support of a majority of the Court. Because the conclusion that certain involuntary acts could not be criminalized was not dicta, see United States v. Johnson, 256 F.3d 895, 915, 914-16 (9th Cir.2001) (en banc) (Kozinski, J., concurring) (narrowly defining dicta as "a statement [that] is made casually and without analysis, . uttered in passing without due consideration of the alternatives, or . merely a prelude to another legal issue that commands" the court's full attention), we adopt this interpretation of Robinson and the Cruel and Unusual Punishment Clause as persuasive authority. We also note that in the absence of any agreement between Justice White and the plurality on the meaning of Robinson and the commands of the Cruel and Unusual Punishment Clause, the precedential value of the Powell plurality opinion is limited to its precise facts. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (omission in original) (internal quotation marks omitted); see also Kent Greenawalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of Powell v. Texas, 69 Colum. L.Rev. 927, 931 (1969) ("[T]he dissent comes closer to speaking for a majority of the Court than does the plurality opinion.").

Following Robinson's holding that the state cannot criminalize pure status, and the agreement of five Justices in Powell that the state cannot criminalize certain involuntary conduct, there are two considerations relevant to defining the Cruel and Unusual Punishment Clause's limits on the state's power to criminalize. The first is the distinction between pure status-the state of being-and pure conduct-the act of doing. The second is the distinction between an involuntary act or condition and a voluntary one. Accordingly, in determining whether the state may punish a particular involuntary act or condition, we are guided by Justice White's admonition that "[t]he proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.' " Powell, 392 U.S. at 550 n. 2, 88 S.Ct. 2145 (White, J., concurring in the judgment); see also Bowers v. Hardwick, 478 U.S. 186, 202 n. 2, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (Blackmun, J., dissenting) (quoting and endorsing this statement in discussing whether the Eighth Amendment limits the state's ability to criminalize homosexual acts).

The Robinson and Powell decisions, read together, compel us to conclude 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. As homeless individuals, Appellants are in a chronic state that may have been acquired "innocently or involuntarily." Robinson, 370 U.S. at 667, 82 S.Ct. 1417. Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human. It is undisputed that, for homeless individuals in Skid Row who have no access to private spaces, these acts can only be done in public. In contrast to Leroy Powell, Appellants have made a substantial showing that they are "unable to stay off the streets on the night[s] in question." Powell, 392 U.S. at 554, 88 S.Ct. 2145 (White, J., concurring in the judgment).

In disputing our holding, the dissent veers off track by attempting to isolate the supposed "criminal conduct" from the status of being involuntarily homeless at night on the streets of Skid Row. Unlike the cases the dissent relies on, which involve failure to carry immigration documents, illegal reentry, and drug dealing, the conduct at issue here is involuntary and inseparable from status-they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping. The cases the dissent cites do not control our reading of Robinson and Powell where, as here, an Eighth Amendment challenge concerns the involuntariness of a criminalized act or condition inseparable from status. See Johnson, 256 F.3d at 915 ("Where it is clear that a statement . is uttered in passing without due consideration of the alternatives, . it may be appropriate to re-visit the issue in a later case."). The City and the dissent apparently believe that Appellants can avoid sitting, lying, and sleeping for days, weeks, or months at a time to comply with the City's ordinance, as if human beings could remain in perpetual motion. That being an impossibility, by criminalizing sitting, lying, and sleeping, the City is in fact criminalizing Appellants' status as homeless individuals.

Similarly, applying Robinson and Powell, courts have found statutes criminalizing the status of vagrancy to be unconstitutional. For example, Goldman v. Knecht declared unconstitutional a Colorado statute making it a crime for " '[a]ny person able to work and support himself' " to " 'be found loitering or strolling about, frequenting public places, . begging or leading an idle, immoral or profligate course of life, or not having any visible means of support.' " 295 F.Supp. 897, 899 n. 2, 908 (D.Colo.1969) (three-judge court); see also Wheeler v. Goodman, 306 F.Supp. 58, 59 n. 1, 62, 66 (W.D.N.C.1969) (three-judge court) (striking down as unconstitutional under Robinson a statute making it a crime to, inter alia, be able to work but have no property or " 'visible and known means' " of earning a livelihood), vacated on other grounds, 401 U.S. 987, 91 S.Ct. 1219, 28 L.Ed.2d 524 (1971). These cases establish that the state may not make it an offense to be idle, indigent, or homeless in public places. Nor may the state criminalize conduct that is an unavoidable consequence of being homeless-namely sitting, lying, or sleeping on the streets of Los Angeles's Skid Row. As Justice White stated in Powell, "[p]unishing an addict for using drugs convicts for addiction under a different name." 392 U.S. at 548, 88 S.Ct. 2145 (White, J., concurring in the judgment).

IV. Conclusion

Homelessness is not an innate or immutable characteristic, nor is it a disease, such as drug addiction or alcoholism. But generally one cannot become a drug addict or alcoholic, as those terms are commonly used, without engaging in at least some voluntary acts (taking drugs, drinking alcohol). Similarly, an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable. That Appellants may obtain shelter on some nights and may eventually escape from homelessness does not render their status at the time of arrest any less worthy of protection than a drug addict's or an alcoholic's.

Undisputed evidence in the record establishes that at the time they were cited or arrested, Appellants had no choice other than to be on the streets. Even if Appellants' past volitional acts contributed to their current need to sit, lie, and sleep on public sidewalks at night, those acts are not sufficiently proximate to the conduct at issue here for the imposition of penal sanctions to be permissible. See Powell v. Texas, 392 U.S. 514, 550 n. 2, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (White, J., concurring in the judgment). In contrast, we find no Eighth Amendment protection for conduct that a person makes unavoidable based on their own immediately proximate voluntary acts, for example, driving while drunk, harassing others, or camping or building shelters that interfere with pedestrian or automobile traffic.

Our holding is a limited one. We do not hold that the Eighth Amendment includes a mens rea requirement, or that it prevents the state from criminalizing conduct that is not an unavoidable consequence of being homeless, such as panhandling or obstructing public thoroughfares. Cf. United States v. Black, 116 F.3d 198, 201 (7th Cir.1997) (rejecting convicted pedophile's Eighth Amendment challenge to his prosecution for receiving, distributing, and possessing child pornography because, inter alia, defendant "did not show that [the] charged conduct was involuntary or uncontrollable").

We are not confronted here with a facial challenge to a statute, cf. Roulette v. City of Seattle, 97 F.3d 300, 302 (9th Cir.1996) (rejecting a facial challenge to a municipal ordinance that prohibited sitting or lying on public sidewalks); Tobe v. City of Santa Ana, 9 Cal.4th 1069, 1080, 40 Cal.Rptr.2d 402, 892 P.2d 1145 (1995) (finding a municipal ordinance that banned camping in designated public areas to be facially valid); nor a statute that criminalizes public drunkenness or camping, cf. Joyce v. City and County of San Francisco, 846 F.Supp. 843, 846 (N.D.Cal.1994) (program at issue targeted public drunkenness and camping in public parks); or sitting, lying, or sleeping only at certain times or in certain places within the city. And we are not called upon to decide the constitutionality of punishment when there are beds available for the homeless in shelters. Cf. Joel v. City of Orlando, 232 F.3d 1353, 1357 (11th Cir.2000) (affirming summary judgment for the City where "[t]he shelter has never reached its maximum capacity and no individual has been turned away for lack of space or for inability to pay the one dollar fee").

We hold only that, just as the Eighth Amendment prohibits the infliction of criminal punishment on an individual for being a drug addict, Robinson v. California, 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); or for involuntary public drunkenness that is an unavoidable consequence of being a chronic alcoholic without a home, Powell, 392 U.S. at 551, 88 S.Ct.

2145 (White, J., concurring in the judgment); id. at 568 n. 31, 88 S.Ct. 2145 (Fortas, J., dissenting); the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles.

We do not suggest that Los Angeles adopt any particular social policy, plan, or law to care for the homeless. See Johnson v. City of Dallas, 860 F.Supp. 344, 350-51 (N.D.Tex.1994), rev'd on standing grounds, 61 F.3d 442 (5th Cir.1995). We do not desire to encroach on the legislative and executive functions reserved to the City Council and the Mayor of Los Angeles. There is obviously a "homeless problem" in the City of Los Angeles, which the City is free to address in any way that it sees fit, consistent with the constitutional principles we have articulated. See id. By our decision, we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets of Los Angeles at any time and at any place within the City. All we hold is that, 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. Appellants are entitled at a minimum to a narrowly tailored injunction against the City's enforcement of section 41.18(d) at certain times and/or places.

We reverse the award of summary judgment to the City, grant summary judgment to Appellants, and remand to the district court for a determination of injunctive relief consistent with this opinion.

REVERSED AND REMANDED.

There is no question that homelessness is a serious problem and the plight of the homeless, a cause for serious concern. Yet this does not give us license to expand the narrow limits that, in a "rare type of case," the Cruel and Unusual Punishment Clause of the Eighth Amendment places on substantive criminal law. The majority sees it differently, concluding that the Eighth Amendment forbids the City of Los Angeles from enforcing an ordinance which makes it unlawful to sit, sleep, or lie on sidewalks. It gets there by cobbling together the views of dissenting and concurring justices, creating a circuit conflict on standing, and overlooking both Supreme Court precedent, and our own, that restrict the substantive component of the Eighth Amendment to crimes not involving an act. I disagree, and therefore dissent, for a number of reasons.

Los Angeles Municipal Code (LAMC) § 41.18(d) does not punish people simply because they are homeless. It targets conduct-sitting, lying or sleeping on city sidewalks-that can be committed by those with homes as well as those without. Although the Supreme Court recognized in Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), that there are substantive limits on what may be made criminal and punished as such, both the Court and we have constrained this category of Eighth Amendment violation to persons who are being punished for crimes that do not involve conduct that society has an interest in preventing. See, e.g., Powell v. Texas, 392 U.S. 514, 531-33, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (Marshall, J., plurality); United States v. Ayala, 35 F.3d 423, 426 (9th Cir.1994).

Neither the Supreme Court nor any other circuit court of appeals has ever held that conduct derivative of a status may not be criminalized. The majority relies on the dissenting opinions and dicta in the concurring opinion in Powell (which involved a conviction for public drunkenness of an alcoholic who was to some degree compelled to drink), but not even the Powell dissent would go so far as to hold that conduct which is closely related to status may not constitutionally be punished unless the conduct is "a characteristic and involuntary part of the pattern of the [status] as it afflicts" the particular individual. 392 U.S. at 559, n. 2, 88 S.Ct. 2145 (Fortas, J., dissenting). This is not the case with a homeless person who sometimes has shelter and sometimes doesn't.

Nor, until now, has the Supreme Court or any other circuit court of appeals intimated (let alone held) that status plus a condition which exists on account of discretionary action by someone else is the kind of "involuntary" condition that cannot be criminalized. Here, the majority holds that the Eighth Amendment "prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles." Maj. op. at 1138. In other words, the City cannot penalize the status of being homeless plus the condition of being without shelter that exists by virtue of the City's failure to provide sufficient housing on any given night. 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.

Regardless, the challenge should fail even on the majority's view of the law because Jones has not shown that he was accused of being in an involuntary condition which he had no capacity to change or avoid. The attack on LAMC § 41.18(d) is not facial; it is as applied to Jones and those who join him in this suit. Jones's theory (embraced by the majority) is that the City's failure to supply adequate shelter caused the six persons who pursue this action to commit the prohibited act, that is, the act of sleeping, sitting or lying on the streets. However, there is no showing in this case that shelter was unavailable on the night that any of the six was apprehended. This is not a class action; each of the six must have been injured in fact by enforcement of the ordinance. As no one has made that showing, the claimants both lack standing and lose on the merits. If Jones were not on the streets because he couldn't find shelter, his conviction cannot have offended the Constitution no matter how broadly the Eighth Amendment is construed.

Finally, Eighth Amendment protections apply to those who are convicted, not to those who are arrested. Even assuming that at least one of the six homeless persons in this action has been convicted and will be prosecuted again, there is no basis for supposing that he will be convicted again. California law provides a defense to conviction under an ordinance such as Los Angeles's if the homeless person shows that he slept, lay or sat on the streets because of economic forces or inadequate alternatives. See In re Eichorn, 69 Cal.App.4th 382, 389-91, 81 Cal.Rptr.2d 535 (1998). Thus, it cannot be said that any of the six will be subject to punishment for purposes of the Eighth Amendment on account of any involuntary condition. They both lack standing, and lose on the merits, for this reason as well.

Accordingly, I part company with the majority's expansive construction of the substantive limits on criminality. It exceeds the boundaries set by the Supreme Court on the Robinson limitation, and intrudes into the state's province to determine the scope of criminal responsibility. I would affirm.

I

Edward Jones and his wife are homeless. Their monthly general relief check is not sufficient to pay for a hotel room on Skid Row for the entire month. No shelter permits a childless couple to stay together. Jones has been cited, but not arrested or convicted, for sleeping on the streets in violation of LAMC § 41.18(d).

Robert Lee Purrie has tried to find shelter in Skid Row and been told that there are no beds available. He was cited for violating LAMC § 41.18(d) but failed to appear, which apparently led to a warrant being issued for his arrest. He was arrested pursuant to the warrant and also charged with violating the ordinance. Purrie states that he was given a suspended sentence on condition that he stay away from the place he was arrested. There is no record of conviction, or any evidence that Purrie was turned away from a shelter the night he was cited.

Patricia and George Vinson have tried to rent rooms in Skid Row hotels and to get into various shelters, but have been unable to find a facility with space they can afford that will allow them to stay together. When they lack money for a motel room, they take the bus to a shelter in South Los Angeles. Occasionally they miss the bus and are forced to sleep on the street. They were cited on one of these occasions, but not arrested or convicted, for violating LAMC § 41.18(d).

Thomas Cash is homeless and disabled. He was residing in a facility on Skid Row provided through the County's cold-weather voucher program when he was cited for sitting on the sidewalk.

Stanley Barger also is homeless and disabled. He can afford to stay in a hotel for only a few days a month on his general relief allowance; his social security income was cut off when he was arrested for consuming alcohol in violation of his parole terms. He was arrested for sleeping on the street and also on an outstanding warrant. He states he was sentenced to time served, but does not say on which charge. There is no record of conviction.

Jones claims that some 42,000 people are homeless each night in the City of Los Angeles, with approximately 11,000 living in the Skid Row area. The number of homeless persons exceeds the number of available shelter beds. Of the 11,000 on Skid Row, approximately 7,000 sleep in a single-room occupancy facility and 2,000 stay in emergency shelter facilities. On any given night, this leaves 2,000 people without shelter.

Jones seeks to enjoin enforcement of LAMC § 41.18(d) between the hours of 9:00 p.m. and 6:30 a.m. The parties brought cross-motions for summary judgment. The district court rejected Jones's contention that the failure of the City to provide sufficient housing compels the conclusion that homelessness is cognizable as a status. It agreed with Judge Jensen's analysis in Joyce v. City and County of San Francisco, 846 F.Supp. 843 (N.D.Cal.1994), that status cannot

be defined as a function of the discretionary acts of others, and held that even if homelessness were considered a status, criminalizing the acts of sitting, lying, or sleeping on the streets would not be a cognizable violation of the Eighth Amendment. Accordingly, the court granted the City's motion for summary judgment.

II

The City asserts for the first time on appeal that the homeless persons who pursue this Eighth Amendment action lack standing because they were never convicted of violating the ordinance. It points to Johnson v. City of Dallas, 61 F.3d 442 (5th Cir.1995), where the court held that homeless persons who sought to enjoin enforcement of a Dallas ordinance prohibiting sleeping in public had no standing as none had been convicted, and to Davison v. City of Tucson, 924 F.Supp. 989, 993 (D.Ariz.1996), which similarly held that homeless persons challenging a city resolution to remove them from a location where they had camped lacked standing because "the Eighth Amendment protection against cruel and unusual punishment can only be invoked by persons convicted of crimes." I agree with the City that our jurisdiction is implicated, and I disagree with the majority that we should be persuaded to reach the merits by Joyce, 846 F.Supp. at 854, or by cases where the court did not even address the question whether there had been convictions. Joyce was a class action in which the plaintiffs alleged injuries to individuals in the putative class that included convictions of "camping"-related offenses, and neither Church v. City of Huntsville, 30 F.3d 1332, 1339 (11th Cir.1994), nor Pottinger v. City of Miami, 810 F.Supp. 1551, 1559-60 (S.D.Fla.1992), states one way or the other whether plaintiffs had been convicted. I also disagree with the majority's conclusion that "all that is required for standing is some direct injury-for example, a deprivation of property, such as a fine, or liberty, such as an arrest-based on the plaintiff's violation of the statute," maj. op. at 1129, because this is an action arising under the Eighth Amendment, where injury comes from cruel and unusual punishment-not under the Due Process Clause, where injury comes from deprivation of a liberty or property interest without due process. Nevertheless, in a case such as this the standing inquiry essentially collapses into the merits, so instead of treating the issue separately as I normally would, I will simply explain why, in my view, there is no basis upon which Jones is entitled to relief.[1]

III

Jones argues that LAMC § 41.18(d) makes criminal what biology and circumstance make necessary, that is, sitting, lying, and sleeping on the streets. He maintains that the gap between the number of homeless persons in Los Angeles, and the number of available shelter beds, leaves thousands without shelter every night. Jones claims that the situation is particularly acute on Skid Row, where most homeless shelters and services have been centralized. As Jones puts it, so long as there are more homeless people than shelter beds, "the nightly search for shelter will remain a zero-sum game in which many of the homeless, through no fault of their own, will end up breaking the law." By enforcing the ordinance, Jones contends, the City subjects homeless persons to a cycle of citation, arrest, and punishment for the involuntary and harmless conduct of sitting or lying in the street. Accordingly, he seeks to bring the ordinance "in line with less draconian ordinances in other cities" by barring its enforcement in Skid Row during nighttime hours.

Jones relies on Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), to argue that persons cannot be punished for their status alone. In Robinson, the Court reversed the conviction of a drug addict who had been convicted of violating a California statute that made it a criminal offense for a person to "be addicted to the use of narcotics." The Court observed of this statute, that it

is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

Id. at 666, 82 S.Ct. 1417. The Court noted that narcotic addiction was "an illness which may be contracted innocently or involuntarily," and held that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment." Id. at 667, 82 S.Ct. 1417.

Jones submits that as the City could not expressly criminalize the status of being homeless without offending the Eighth Amendment, it cannot enforce the ordinance when the number of homeless persons exceeds the number of available shelter beds because to do so has the effect of criminalizing homelessness. For this he relies on Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D.Fla.1992). Pottinger was a class action on behalf of 6,000 homeless people living in Miami who alleged that arrests for sleeping or bathing in public, and destruction of their property, violated their rights under the Eighth Amendment. The court held that arresting homeless individuals for harmless, involuntary conduct is cruel and unusual punishment and a violation of their due process rights. Based on the record adduced in that case, it found that being homeless is rarely a choice; it also found that the homeless plaintiffs lacked any place where they could lawfully be and had no realistic choice but to live in public places because of the unavailability of low-income housing or alternative shelter. In this sense, the court believed that their conduct was involuntary and that being arrested effectively punishes the homeless for being homeless. However, in my view, Pottinger's extension of the Eighth Amendment to conduct that is derivative of status takes the substantive limits on criminality further than Robinson or its progeny support. See Joyce, 846 F.Supp. at 856-58 (rejecting Pottinger's rationale as a dubious application of Robinson and Powell as well as principles of federalism).

In Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), the successor case to Robinson, the Court affirmed a conviction for being found in a state of intoxication in a public place in violation of state law. Justice Marshall's plurality opinion rejected Powell's reliance on Robinson because Powell was not convicted for being a chronic alcoholic but for being in public while drunk on a particular occasion. As he explained:

Robinson so viewed brings this Court but a very small way into the substantive criminal law. And unless Robinson is so viewed it is difficult to see any limiting principle that would serve to

prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.

Id. at 533, 88 S.Ct. 2145 (Marshall, J., plurality). The plurality also rejected the dissent's interpretation of Robinson-adopted by Jones and the majority here-as precluding the imposition of criminal penalties upon a person for being in a condition he is powerless to change. Rather,

[t]he 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. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion."

Id. at 533, 88 S.Ct. 2145.

Justice White concurred in the judgment. In his view, if it could not be a crime to have an "irresistible compulsion to use narcotics" in Robinson, then the use of narcotics by an addict must be beyond the reach of the criminal law. Id. at 548-49, 88 S.Ct. 2145 (White, J., concurring in the result). From this it followed to Justice White that the statute under which Powell was convicted should not be applied to a chronic alcoholic who has a compulsion to drink and nowhere but a public place in which to do so. "As applied to [such alcoholics] 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." Id. at 551, 88 S.Ct. 2145. However, Justice White did not believe the conviction offended the Constitution because Powell made no showing that he was unable to stay off the streets on the night he was arrested. Id. at 552-53, 88 S.Ct. 2145.

The Powell dissent opined that a criminal penalty could not be imposed on a person suffering the disease of chronic alcoholism for a condition-being in a state of intoxication in public-which is a characteristic part of the pattern of his disease. Id. at 559, 88 S.Ct. 2145 (Fortas, J., dissenting). Contrary to the plurality, the dissent read Robinson as standing on the principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." Id. at 567, 88 S.Ct. 2145. Noting that the statute in Powell differed from the statute in Robinson by covering more than mere status (being intoxicated and being found in a public place while in that condition), the dissent nevertheless found the same constitutional defect present as in both cases, the defendant was accused of being "in a condition which he had no capacity to change or avoid." Id. at 567-68, 88 S.Ct. 2145.

Finally, the Court commented on the purpose of the Cruel and Unusual Punishment Clause, and on Robinson, in Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). Ingraham involved the use of corporal punishment of students in a public school. "An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." Id. at 664, 97 S.Ct. 1401; see also Graham v. Connor, 490 U.S. 386, 392 & n. 6, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (noting that Judge Friendly's view that Eighth

Amendment protections do not attach until after conviction and sentence "was confirmed by Ingraham "). Put differently, "[t]he primary purpose of [the 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." Ingraham, 430 U.S. at 667, 97 S.Ct. 1401 (quoting Powell, 392 U.S. at 531-32, 88 S.Ct. 2145 (Marshall, J., plurality)). After surveying its "cruel and unusual punishment" jurisprudence, the Court remarked that

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

Id. at 667, 97 S.Ct. 1401 (citations omitted). Of the last, or Robinson, limitation, the Court stated: "We have recognized the last limitation as one to be applied sparingly." Id. (referring to Powell, 392 U.S. at 531-32, 88 S.Ct. 2145).

Our court has considered whether individuals are being punished on account of status rather than conduct several times. In United States v. Ritter, 752 F.2d 435 (1985), the defendant was convicted of possession of cocaine with intent to distribute. He was stopped at a border checkpoint but was not carrying immigration documents. Id. at 436. This led to a search that uncovered drugs, and to a motion to suppress that challenged the constitutionality of a federal statute making it a criminal offense for documented aliens to fail to carry documents. Ritter argued that requiring documents to check his status offended the Eighth Amendment's substantive limits on what can be made criminal. Id. at 437. Citing Robinson as an example of "the rare type of case in which the clause has been used to limit what may be made criminal," we held that the statute at issue in Ritter did not come with the purview of "this unusual sort of case." Id. In doing so, we emphasized the Supreme Court's admonition that "this particular use of the clause is to be applied sparingly," and reiterated that "[t]he primary purpose of the clause is directed at the method or kind of punishment imposed for a criminal violation." Id. at 438 (citing Ingraham, 430 U.S. at 667, 97 S.Ct. 1401).

In United States v. Kidder, 869 F.2d 1328 (9th Cir.1989), a defendant convicted of possession of cocaine with intent to distribute argued that he was being unconstitutionally punished because of his status as a mentally ill drug addict. We understood his contention to be that his involvement was caused by mental illness, so to imprison him for drug dealing was tantamount to punishing him for being mentally ill. Id. at 1331-32. We concluded that because the statute under which he was convicted punishes a person for the act of possessing illegal drugs with intent to distribute, it does not run afoul of Robinson. Id. at 1332. Kidder also argued that even if he were being punished for his acts rather than his status, the involuntary nature of the acts rendered them immune from criminal punishment. Id. We recognized that this issue was raised in Powell but no majority opinion emerged; however, we declined to decide it because Kidder's guilty plea waived any argument that his actions were involuntary.[2] Id. at 1332-33.

And in United States v. Ayala, 35 F.3d 423 (9th Cir.1994), the defendant was convicted of illegal re-entry in the United States without permission and within five years of being deported.

Relying on Robinson, he argued that the "found in" provision of 28 U.S.C. § 1326 impermissibly punished him for the "status" of being found in the United States. Id. at 425. We thought the reliance misplaced, noting that the "Supreme Court has subsequently limited the applicability of Robinson to crimes that do not involve an actus reus." Id. at 426 (citing Powell, 392 U.S. at 533, 88 S.Ct. 2145 (Marshall, J., plurality)). As a conviction for being "found in" the United States necessarily requires that a defendant commit the act of re-entering the country without permission within five years of being deported, there was no Eighth Amendment problem.

These cases indicate to me that application of LAMC § 41.18(d) to Jones's situation is not the "rare type of case" for which the Cruel and Unusual Punishment Clause limits what may be criminalized. Robinson does not apply to criminalization of conduct. Its rationale is that the California statute penalizing addiction failed to criminalize conduct, and this failure is what made it unconstitutional. 370 U.S. at 666, 82 S.Ct. 1417 ("This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration."). The plurality in Powell interpreted Robinson this way, and in a view that is binding on us now, we previously adopted the plurality's position as controlling by stating in Ayala that "[t]he Supreme Court has subsequently limited the applicability of Robinson to crimes that do not involve an actus reus." Ayala, 35 F.3d at 426 (citing Powell, 392 U.S. at 533, 88 S.Ct. 2145 (Marshall, J., plurality)); see also 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"). As the offense here is the act of sleeping, lying or sitting on City streets, Robinson does not apply.[3]

Also, in the rare case exemplified by Robinson, the status being criminalized is an internal affliction, potentially an innocent or involuntary one. See Robinson, 370 U.S. at 665-67, 82 S.Ct. 1417 (equating a statute that makes the status of addiction criminal with making it a crime for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease, and noting that addiction is an illness that "may be contracted innocently or involuntarily"). Although the majority acknowledges that homelessness is neither a disease nor an innate or immutable characteristic, maj. op. at 1137, it nevertheless holds that Jones, as a homeless individual, is "in a chronic state that may have been 'contracted innocently or involuntarily.' " Id. at 1135. Being homeless, however, is a transitory state. Some people fall into it, others opt into it. For many, including the homeless persons who pursue this action, it is a status that fluctuates on a daily basis and can change depending upon income and opportunities for shelter. Many are able to escape it altogether. See U.S. Conf. of Mayors, A Status Report on Hunger and Homelessness in America's Cities 2002 at 312 (indicating that "people remain homeless an average of six months in survey cities").[4] In addition, the justices in Powell who were troubled by the statute at issue there, which made it a crime to be found intoxicated in public, thought it was problematic because a chronic alcoholic has a compulsion to drink wherever he is. See Powell, 392 U.S. at 549, 88 S.Ct. 2145 (White, J., concurring) (noting that resisting drunkenness and avoiding public places when intoxicated may be impossible for some); id. at 568, 88 S.Ct. 2145 (Fortas, J., dissenting) (noting that like the addict in Robinson, an alcoholic is powerless to avoid drinking to the point of intoxication and once intoxicated, to prevent himself from appearing in public places).

In further contrast to Robinson, where the Court noted that California through its statute "said that a person can be continuously guilty of this offense [being addicted to the use of narcotics], whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there," 370 U.S. at 666, 82 S.Ct. 1417, Los Angeles through its ordinance does not purport to say that "a person can be continuously guilty of this offense," whether or not he has ever slept on a City street. This is important for two reasons: first, because it shows that the statute itself does not suffer the Robinson defect of making the status of being homeless a criminal offense; and second, because there is no evidence that Jones or any of the parties joining with him-including Purrie or Barger, who were convicted of violating LAMC § 41.18(d)-were unable to stay off the sidewalk on the night they were arrested. For this reason, Jones cannot prevail on the evidence presented even if it were open to us to rely on Justice White's concurring opinion in Powell, which I believe Ayala forecloses. 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." Powell, 392 U.S. at 554, 88 S.Ct. 2145 (White, J., concurring in the result). Despite this, the majority here reasons that unlike Powell, Purrie and Barger made a substantial showing that they are "unable to stay off the streets on the night[s] in question," because "[a]ll human beings must sit, lie, and sleep, and hence must do these things somewhere. It is undisputed that, for homeless individuals in Skid Row who have no access to private spaces, these acts can only be done in public." Maj. op. at 1136. This, of course, is simply a conclusion about the usual condition of homeless individuals in general. As Justice White pointed out with respect to Powell, "testimony about his usual condition when drunk is no substitute for evidence about his condition at the time of his arrest." Powell, 392 U.S. at 553, 88 S.Ct. 2145 (White, J., concurring in the result). The same is true here. Testimony about Jones's usual condition when homeless is not a surrogate for evidence about his condition at the time he was arrested.

Wholly apart from whatever substantive limits the Eighth Amendment may impose on what can be made criminal and punished as such, the Cruel and Unusual Punishment Clause places no limits on the state's ability to arrest. Jones relies heavily on "mass arrests" of homeless people on Skid Row. However, the Eighth Amendment's "protections d[o] not attach until after conviction and sentence." Graham, 490 U.S. at 392 n. 6, 109 S.Ct. 1865. The Court said so in Ingraham: "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions," 430 U.S. at 671 n. 40, 97 S.Ct. 1401, and reiterated this position in Graham, 490 U.S. at 392 n. 6, 109 S.Ct. 1865. See also Johnson, 61 F.3d at 445 (finding that plaintiffs who had not been convicted of violating a sleeping in public ordinance lacked standing to challenge it on Eighth Amendment grounds). It is not open to us to back off the rule, or to accept, as the majority here does instead, the view of the dissent in Ingraham that the Court's rationale was based upon the "distinction between criminal and noncriminal punishment." Maj. op. at 1128 (quoting 430 U.S. at 687, 97 S.Ct. 1401 (White, J., dissenting)).

In any event, there is a difference between the protection afforded by the Eighth Amendment, and protection afforded by the Fourteenth. Protection against deprivations of life, liberty and property without due process is, of course, the role of the Fourteenth Amendment, not the Eighth. The majority's analysis of the substantive component of the Eighth Amendment blurs the two. However, the Eighth Amendment does not afford due process protection when a

Fourteenth Amendment claim proves unavailing. See Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("The Court of Appeals properly relied on the Due Process Clause rather than the Eighth Amendment in considering the claims of pretrial detainees."); id. at 579, 99 S.Ct. 1861 (Stevens, J., dissenting) ("Nor is this an Eighth Amendment Case. That provision . protects individuals convicted of crimes from punishment that is cruel and unusual. The pretrial detainees . are innocent men and women who have been convicted of no crimes."). As Justice White's concurrence in Powell explains:

I do not question the power of the State to remove a helplessly intoxicated person from a public street, although against his will, and to hold him until he has regained his powers. The person's own safety and the public interest require this much. A statute such as the one challenged in this case is constitutional insofar as it authorizes a police officer to arrest any seriously intoxicated person when he is encountered in a public place. Whether such a person may be charged and convicted for violating the statute will depend upon whether he is entitled to the protection of the Eighth Amendment.

Powell, 392 U.S. at 554 n. 5, 88 S.Ct. 2145 (White, J., concurring in the result). Thus the arrests upon which Jones relies do not implicate the Eighth Amendment.

Not only has Jones produced no evidence of present or past Eighth Amendment violations, he has failed to show any likelihood of future violations.[5] Since 1998, California has recognized a necessity-due-to-homelessness defense to ordinances such as LAMC § 41.18(d). See Eichorn, 69 Cal.App.4th at 389-91, 81 Cal.Rptr.2d 535. The defense encompasses the very difficulties that Jones posits here: sleeping on the streets because alternatives were inadequate and economic forces were primarily to blame for his predicament. Id. at 390, 81 Cal.Rptr.2d 535. Jones argues that he and other homeless people are not willing or able to pursue such a defense because the costs of pleading guilty are so low and the risks and challenges of pleading innocent are substantial. But a constitutional violation cannot turn on refusal to employ a defense that prevents conviction. Moreover, defendants who do plead guilty cannot suffer Eighth Amendment harm, because the guilty plea "is an admission of each and every element required to establish the offense" and thus "constitutes an admission . [of] the requisite culpable intent"- that is, the voluntary choice to sleep on the street and the absence of an unavoidable compulsion to do so. See Kidder, 869 F.2d at 1332-33.

As the Eighth Amendment does not forbid arrests, the injunction sought by Jones extends beyond what would be necessary to provide complete relief even if convictions under the ordinance were unconstitutional. An injunction "should be no more burdensome to the defendant than [is] necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). Here, there is no evidence of Eighth Amendment harm to any of the six homeless persons who prosecute this action and equitable relief cannot be based on alleged injuries to others. Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1045 (9th Cir.1999) (en banc). Therefore, the record does not support the relief sought, even under Justice White's concurrence in Powell. Regardless, as a matter of constitutional law, the Eighth Amendment could at most entitle Jones to an injunction forbidding punishment of a homeless person under the ordinance when he demonstrates a necessity defense; however, I would decline to accord any such relief as it would entail "intrusive and unworkable" federal

oversight of state court proceedings. As the Supreme Court explained in O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), such an injunction would not "strike down a single state statute, either on its face or as applied[, nor] enjoin any criminal prosecutions that might be brought under a challenged criminal law," but rather would be "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." Id. at 500, 94 S.Ct. 669. This would run afoul of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and related cases. So, too, would an injunction requiring state courts to permit and to apply the Eichorn defense. The proper procedure for homeless people to protect their rights would be to plead "not guilty and then to challenge the constitutionality" of their conviction, either through direct appeal or collateral review, in the event their necessity defense was rejected by the court. See Kidder, 869 F.2d at 1333.

As the majority's opinion seems to me contrary to the Supreme Court's instruction to apply Robinson sparingly, and instead applies it expansively, I dissent. I believe the district court correctly concluded that the substantive limits on what can be made criminal and punished as such do not extend to an ordinance that prohibits the acts of sleeping, sitting or lying on City streets. Accordingly, I would affirm.

FOOTNOTES

1. It is unclear on what basis the dissent asserts that this report "does not indicate that Los Angeles was among the cities surveyed," or that it "is the only study in the record." Throughout the report, including on page 96 and on the final page, Los Angeles is named as one of the twenty-five surveyed cities. The record includes more than a half dozen public reports Appellants filed in support of their motion for summary judgment, without objection.

2. During oral argument, the attorney for the City asserted that L.A.P.D. officers leaflet Skid Row the day before making their section 41.18(d) sweeps to warn the homeless, and do not cite or arrest people for violating section 41.18(d) unless there are open beds in homeless shelters at the time of the violations. No evidence in the record supports these assertions.

3. As a practical matter, it is questionable how homeless individuals would either know that they could assert a necessity defense or have the wherewithal to hire an attorney who might so advise them, particularly after being arrested, serving jail time, and losing their belongings. The argument that at trial a homeless individual would have recourse to a necessity defense so as to avoid conviction begs the question why the City arrests homeless individuals during nighttime in the first place, other than out of indifference or meanness. As the Los Angeles City Attorney has publicly stated, " 'The tragedy of homelessness is compounded by indifference.' " Anat Rubin, "Jobs, Not Jails," Skid Row Protesters Shout at Politicos, L.A. Daily J., Feb. 22, 2006, at 1 (quoting the City Attorney). Yet the National Coalition for the Homeless recently named Los Angeles one of the twenty "meanest" cities in the United States in its treatment of the homeless. Nat'l Coal. for the Homeless & Nat'l Law Ctr. on Homelessness & Poverty, A Dream Denied: The Criminalization of Homelessness in U.S. Cities 10, 40-41 (2006).

4. The City belatedly objects to the dispositions attached to the Barger and Purrie declarations on foundational grounds. Having failed to assert its objections before the district

court, the City has waived its objections as to the authenticity of the dispositions. See, e.g., Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1058 n. 5 (9th Cir.2003).In addition, the City and the dissent claim Appellants lack standing because they have failed to demonstrate that shelter was unavailable on the nights they were arrested or cited for violating section 41.18(d), and therefore cannot establish that they were punished for involuntary conduct. Because Appellants seek only prospective injunctive relief, standing depends on the likelihood of future injury, not the existence of past injury. Nevertheless, undisputed evidence in the record, including several reports directly authored or commissioned by City agencies or task forces, shows that there is a chronic and severe gap between the number of homeless individuals and the number of available beds in Los Angeles. E.g., L.A. Homeless Servs. Auth., supra, at 2-14 (in the County as a whole, there are almost 50,000 more homeless people than available beds). This evidence supports the reasonable inference that shelter is unavailable for thousands of homeless individuals in Los Angeles on any given night, including on the nights in question. Moreover, each of the declarations either expressly state that the declarant was unable to obtain shelter at the time they were cited or arrested, or provide sufficient facts from which a reasonable inference can be drawn that they were unable to do so.

1. It would appear that at least Purrie and Barger raise a triable issue that they were convicted of violating LAMC § 41.18(d) and fear conviction in the future. While this might satisfy the Fifth Circuit's Johnson test, it does not necessarily save their standing to the extent they challenge the ordinance based on being convicted for the involuntary "condition" of being on the streets without available shelter. This is because there is no evidence that shelter was unavailable when they committed the underlying offense of sitting, sleeping or lying on City sidewalks.

2. In this connection, we noted that "[t]he proper procedure to raise this sort of claim would have been for Kidder to have pleaded not guilty and then to challenge the constitutionality of the [statute]. Having pleaded guilty, however, Kidder may not now claim that his actions were really involuntary and thus not constitutionally susceptible to punishment." Kidder, 869 F.2d at 1333.

3. Neither of the two 1969 district court opinions cited by the majority, maj. op. at 1137, in support of the proposition that the Eighth Amendment forbids criminalizing conduct derivative of status, Goldman v. Knecht, 295 F.Supp. 897 (D.Colo.1969); Wheeler v. Goodman, 306 F.Supp. 58 (W.D.N.C.1969), vacated on other grounds by 401 U.S. 987, 91 S.Ct. 1219, 28 L.Ed.2d 524 (1971), is to the contrary. In fact, in both cases the court struck down the statute at issue for criminalizing status, not conduct, explicitly recognizing that there would have been no trouble had the statutes instead criminalized conduct. Goldman, 295 F.Supp. at 908; Wheeler, 306 F.Supp. at 64.

4. This is the only study in the record (others referred to by the majority are not), and it does not indicate that Los Angeles was among the cities surveyed. However, there is no reason to believe that the statistics aren't applicable to Los Angeles as well. See, e.g., Daniel Flaming, et al., Homeless in LA: Final Research Report for the 10-Year Plan to End Homelessness in Los Angeles County at 72 (Sept.2004) (finding that in a given year in Los Angeles less than ten

percent of the homeless population remained homeless for more than six months), available at http://www.bringlahome.org/docs/HILA-Final.PDF. (This study is not part of the record, either.)

5. This, too, calls into question the plaintiffs' standing. See Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139-41 (9th Cir.2000) (en banc).

WARDLAW, Circuit Judge.

Opinion by Judge Wardlaw; Dissent by Judge Rymer

United States Court of Appeals,Ninth Circuit.

ROULETTE v. CITY OF SEATTLE

Megan S. ROULETTE, Plaintiff-Appellant, v. CITY OF SEATTLE, a Washington municipal corporation; Norman Rice, Mayor of the City of Seattle; Patrick S. Fitzsimmons, Chief of the City of Seattle Police Department, Defendants-Appellees.

No. 94-35354.

Argued and Submitted March 8, 1995. -- March 18, 1996

Before: PREGERSON, KOZINSKI and LEAVY, Circuit Judges.

David Girard and Peter Greenfield, Evergreen Legal Services, Seattle, Washington, Beth M. Andrus, and David Zuckerman, ACLU-WASHINGTON, Seattle, Washington, for the appellants.Mark H. Sidran, Seattle City Attorney, Sandra L. Cohen and Gary E. Keese, Assistant City Attorneys, Seattle, Washington, for the appellees.Daniel E. Loeb, Bruce J. Casino, Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C.; Maria Foscarinis, National Law Center on Homelessness & Poverty, Washington, D.C., for amici National Law Center on Homelessness & Poverty, et al., on behalf of the appellants.Gary Born, Robert Hoyt, Thomas Clark, Wilmer, Cutler & Pickering, Washington, D.C.; Michael Gallagher, Perkins Coie, Seattle, Washington; Robert Teir, American Alliance for Rights and Responsibilities, for amicus American Alliance for Rights and Responsibilities, on behalf of the appellees.Donald A. Lachman, Senior Achievement Non-Profit Housing Association, Seattle, Washington; Camille Monzon, Seattle Indian Center, Seattle, Washington, for amici Senior Achievement Non-Profit Housing Association and Seattle Indian Center, on behalf of the appellees.

OPINION

The first step to wisdom is calling a thing by its right name. Whoever named "parkways" and "driveways" never got to step two; whoever named "sidewalks" did.

Seeing the wisdom of preserving the sidewalk as an area for walking along the side of the road, the City of Seattle passed an ordinance generally prohibiting people from sitting or lying on public sidewalks in certain commercial areas between seven in the morning and nine in the evening. SMC §§ 15.48.040.[1] The ordinance doesn't restrict sitting or lying in public parks, private or public plazas, or alleys, nor sitting on the sidewalk in noncommercial areas of the city. It also permits sitting on the sidewalks in the commercial areas at night. No one may be cited, moreover, unless first notified by a police officer that he's sitting or lying where he shouldn't.

Plaintiffs come from many walks: homeless people and their advocates, social service providers, a deputy registrar of voters, a street musician, and various organizations like the Freedom Socialist Party and the Seattle chapter of the National Organization for Women. What brings them together, and what defines the class they represent, is that they all sometimes sit or lie on the sidewalk. Plaintiffs claim it is unconstitutional for the city to curtail their use of the sidewalk as a sideseat or a sidebed.

They filed suit under 42 U.S.C. § 1983, claiming that the sidewalk ordinance violates their rights to procedural and substantive due process, equal protection, travel and free speech.[2] Plaintiffs moved for summary judgment, asking the district court to declare the ordinance unconstitutional on its face. The district court denied the motion and, instead, granted the city's cross-motion for summary judgment, holding that the ordinance is facially constitutional. Plaintiffs appeal only on First Amendment and substantive due process grounds.[3] We review de novo.

I. FREE SPEECH

The First Amendment protects not only the expression of ideas through printed or spoken words, but also symbolic speech-nonverbal "activity . sufficiently imbued with elements of communication." Spence v. Washington, 418 U.S. 405, 409, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974). Spence is a typical symbolic speech case. Appellant there had been prosecuted for displaying an American flag on which he had formed a peace sign with plastic tape.[4] He did so in order to protest American bombing in Cambodia and the National Guard's killing of anti-war demonstrators at Kent State. The context in which he acted made it highly likely that his message would be understood, whereas at another time it "might be interpreted as nothing more than bizarre behavior." Id. at 410, 94 S.Ct. at 2730. His conduct thus amounted to expression, because "[a]n intent to convey a particularized message was present, and . the likelihood was great that the message would be understood by those who viewed it." Id. at 410-11, 94 S.Ct. at 2730. The Court held the statute unconstitutional "as applied to appellant's activity." Id. at 406, 94 S.Ct. at 2728; see also Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539-40, 105 L.Ed.2d 342 (1989) (burning an American flag as part of a political demonstration was symbolic speech under Spence).

Plaintiffs' claim presents a rarely attempted, and still more rarely successful, twist on the Spence analysis: They argue not that the Seattle ordinance is invalid as applied to a particular instance of sitting on the sidewalk for an expressive purpose, but that the ordinance on its face violates the First Amendment.

Plaintiffs observe that posture can sometimes communicate a message: Standing when someone enters a room shows respect; remaining seated can show disrespect. Standing while clapping says the performance was fabulous; remaining seated shows a more restrained enthusiasm. Sitting on the sidewalk might also be expressive, plaintiffs argue, such as when a homeless person assumes a sitting posture to convey a message of passivity toward solicitees.

The fact that sitting can possibly be expressive, however, isn't enough to sustain plaintiffs' facial challenge to the Seattle ordinance. It's true that our ordinary reluctance to entertain facial

challenges is somewhat diminished in the First Amendment context. See, e.g., Massachusetts v. Oakes, 491 U.S. 576, 581, 109 S.Ct. 2633, 2637, 105 L.Ed.2d 493 (1989). However, this is because of our concern that "those who desire to engage in legally protected expression . may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503, 105 S.Ct. 2794, 2801-02, 86 L.Ed.2d 394 (1985).[5] Consistent with this speech-protective purpose, the Supreme Court has entertained facial freedom-of-expression challenges only against statutes that, "by their terms," sought to regulate "spoken words," or patently "expressive or communicative conduct" such as picketing or handbilling. See Broadrick v. Oklahoma, 413 U.S. 601, 612-13, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830.[6] Seattle's ordinance does neither. By its terms, it prohibits only sitting or lying on the sidewalk, neither of which is integral to, or commonly associated with, expression.[7] Subject to other valid legislation, homeless people remain free to beg on Seattle's sidewalks, passively or not. Voter registrars may solicit applications for the franchise. Members of the Freedom Socialist Party may doggedly pursue petition signatures and donations, or distribute educational materials. And the National Organization for Women may hold rallies or demonstrations. Cf. Schneider v. New Jersey, 308 U.S. 147, 160-61, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939) (state may prohibit speaker from "taking his stand in the middle of a crowded street, contrary to traffic regulations . since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.").[8]

Plaintiffs and the dissent point to Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966), where Justice Fortas, writing for himself and two others, found a breach-of-the-peace statute unconstitutional as applied to a peaceful "sit-in" demonstration. See id. at 138-43, 86 S.Ct. at 722-25 (opinion of Fortas, J., joined by Warren, C.J., and Douglas, J.).[9] To the extent Justice Fortas's opinion in Brown has any bearing in the context of this facial challenge, it supports the city's position. Justice Fortas termed the protest there a "sit-in," but only one of the five defendants actually sat-the other four stood. See id. at 136, 86 S.Ct. at 721 ("Brown sat down and the others stood near him."), 139, 86 S.Ct. at 722 ("They sat and stood in the room, quietly, as monuments of protest."). The conduct three members of the Court found expressive in Brown thus wasn't the defendants' postures; it was their "silent and reproachful presence," id. at 142, 86 S.Ct. at 724 (emphasis added).[10]

In Broadrick, the Supreme Court expressly disavowed its prior cases to the extent they purported to sustain facial freedom of speech attacks on laws like the Seattle ordinance that, by their terms, prohibit only conduct. 413 U.S. at 613-15 & n. 13, 93 S.Ct. at 2916-18 & n. 13. The Court explained:

[F]acial overbreadth adjudication is an exception to our traditional rules of practice and . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure' speech toward conduct and that conduct-even if expressive-falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect-at best a prediction-cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter

another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Id. at 615, 93 S.Ct. at 2917-18 (citations omitted).

This reasoning is eminently sensible. One might murder certain physicians to show disapproval of abortion; spike trees in a logging forest to demonstrate support for stricter environmental laws; steal from the rich to protest perceived inequities in the distribution of wealth; or bomb military research centers in a call for peace. Fringe acts like these, however, provide no basis upon which to ground facial freedom-of-speech attacks on our laws against murder, vandalism, theft or destruction of property. See Roberts v. United States Jaycees, 468 U.S. 609, 628, 104 S.Ct. 3244, 3255, 82 L.Ed.2d 462 (1984); see also Henry P. Monaghan, "Overbreadth," 1981 Sup.Ct. Rev. 1, 28 ("[T]he core point [of Broadrick is that] the Court will be hostile to facial condemnation of statutes whose central focus is prohibition of tangible harms unrelated to the content of the expression generated by the production of those harms.").

The lesson we take from Broadrick and its progeny is that a facial freedom of speech attack must fail unless, at a minimum, the challenged statute "is directed narrowly and specifically at expression or conduct commonly associated with expression." City of Lakewood, 486 U.S. at 760, 108 S.Ct. at 2145; compare Arcara v. Cloud Books, Inc., 478 U.S. 697, 706-07, 106 S.Ct. 3172, 3177, 92 L.Ed.2d 568 (1986) ("where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity," the statute may be subject to First Amendment scrutiny) with City of Dallas v. Stanglin, 490 U.S. 19, 25, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes-for example, walking down the street or meeting one's friends at a shopping mall-but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").[11] By its terms, the ordinance here prohibits only sitting or lying on the sidewalk. As we explained above, these are not forms of conduct integral to, or commonly associated with, expression. We therefore reject plaintiffs' facial attack on the ordinance.

II. SUBSTANTIVE DUE PROCESS

Plaintiffs also argue that Seattle's ordinance is facially unconstitutional under the Fourteenth Amendment's Due Process Clause; in plaintiffs' view, the ordinance is nothing more than a thinly veiled attempt to drive unsightly homeless people from Seattle's commercial areas. The city counters that the ordinance is a legitimate response to substantial public concerns. As amicus American Alliance for Rights and Responsibilities explains on the city's behalf, "[a] downtown area becomes dangerous to pedestrian safety and economic vitality when individuals block the public sidewalks, thereby causing a steady cycle of decline as residents and tourists go elsewhere to meet, shop and dine." Brief of Amicus Curiae [American Alliance for Rights and Responsibilities] at 9. We need not reach the merits of these contentions, given the posture of this case: Plaintiffs' substantive due process claim, like their First Amendment claim, challenges the statute on its face, not as applied. "The fact that [a legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697

(1987); this has been described as "a long established principle of our jurisprudence." Janklow v. Planned Parenthood, 517U.S. 1174, ----, 116 S.Ct. 1582, 1583, 134 L.Ed.2d 679 (1996) (Stevens, J., respecting the denial of the petition for certiorari). Thus the Salerno Court effectively rejected a facial Substantive Due Process challenge because "the statute at issue would be constitutional as applied in a large fraction of cases." Id., citing Salerno, 481 U.S. at 749-50, 107 S.Ct. at 2102-03.

Here, plaintiffs have conceded that "the City may prevent individuals or groups of people from sitting or lying across a sidewalk in such a way as to prevent others from passing." Reply Brief of Appellants at 6. This and other aspects of the record make clear that the statute at issue would be constitutional as applied in a large fraction of cases. Plaintiffs' facial Substantive Due Process challenge therefore fails.

AFFIRMED.

Two aspects of the majority opinion are troublesome. First, the majority requires plaintiffs mounting a First Amendment challenge to show that the challenged ordinance restricts conduct that is "integral to, or commonly associated with, expression." Maj. at 305. Second, the majority fails to analyze Seattle's sidewalk ordinance under traditional time, place, and manner standards.

I

Seattle's sidewalk ordinance bans lying or sitting on sidewalks in the city's business areas between the hours of 7:00 a.m. and 9:00 p.m. SMC § 15.48.040(A).[1] The sidewalk ordinance thus makes it illegal for people to communicate, meet, protest, sleep, beg, solicit alms, or engage in other First Amendment activities on Seattle's sidewalks whenever sitting or lying is involved. That this ordinance aims at expressive conduct is evidenced by the ordinance's multiple exceptions that allow sitting and lying in non-expressive situations. SMC § 15.48.040(B).[2]

It is undeniable that city sidewalks are public forums meant for a variety of expressive activities in addition to walking.

Sidewalks . are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.

United States v. Grace, 461 U.S. 171, 179, 103 S.Ct. 1702, 1708, 75 L.Ed.2d 736 (1983). Indeed, because sidewalks are quintessential public forums, courts normally review an ordinance restricting expressive activity on sidewalks under some form of First Amendment scrutiny.

But according to the majority, constitutionally protected expressive conduct on public sidewalks is limited to conduct "integral to, or commonly associated with, expression." Maj. at 305. In this way, the majority limits First Amendment protection to conduct already deemed expressive, like flag burning. See maj. at 302-03 (discussing Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) and Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d

342 (1989)). In truth, expressive conduct comes in many forms and the Supreme Court has not shied away from recognizing that the First Amendment protects a wide variety of such expression. See R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (burning crosses); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (live nude dancing); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (wearing black armbands). From time to time, the Court has even recognized sitting as protected expressive conduct. See Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (Fortas, J., joined by Warren, C.J., and Douglas, J.) (plurality opinion) (reviewing application of breach of the peace violations involving civil rights sit-in at segregated facility); Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961) (same). Yet here, the majority decides that the First Amendment does not protect sitting per se, even though the Court has implicitly recognized that sitting can be a protected form of expression. Id.

The majority also brushes aside the Supreme Court's decision in Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). In Clark, the Court suggested that a ban on sitting or lying in a public forum merits at least some First Amendment consideration.[3] Id. at 293, 104 S.Ct. at 3068-69. Although the Court concluded that the Park Service's ban on overnight camping did not violate the First Amendment, the Court did not reject outright the idea that camping could constitute expressive conduct. Id. Instead, the Court assumed that there was some expressive content in overnight camping done in connection with a demonstration. Id. at 293, 104 S.Ct. at 3068-69. Because camping was restricted in a traditional public forum-a park-the Court applied a time, place, and manner analysis. Id. at 294-98, 104 S.Ct. at 3069-71. Granted, the Court gave the Park Service great leeway, Id. at 299, 104 S.Ct. at 3071-72, but the lesson of Clark concerning the method of analysis is clear: even mundane actions-like camping-may merit some level of First Amendment protection. Id. at 293-99, 104 S.Ct. at 3068-72. The majority minimizes Clark 's applicability to this case, and thus gives short shrift to the constitutional concerns presented here.

II

On its face, I believe that Seattle's sidewalk ordinance, with its multiple exceptions for non-expressive activities, requires more careful scrutiny than the majority opinion offers. A correct analysis of the statute should begin, as Clark did, with the assumption that sitting or lying by people in a traditional public forum can have communicative content. This assumption, that sitting or lying on sidewalks may be expressive conduct, is not cut out of whole cloth. It is in line with Supreme Court cases noted above and the law of the Second Circuit. See Loper v. New York City Police Dep't, 999 F.2d 699, 704 (2d Cir.1993) ("the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance"); Streetwatch v. National R.R. Passenger Corp., 875 F. Supp. 1055, 1066 (S.D.N.Y.1995) (ruling that Amtrak could not continue to eject people from Pennsylvania Station in New York City simply because they are homeless or appear homeless).

Of course, just because an activity may implicate First Amendment interests does not mean that the government is completely barred from regulating that activity. But the correct method of analysis is not to deny that a First Amendment right is implicated and thus avoid any level of

constitutional scrutiny of the ordinance. Rather, courts should determine whether time, place, or manner restrictions on expressive conduct are justified without reference to the content of the expression, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communicating the information. Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753-54, 105 L.Ed.2d 661 (1989) (citations omitted). Seattle's ordinance is obviously content-neutral; therefore, I conduct three interrelated inquiries: (a) whether Seattle's interests are significant, (b) whether the ordinance is narrowly tailored to effect those interests, and (c) whether there are alternative forums for communicating this expression.

A

The Seattle City Council drafted the sidewalk ordinance to facilitate the safe and efficient movement of pedestrians and goods on the public sidewalks of commercial areas and to promote economic health in the downtown and neighborhood commercial areas by removing the obstructions to shoppers caused by people sitting and lying on the sidewalk. See Seattle City Council, Statement of Legislative Intent (adopted by the Public Safety Committee meeting held on September 23, 1993) (hereinafter "Statement of Legislative Intent"). On their face, these goals are legitimate and unremarkable.

Public safety is a laudable civic objective, see Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 649-50, 101 S.Ct. 2559, 2564-65, 69 L.Ed.2d 298 (1981), and I do not argue that First Amendment activities should be protected at the cost of blocking fire exits, for example. But Seattle's second claim, that it has a significant governmental interest in passing the sidewalk ordinance to preserve the economic vitality of Seattle's commercial areas, is questionable.

The Seattle City Council declared that:

In some circumstances people sitting or lying on the sidewalks deter many members of the public from frequenting [commercial] areas, which contributes to undermining the essential economic viability of those areas. Business failures and relocations can cause vacant storefronts which contribute to a spiral of deterioration and blight.

Statement of Legislative Intent. In other words, Seattle seeks economic preservation by ridding itself of social undesirables-homeless or otherwise-who sit or lie on the sidewalks, and this is done to protect the sensibilities of shoppers.

Although aesthetics may be a legitimate concern of lawmakers when debating whether to allow signs on utility poles, see Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805, 104 S.Ct. 2118, 2128-29, 80 L.Ed.2d 772 (1984), such a concern is questionable when evaluating restrictions that directly impede individual expressive conduct. See DeWeese v. Town of Palm Beach, 812 F.2d 1365, 1369 n. 11 (11th Cir.1987). Fear that people may choose to sit or lie on Seattle sidewalks to share their religious or political views, beg or solicit alms, or register voters, is, without more, a less than compelling governmental interest.[4] We should hesitate to accord great weight to "a perceived public interest in avoiding the

aesthetic discomfort of being reminded on a daily basis that many of our fellow citizens are forced to live in abject and degrading poverty." Streetwatch, 875 F.Supp. at 1066.

B

Even if we assume that Seattle's interest in ensuring pedestrian safety and preventing urban blight is substantial, the ordinance is still not narrowly tailored to meet those interests. Ward, 491 U.S. at 798, 109 S.Ct. at 2757-58.

In Ward, the Court explained that to be "narrowly tailored," an ordinance need not be the "least intrusive means" of achieving the city's desired end. Id. at 798, 109 S.Ct. at 2757. But Ward also cautioned that "this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary" to reach the government's desired end. Ward, 491 U.S. at 799, 109 S.Ct. at 2758. Moreover, the Court clarified that a municipality fails the "means-end" prong of the standard when it "regulate[s] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Id.

In Project 80's, Inc. v. City of Pocatello, 942 F.2d 635, 638 (9th Cir.1991), we noted that "restrictions which disregard far less restrictive and more precise means are not narrowly tailored." The Supreme Court took up this view in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13, 113 S.Ct. 1505, 1510 n.13, 123 L.Ed.2d 99 (1993). The Court explained that, although a regulation need not be the "least restrictive" means of serving the relevant governmental interest, "if there are numerous and obvious less-burdensome alternatives to the restriction on . speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." Id.

Seattle claims that it enacted its sidewalk ordinance to promote public safety and orderly movement of pedestrians and to protect the local economy by maintaining the aesthetic attractiveness of the "Downtown Zone" and "Neighborhood Commercial Zones," SMC § 15.48.040(A). These are worthy civic goals. But obvious, less-restrictive alternatives to the sidewalk ordinance are already available or can be easily developed.

Under Seattle Municipal Code § 12A.12.015, it is a misdemeanor to intentionally obstruct the passage of a pedestrian or vehicle in a public right-of-way.[5] Seattle argues that § 12A.12.015 by itself does not adequately remedy its alleged public safety concerns because the ordinance requires the city to prove "an individual's criminal intent to block the passage of others." Appellees' Brief at 19 n. 22. Seattle could alleviate these concerns by requiring its police to give notice to a person sitting or lying on the sidewalk similar to the notice of violation provided for in the challenged sidewalk ordinance. SMC § 15.48.040(C). Failure to move after being notified that one is obstructing a public right-of-way would provide evidence that a person has "intentionally" obstructed pedestrian traffic. SMC § 12A.12.015(B).

Moreover, if easing the prosecutorial burden is the real issue here, then Seattle could easily make it a civil infraction to obstruct pedestrian traffic or to aggressively beg. Such an ordinance, if passed, would make it a violation to obstruct the sidewalk and would thus precisely deal with the pedestrian safety problem and the shopping deterrence problem alleged as significant

governmental interests. Alternatively, Seattle could pass a civil infraction ordinance that restricts people from lying and sitting only in the most congested areas, such as those areas near street corners or building entrances.

There are other more reasonable means to battle perceived urban blight than the sidewalk ordinance at issue here. If the prevention of harassment or assault is a concern, Seattle could employ traditional law enforcement methods, such as prosecuting those who commit such crimes. See Martin v. Struthers, 319 U.S. 141, 148, 63 S.Ct. 862, 865-66, 87 L.Ed. 1313 (1943). Similarly, if litter and squalor are a concern, punishing those personally responsible is a less-restrictive option. See Schneider v. New Jersey, 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939).

I am also unconvinced that the sidewalk ordinance is narrowly tailored given the safety and aesthetic problems that the ordinance leaves untouched. For instance, pedestrian safety may be compromised when friends stop to chat on a busy street corner. Safety as well as pleasing aesthetics are threatened when office workers congregate outside of buildings for smoking breaks. Similarly, safety and aesthetics are placed at risk when people sit on the sidewalk while waiting for city buses.[6] Seattle's ordinance doesn't come close to preventing the above mentioned aesthetic and safety concerns, and we should not validate the sidewalk ordinance absent a better means-ends fit.

C

The majority also asserts that plaintiffs remain free to sit and lie expressively in other places in Seattle. Yet one wonders if there are many places in Seattle where homeless people will be welcome, much less allowed to sit or lie on the sidewalk.

We have held that an alternative forum is inadequate if the speaker is not permitted to reach his "intended audience." Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (9th Cir.1990). In Bay Area Peace Navy, we invalidated a Coast Guard regulation that prohibited protesters from demonstrating within a 75-yard radius of the pier during the annual "Fleet Week" celebration. We found that the 75-yard zone completely insulated the audience from the anti-war and anti-militarization views of the demonstrators. Id. at 1230. This reasoning also applies to other expressive conduct. See Students Against Apartheid Coalition v. O'Neil, 660 F.Supp. 333, 339-40 (W.D.Va.1987) (holding that university regulation prohibiting shanties on lawn of building where Board of Visitors meets, impermissibly insulates the Board, the intended audience, from the protest), aff'd, 838 F.2d 735 (4th Cir.1988).

The majority opinion upholds an ordinance that severely restricts people from engaging in expressive conduct while sitting and lying on the sidewalks of Seattle's downtown and neighborhood business zones. The effects are clear. The homeless and their advocates are deprived of the effective use of these sidewalks that are key locations for soliciting alms and making known the plight of the downtrodden. Others are deprived of a good place to sit and share their music, philosophies, or religious beliefs. No other area of Seattle has the density or diversity of audience found in these commercial centers.

III

Our Constitution affords people the "right to be let alone," Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), as well as a right to free expression in a public forum, Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). At a minimum, this gives us the right to express ourselves on public sidewalks. If Seattle wants to secure public safety and prevent urban blight, then there are far less-restrictive and more reasonable alternatives to the current sidewalk ordinance. That Seattle has not pursued such alternatives suggests that the city's real objective is to sweep its commercial zones clear of homeless people and other social pariahs.

The majority validates an unconstitutional burden on free expression in Seattle's key public forums. Accordingly, I dissent.

ORDER

Sept. 17, 1996

The opinion filed March 18, 1996 is amended as follows:

[Editor's Note: Amendments incorporated for purpose of publication.]

The petition for rehearing is denied in all other respects. Judge Pregerson would grant the petition for rehearing.

A judge called for a vote on the suggestion for rehearing en banc, but the suggestion failed to obtain the votes of a majority of active judges. The suggestion is therefore rejected.

I dissent from the denial of rehearing en banc for the reasons set forth in my dissent above [p. 306], and for the reasons set forth in Judge Norris's opinion.

I

In rejecting the facial challenge to the Seattle ordinance on First Amendment grounds, Roulette v. City of Seattle, 78 F.3d 1425 (9th Cir.1996), makes new law by departing from the standard that conduct needs only "a significant expressive element" to merit First Amendment protection. Arcara v. Cloud Books, 478 U.S. 697, 702, 706, 106 S.Ct. 3172, 3175, 3177, 92 L.Ed.2d 568 (1986). Roulette replaces the Arcara standard with a more stringent standard for making facial challenges: A statute directed at conduct cannot be facially challenged unless the conduct is "patently expressive or communicative" or "integral to, or commonly associated with, expression." Roulette, 78 F.3d at 1427-28.

Interestingly, the Roulette panel makes its new First Amendment test applicable to facial challenges only. It expressly disclaims any intent to make its new test applicable to as-applied First Amendment claims. Thus, Roulette reserves the right of plaintiffs to bring individual as-applied challenges to the Seattle ordinance, even after denying their right to bring a facial

challenge: "Of course, nothing we say today forecloses the possibility of mounting a successful as applied challenge." Id. at 1429 n. 10. In other words, under Roulette, conduct may be sufficiently expressive to mount an as-applied attack on a statute restricting it, but not sufficiently expressive to mount a facial overbreadth attack. As far as I can tell, this dichotomy is unprecedented in First Amendment jurisprudence.

None of the cases cited in Roulette supports the dichotomy it creates between facial and as-applied challenges. Most of the cited cases do not discuss the expressive potential of conduct because they involve behavior that is indisputably expressive.[1] The cases that do address whether conduct is sufficiently expressive to come under the protective umbrella of the First Amendment do not distinguish between facial and as-applied claims in their analyses. To the contrary, when discussing the expressive potential of the conduct at issue, cases involving facial attacks borrow their reasoning freely from cases involving as-applied claims.[2] The overlapping of facial and as-applied cases in the analyses shows that the threshold standard for deciding whether the conduct in question is sufficiently communicative to bring First Amendment analysis into play does not vary depending on whether the plaintiff brings a facial or an as-applied claim.[3]

The real differences between facial overbreadth and as-applied analyses do not emerge until after a court determines whether the behavior targeted by a statute has sufficient communicative content to trigger the First Amendment. In other words, the threshold inquiry common to both facial overbreadth and as-applied challenges is whether the behavior has "a significant expressive element." Only after the threshold inquiry do the two analyses diverge. In an as-applied challenge, there is a narrow focus on the particular plaintiff's behavior and whether the statute is constitutional as applied to her. In a facial overbreadth challenge, there is a broad focus on the entire range of behavior affected by the statute, and whether the unconstitutional applications of a statute are substantial in relation to the statute's legitimate effect. Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973).

Under proper overbreadth analysis, if a court determines that a statute regulates behavior with "a significant expressive element," it must then ask whether there are a substantial number of instances in which the statute will violate the First Amendment. See Broadrick, 413 U.S. at 601, 93 S.Ct. at 2910; Yniguez v. Arizonans for Official English, 69 F.3d 920, 932 (9th Cir.1995), cert. granted, 517 U.S. 1102, 116 S.Ct. 1316, 134 L.Ed.2d 469 (1996). To determine whether the statute's prohibitions on expressive conduct are unconstitutional, a court may have to ask whether the prohibitions are valid time, place, and manner restrictions. See Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 803-17, 104 S.Ct. 2118, 2127-35, 80 L.Ed.2d 772 (1984). Thus, even if conduct hit by a statute is deemed expressive by the threshold inquiry, a facial challenge will fail unless the parties show that the statute hits a substantial amount of protected expression and that its restrictions on this expression violate the First Amendment.

II

The Seattle ordinance at issue in this case prohibits any person from sitting or lying down on a public sidewalk, or upon an object placed on a public sidewalk, between 7:00 a.m. and 9:00 p.m.

in commercial areas of the city. Seattle Mun. Code § 15.48.040. The plaintiffs are political activists, social service providers, a deputy registrar of voters, a street musician, and homeless people. Based on the false dichotomy it creates, the Roulette panel holds that no one can bring a facial overbreadth challenge to the Seattle ordinance because sitting or lying on the sidewalk is not sufficiently expressive to merit First Amendment protection. Sitting or lying on the sidewalk, however, is sufficiently expressive to invoke the First Amendment if a plaintiff brings an as-applied challenge. Roulette, 78 F.3d at 1428 nn. 7 & 10.

The Roulette panel holds that a facial challenge to a statute directed at conduct must fail unless the conduct is "patently expressive or communicative" or "integral to, or commonly associated with, expression." Id. at 1427-28. Since a majority of the panel believes that sitting or lying on the sidewalk is not "integral to, or commonly associated with, expression," id. at 1428, it holds that plaintiffs cannot bring a facial challenge to the Seattle ordinance. Thus, the panel never reaches the question of how much expressive conduct the ordinance hits, nor whether the ordinance's restrictions on expression are reasonable time, place, and manner restrictions.

The test the panel creates is impermissibly subjective. In applying the new test, the panel interprets "patently" and "integral to, or commonly associated with," as a license to make a completely subjective judgment about the expressive nature of sitting. The panel simply pronounces ex cathedra that sitting or lying on the sidewalk is not integral to, or commonly associated with, expression. There is no discussion of the possible communicative power of sitting, such as the possibility that a beggar's message is dramatized by sitting, instead of standing or walking. Rather, we have only the words "sitting" and "lying" and the imperious conclusion that these activities, when judged in a vacuum, are not sufficiently expressive to make the ordinance vulnerable to a facial overbreadth challenge.

It surely cannot be the law that such imperious, subjective reasoning of judges can dictate whether sitting by a speaker, artist, musician, or solicitor is sufficiently expressive to permit a facial First Amendment overbreadth challenge. For example, while the panel belittles the expressive power of sitting, an entire genre of fourteenth century paintings, the Madonna of Humility, is defined by the expressive nature of sitting. As noted by the prominent art historian Millard Meiss, "[T]he humility of the Virgin resided primarily in the single fact that she was seated on the ground." Millard Meiss, Painting in Florence and Siena after the Black Death: The Arts, Religion, and Society in the Mid-Fourteenth Century 132 n. 1 (1951). It is settled law that the First Amendment protects a person's right to choose how to express herself, including her right to decide the manner in which she communicates. Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). First Amendment inquiry into the expressiveness of conduct must proceed from the speaker's perspective. The panel errs because it proceeds from its own subjective point of view.

The correct test for whether conduct is expressive enough to implicate the First Amendment looks at the circumstances surrounding the conduct. See, e.g., id. at 15, 91 S.Ct. at 1783. Conduct triggers the First Amendment when the actor intends to convey a particularized message, and the likelihood is great under the circumstances that the message will be understood by those who view it. Spence v. Washington, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974). Conduct needs only a "significant expressive element" or "at least the

semblance of expressive activity" to invoke First Amendment analysis. Arcara, 478 U.S. at 702, 706, 106 S.Ct. at 3175, 3177. Thus, "[t]he fact that sitting can possibly be expressive," Roulette, 78 F.3d at 1427, is enough to trigger First Amendment facial overbreadth analysis. Even conduct that is "[not] necessarily expressive . [nor] ordinarily expressive" cannot be summarily dismissed as insufficiently expressive to trigger overbreadth analysis. Arcara, 478 U.S. at 702, 106 S.Ct. at 3175.

By viewing sitting in a vacuum, the panel majority reaches a foreordained conclusion, since an action devoid of context, though "possibly expressive," can easily be characterized as pure conduct. In examining the medium divorced from the message, the panel ignores the power of the medium to enhance the message. Essentially the panel holds that an ordinance which on its face is aimed only at conduct cannot be subject to a First Amendment facial overbreadth challenge, even if it hits a great deal of protected expression in the process. This theory is unprecedented in First Amendment jurisprudence.

The panel insists that its newly minted test is perfectly reasonable, because even without sitting, "homeless people remain free to beg. [v]oter registrars may solicit applications. [m]embers of the Freedom Socialist Party may doggedly pursue petition signatures and donations," etc. Roulette, 78 F.3d at 1428. Again, the panel confuses the analysis. The availability of alternative means of expression may be significant in First Amendment analysis, but as part of a time, place, and manner inquiry. See Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753-54, 105 L.Ed.2d 661 (1989); One World One Family Now v. City & County of Honolulu, 76 F.3d 1009, 1012 (9th Cir.1996). Once again, the panel does something that is unique in First Amendment jurisprudence: It uses time, place, and manner reasoning in deciding the threshold question whether First Amendment interests are sufficiently implicated to even permit a facial overbreadth challenge.

The cases the panel cites as using the words "patently expressive or communicative," or "integral to, and commonly associated with, expression" fail to support the panel's own use of this language. The panel imports the phrase "commonly associated with expression" from City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 760, 108 S.Ct. 2138, 2145, 100 L.Ed.2d 771 (1988), but that case did not deal with the distinction between expressive and non-expressive conduct. Lakewood involved the circulation of newspapers, and the Court simply described this activity as "expression or conduct commonly associated with expression." Yet, the Roulette panel seizes upon that descriptive language and transforms it into a standard for determining whether conduct is sufficiently expressive to mount a facial challenge.

Moreover, the words "patently" and "integral to," used by the panel as part of its new test, do not appear in any of the authorities cited by the panel.[4] In sum, the panel cobbles its test together from its own imagination and language taken out of context.

III

In answering the threshold question in this facial overbreadth case, the panel should have considered whether sitting or lying on the sidewalk has "a significant expressive element," regardless of whether the plaintiff raises an as-applied or a facial challenge. This inquiry

requires us to think about concrete instances where the conduct may be expressive. If the panel had considered the expressive elements of sitting or lying on a busy sidewalk in a commercial area, instead of merely indulging its subjective biases about the expressive value of "sitting" in the abstract under its new test, it would have considered that sitting or lying on the pavement may be inextricably intertwined with the messages of street people, and thus sufficiently expressive to permit a facial overbreadth challenge. As Judge Wilken asserted when she issued a preliminary injunction on First Amendment grounds against a Berkeley ordinance almost identical to the Seattle ordinance: "One message which may be communicated by the act of sitting on the sidewalk is the message that the solicitor is in serious need. [and] too weak, ill, or defeated by circumstances to stand." Berkeley Community Health Project v. City of Berkeley, 902 F.Supp. 1084, 1092-93 (N.D.Cal.1995).

If the panel had applied the correct analysis, it would have considered whether many people beg while seated because sitting is a non-threatening posture that signals passivity. Sitting can make the pedestrian feel safe, because that posture suggests that the solicitor is not aggressive and intends no harm. It can also communicate the beggar's degree of desperation, by signalling surrender, weakness, and humiliation, thus altering the character of begging and making the solicitation more effective. There is an indigent woman who sits on a sidewalk along Rodeo Drive in Beverly Hills. Against the background of the retail mecca that literally defines American wealth, the image of this woman, plainly destitute and desperate, sitting against a lamppost, sends a powerful message about the plight of the downtrodden. Perhaps this particular woman chose this particular sidewalk because she believed the most effective means of begging was to confront the rich with her message of abject poverty in the face of their own affluence. And perhaps she chose to sit, placing herself at the feet of the wealthy, to amplify her message of degradation and dependence. In any case, it is presumptuous, if not arrogant, for the majority to disregard such real world possibilities and decide in a vacuum that "sitting" is not sufficiently expressive to trigger a facial overbreadth analysis.

Even beyond helping to impart the inescapable message of weakness and humility, sitting may be used to enhance a statement about poverty in general. When a dishevelled man badly in need of a bath chooses to sit on the sidewalk where shoppers toss their cigarette butts and other trash, he conveys a message about the degradation that results from society's failure to accommodate the essential needs of all its citizens. His message addresses what many consider to be the single most compelling problem facing our nation: the growing disparity between the haves and the have-nots.[5]

Sitting has, in fact, been closely tied to political messages. There is no question that sit-ins are a paradigm of political protest. See Brown v. Louisiana, 383 U.S. 131, 139, 86 S.Ct. 719, 722, 15 L.Ed.2d 637 (1966) (plaintiffs "sat and stood in the room, quietly, as monuments of protest against the segregation of the library"). No one can question that Gandhi used the posture of sitting to symbolize peaceful, nonviolent resistance.

Conclusion

The Seattle ordinance raises difficult and important First Amendment questions, which should not be dismissed out of hand, the way the panel has done. Without any basis, the panel falsely

dichotomizes facial overbreadth and as-applied challenges from the start, and creates a First Amendment test that effectively immunizes the Seattle ordinance, and others like it, from facial challenge. It is especially troubling that the panel gives such short shrift to plaintiffs' facial overbreadth claims, because the Seattle ordinance targets street people, who are among the most powerless in our society. If the real purpose of the ordinance were to combat sidewalk congestion, then the ordinance would have targeted all obstacles to pedestrian traffic. But the ordinance has an express exception allowing people to sit on the sidewalk, so long as they do so on a chair supplied by a merchant. Seattle Mun. Code § 15.48.040(B)(4).[6] Thus, those deemed "desirable" by shopkeepers may sit on the sidewalk and obstruct pedestrian traffic all day long, drinking their cappuccinos and reading their Wall Street Journals to their hearts' content. But someone with an unpopular political message or an unsightly beggar symbolizing the failure of our society to achieve economic justice, may not sit, even to add power and content to his message. As Judge Pregerson said in dissent to the panel's decision, "Seattle seeks economic preservation by ridding itself of social undesirables-homeless or otherwise-who sit or lie on the sidewalks, and this is done to protect the sensibilities of shoppers." Roulette, 78 F.3d at 1432 (Pregerson, J., dissenting). Yet "a bare . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534, 93 S.Ct. 2821, 2825-26, 37 L.Ed.2d 782 (1973)).

Pedestrian safety and the free flow of pedestrian traffic in commercial centers are legitimate municipal concerns. No one argues that cities cannot address the problem of congestion through carefully tailored ordinances. However, municipalities must respect the First Amendment when they formulate their ordinances, and it is our job, in deciding cases such as this one, to provide them guidance in doing so. Roulette offers no guidance to any municipality trying to fashion a remedial ordinance that is consistent with First Amendment values.

FOOTNOTES

1. The ordinance reads as follows:A. Prohibition. No person shall sit or lie down upon a public sidewalk, or upon a blanket, stool, or any other object placed upon a public sidewalk, during the hours between 7:00 a.m. and 9:00 p.m. in the following zones:1. The Downtown Zone .2. Neighborhood Commercial Zones .B. Exceptions. The prohibition in Subsection A shall not apply to any person:1. sitting or lying down on a public sidewalk due to a medical emergency;2. who, as the result of a disability, utilizes a wheelchair, walker, or similar device to move about the public sidewalk;3. operating or patronizing a commercial establishment conducted on the public sidewalk pursuant to a street use permit; or a person participating in or attending a parade, festival, performance, rally, demonstration, meeting or similar event conducted on the public sidewalk pursuant to a street use or other applicable permit;4. sitting on a chair or bench located on the public sidewalk which is supplied by a public agency or by the abutting private property owner; or5. sitting on a public sidewalk within a bus stop zone while waiting for public or private transportation.

2. Plaintiffs also challenged SMC §§ 12A.12.015, which prohibits aggressive begging. The district court narrowly construed, limited and upheld that ordinance. No one appeals that ruling.

3. Amici National Law Center on Homelessness & Poverty, et al., also raise right to travel and equal protection arguments in their brief. Because plaintiffs chose not to reassert these arguments, we decline to address them. See Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 862 (1982).

4. For those too young to remember them, peace signs closely resemble the hood ornament on Mercedes-Benz automobiles.

5. When we allow such challenges, we mostly say we're protecting the free speech interests of "parties not before the Court." See, e.g., Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 574, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500 (1987) (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984)). Plaintiffs here are the class of all individuals who have sat or laid down, or will sit or lie down, on public sidewalks in the relevant portions of Seattle. In a sense, then, all the relevant parties are already "before the Court"-and there might therefore be no basis for entertaining a facial challenge at all.

6. We know of no case decided after Broadrick in the Supreme Court or our court that is inconsistent with this principle. For example, the "disorderly conduct" statute struck down on its face in R.A.V. v. City of St. Paul, 505 U.S. 377, 380, 112 S.Ct. 2538, 2541, 120 L.Ed.2d 305 (1992), by its terms, prohibited placing on public or private property " 'a symbol, object, appellation, characterization or graffiti, including . a burning cross or Nazi swastika.' " See also Houston v. Hill, 482 U.S. 451, 460-61, 107 S.Ct. 2502, 2508-09, 96 L.Ed.2d 398 (1987) (verbally interrupting a police officer); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 959, 104 S.Ct. 2839, 2848, 81 L.Ed.2d 786 (1984) (soliciting); Buckley v. Valeo, 424 U.S. 1, 6-7, 16, 58-59, 96 S.Ct. 612, 628-29, 46 L.Ed.2d 659 (1976) (making political contributions and expenditures).Similarly, we have held invalid on its face a statute that, by its terms, prohibited barroom topless dancing, BSA, Inc. v. King County, 804 F.2d 1104, 1106, 1109-10 (1986), a form of conduct we held to be expressive for First Amendment purposes, id. at 1107 (citing Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981)); see also Chase v. Davelaar, 645 F.2d 735 (1981) (sustaining facial freedom of speech attack on prohibition against topless entertainment in non-theatrical establishments, because "[u]nlike [the statute against draft card destruction upheld in [United State v.] O'Brien, [391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)] the law at issue here] is not attacked for implicating conduct, generally considered non-expressive, which the actor asserts to be communicative").

7. Plaintiff Johnny Hahn makes his living as a street musician; he claims it would be impossible for him to play his keyboard instrument without sitting. The district court believed Hahn might have a claim that the ordinance is unconstitutional as applied to him because the ordinance might make it impossible for him to communicate his message. The district court nevertheless correctly held that Hahn's unusual predicament was an insufficient basis for striking down the ordinance on its face.

8. Plaintiffs also offer evidence that certain of their number would find it difficult to participate in a rally or demonstration unless they could occasionally sit on the sidewalk to rest. The ordinance, however, doesn't apply to people involved in a rally, demonstration or similar

event conducted on the public sidewalk pursuant to a street use or other permit, SMC § 15.48.040.B.3, and plaintiffs haven't challenged the permitting procedure.

9. Justice Brennan concurred only in the judgment; he would have held the statute unconstitutional on its face, without reaching the question of whether the protestors' conduct was protected. Id. at 149-50, 86 S.Ct. at 728-29. Justice White also concurred only in the judgment, on equal protection grounds. Id. at 151-52, 86 S.Ct. at 729-30.

10. The dissent also cites Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961), for proposition that sitting can be expressive. Diss. at 1431. It stands for nothing of the kind. The Court there reversed several breach of the peace convictions, not because they violated the First Amendment, but because they were "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment." Id. at 163, 82 S.Ct. at 251. The dissent also holds out Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), as "suggest [ing] that a ban on sitting or lying in a public forum merits at least some First Amendment consideration." Diss. at 1431. True enough. But Clark involved an as-applied challenge, not a facial attack. Id. at 289, 104 S.Ct. at 3066-67. The Court assumed without deciding that the camping in a public park there was expressive, and rejected the as-applied challenge on other grounds. Id. at 293-94, 104 S.Ct. at 3068-69. Nothing in Clark even remotely suggests that camping-or sitting or lying on the sidewalk-is so "commonly associated with expression" as to make a ban on that conduct subject to facial First Amendment scrutiny. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 760, 108 S.Ct. 2138, 2145-46, 100 L.Ed.2d 771 (1988). Of course, nothing we say today forecloses the possibility of mounting a successful as applied challenge to the Seattle ordinance. See, e.g., n. 7 supra.

11. Loper v. New York City Police Dept., 999 F.2d 699 (2d Cir.1993), is consistent with this analysis: The statute there prohibited " '[l]oiter [ing], remain[ing], or wander[ing] about in a public place for the purpose of begging' " id. at 701 (emphasis added), and, in the Second Circuit's view, begging is an activity entitled to some First Amendment protection, id. at 704.

1. Section 15.48.040, entitled "Sitting or lying down on public sidewalks in downtown and neighborhood commercial zones," reads:A. Prohibition. No person shall sit or lie down upon a public sidewalk, or upon a blanket, chair, stool, or any other object placed upon a public sidewalk, during the hours between 7:00 a.m. and 9:00 p.m. in the following zones:1. The Downtown Zone, defined as the area bounded by the Puget Sound waterfront on the west, South Jackson Street on the south, Interstate 5 on the East, and Denny Way and Broad Street on the North.2. Neighborhood Commercial Zones, defined as areas zoned as Pioneer Square Mixed (PSM), International District Mixed (IDM), Commercial 1(C1), Commercial 2(C2), Neighborhood Commercial 1(NC1), Neighborhood Commercial 2(NC2), and Neighborhood Commercial 3(NC3).

2. Subsection B, reads:B. Exceptions. The prohibition in Subsection A shall not apply to any person:1. sitting or lying down on a public sidewalk due to a medical emergency;2. who, as the result of a disability, utilizes a wheelchair, walker, or similar device to move about the public sidewalk;3. operating or patronizing a commercial establishment conducted on the

public sidewalk pursuant to a street use permit; or a person participating in or attending a parade, festival, performance, rally, demonstration, meeting, or similar event conducted on the public sidewalk pursuant to a street use or other applicable permit;4. sitting on a chair or bench located on the public sidewalk which is supplied by a public agency or by the abutting private property owner; or5. sitting on a public sidewalk within a bus stop zone while waiting for public or private transportation.

3. Of course, the Court issued a caveat that it was not holding all conduct to be presumptively expressive. See 468 U.S. at 293 n. 5, 104 S.Ct. at 3069 n. 5. But footnote 5 does not preclude First Amendment scrutiny of an ordinance that bans people from sitting or lying on a public sidewalk. Here, plaintiffs provided examples of expressive conduct that involved sitting or lying on sidewalks.

4. In Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D.Fla.1992), remanded for limited purposes, 40 F.3d 1157 (11th Cir.1994), the court struck down an ordinance under which the homeless were arrested in Miami as overbroad, and ruled that Miami's practice of arresting homeless persons for activities such as sleeping, standing, and congregating in public places violated the Eighth Amendment and the right to travel. Although it was not analyzing the Miami ordinance under strict First Amendment scrutiny, the court nevertheless found that "the City's interest in promoting tourism and business and in developing the downtown area are at most substantial, rather than compelling, interests." Pottinger, 810 F.Supp. at 1581 (emphasis added).

5. SMC § 12A.12.015, entitled "Pedestrian Interference," reads as follows:A. The following definitions apply in this section:1. "Aggressively beg" means to beg with the intent to intimidate another person into giving money or goods.2. "Intimidate" means to engage in conduct which would make a reasonable person fearful or feel compelled.3. "Beg" means to ask for money or goods as a charity, whether by words, bodily gestures, signs, or other means.4. "Obstruct pedestrian or vehicular traffic" means to walk, stand, sit, lie, or place an object in such a manner as to block passage by another person or a vehicle, or to require another person or a driver of a vehicle to take evasive action to avoid physical contact. Acts authorized as an exercise of one's constitutional right to picket or to legally protest, and acts authorized by a permit issued pursuant to the Street Use Ordinance, Chapters 15.02 through 15.50 of the Seattle Municipal Code, shall not constitute obstruction of pedestrian or vehicular traffic.5. "Public place" means an area generally visible to public view and includes alleys, bridges, buildings, driveways, parking lots, parks, plazas, sidewalks and streets open to the general public, including those that serve food or drink or provide entertainment, and the doorways and entrances to buildings or dwellings and the grounds enclosing them.B. A person is guilty of pedestrian interference if, in a public place, he or she intentionally:1. Obstructs pedestrian or vehicular traffic; or2. Aggressively begs.C. Pedestrian interference is a misdemeanor.

6. Sitting while waiting for a bus is perfectly legal under one of the exceptions to the ordinance. SMC § 15.48.040(B)(5).

1. See R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (holding without discussion that display of symbols is clearly expressive speech); City of

Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (holding without discussion that verbal interruption of police officers is speech); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (holding without discussion that live entertainment, including topless barroom dancing, has long been protected by the First Amendment); Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (assuming without deciding that wearing political buttons or using bumper stickers is "arguably protected" conduct).

2. See, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (holding solicitation has sufficient "speech interests" to merit First Amendment protection (relying on Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed.430 (1945); Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939))), Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (holding contributions and expenditures are protected speech (relying on Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975); United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965))).

3. By creating a more stringent threshold test for facial challenges than for as-applied claims, the Roulette panel also negates the very premise behind the facial overbreadth doctrine. That doctrine was created to enable plaintiffs to bring claims when "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). Thus, the doctrine rests on the notion that as-applied challenges may not be effective in combatting laws that have a speech-chilling effect because potential plaintiffs will remain silent rather than run the risk of facing civil or criminal penalties if an as-applied defense fails. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985).

4. See R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (discussing pure speech, not conduct); Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (same); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) (holding conduct "so intertwined with speech" deserves First Amendment protection); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (holding conduct long held to be protected deserves First Amendment scrutiny); Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (discussing pure speech, not conduct); Chase v. Davelaar, 645 F.2d 735 (9th Cir.1981) (discussing conduct "ordinarily regarded as expressive," but not limiting overbreadth challenges to such conduct).

5. A University of Michigan study recently found that the wealthiest 10% of American households held 66.8% of the nation's wealth in 1994, up over 5% since 1989. Meanwhile, the poorest 10% had debts averaging over $7,000, up almost $2,500 since 1989. Keith Bradsher, Rich Control More of U.S. Wealth, Study Says, as Debts Grow for Poor, N.Y. Times, June 22, 1996, at 31. The Census Bureau also reports that the gap between the most affluent Americans and everyone else was wider in 1994 than it has been since the end of World War II. Steven A. Holmes, Income Disparity Between Poorest and Richest Rises, N.Y. Times, June 20, 1996, at

A1; see also Robin Wright, U.S. Child Poverty Worst Among Richest Nations, L.A. Times, June 12, 1996, at A22 (reporting UNICEF found United States has highest child poverty rate among world's rich industrialized nations, but also houses world's richest children).

6. Seattle Mun. Code, § 15.48.040 provides:

KOZINSKI, Circuit Judge.

(3)

#897

PORTLAND CITY COUNCIL
COMMUNICATION REQUEST
Wednesday Council Meeting 9:30 AM

Council Meeting Date: 9-25-13

AUDITOR 08/14/13 AM 9:35

Today's Date 8-14-13

Name Mark Hoffheins

Address Terry Shrunk Plaza, Occupy

Telephone (503)839-1302 Email transgressionzink911@Gmail.com

Reason for the request:

Open discussion to help enlighten and project avenues for ending the "homeless Occupation." Also to address the city's concerns and end police aggressive tactics properly and assertively without prejudices. Amen

Mark H
(signed)

- Give your request to the Council Clerk's office by Thursday at 5:00 pm to sign up for the following Wednesday Meeting. Holiday deadline schedule is Wednesday at 5:00 pm. (See contact information below.)

- You will be placed on the Wednesday Agenda as a "Communication." Communications are the first item on the Agenda and are taken promptly at 9:30 a.m. A total of five Communications may be scheduled. Individuals must schedule their own Communication.

- You will have 3 minutes to speak and may also submit written testimony before or at the meeting.

Thank you for being an active participant in your City government.

Contact Information:

Karla Moore-Love, City Council Clerk
1221 SW 4th Ave, Room 140
Portland, OR 97204-1900
(503) 823-4086 Fax (503) 823-4571
email: **Karla.Moore-Love@portlandoregon.gov**

Sue Parsons, Council Clerk Assistant
1221 SW 4th Ave., Room 140
Portland, OR 97204-1900
(503) 823-4085 Fax (503) 823-4571
email: **Susan.Parsons@portlandoregon.gov**

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Request of Mark Hofheins to address Council regarding ending the homeless occupation and end police aggressive tactics (Communication)

SEP 25 2013

PLACED ON FILE

Filed SEP 20 2013

LaVonne Griffin-Valade
Auditor of the City of Portland

By _____

COMMISSIONERS VOTED AS FOLLOWS:		
	YEAS	NAYS
1. Fritz		
2. Fish		
3. Saltzman		
4. Novick		
Hales		