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 Tuscon, 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 [*67] 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 24, 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 [*68] 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. n1

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n1 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.

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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 [*69] 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 [*70] 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. 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.

Jones submits that as the City could not expressly criminalize the status of being homeless without [*71] 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 [*72] '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 [*73] law, throughout the country.

Id. at 533 (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,

> the entire thrust of Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. 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.

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 (White, J., concurring in the result). From [*74] 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. 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.

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 (Fortas, J., dissenting). Contrary to the plurality, the dissent read Robinson as standing on the principle that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." Id. at 567. Noting that the statute [*75] 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.

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; see also Graham v. Connor, 490 U.S. 386, 392, 109 S. Ct. 1865, 104 L. Ed. 2d 443 & n.6, 490 U.S. 386, 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, "the primary purpose of [the clause] [*76] 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 (quoting Powell, 392 U.S. at 531-32 (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 (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, 393 U.S. at 531-32).

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 [*77] 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 "the 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).

In United States v. Kidder, 869 F.2d 1328 (9th Cir. 1989), [*78] 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. n2 Id. at 1332-33.

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n2 In this connection, we noted that "the 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.

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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 8 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 (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 [*80] is that the California statute penalizing addiction failed to criminalize conduct, and this failure is what made it unconstitutional. 370 U.S. at 666 ("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 "the 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 (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. n3

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n3 Neither of the two 1969 district court opinions cited by the majority, maj. op. at 43, 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.

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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 (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 44, it nevertheless holds that Jones, as a homeless individual, is "in a chronic state that may have been 'contracted innocently or involuntarily.'" Id. at 38. 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 [*82] that "people remain homeless an average of six months in survey cities"). n4 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 (White, J., concurring) (noting that resisting drunkenness and avoiding public places when intoxicated may be impossible for some); id. at 568 (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).

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n4 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.)

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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, 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 Alaya forecloses. Justice White ended up concurring [*84] 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 (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 "all 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 42. 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 (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 [*85] 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 do not attach until after conviction and sentence." Graham, 490 U.S. at 392 n.6. 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, and reiterated this position in Graham, 490 U.S. at 392 n.6. 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 21 (quoting 430 U.S. at 687 (White, [*86] 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 (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 [*87] 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 (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. n5 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. 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 [*88] his predicament. Id. at 390. 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.

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N5 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).

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As the Eighth Amendment does not forbid arrests, the injunction [*89] 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), [*90] 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. 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 [*91] as such do not extend to an ordinance that prohibits the acts of sleeping, sitting or lying on City streets. Accordingly, I would affirm.

JONES V. CITY OF LOS ANGELES
Settlement Agreement

It is hereby agreed among Appellants and Appellees (collectively, "the Settling Parties") in Jones v. City of Los Angeles, Case Number 04-55324 in the United States Court of Appeals for the Ninth Circuit:

1. The Los Angeles Police Department will issue a policy directive stating that it will not enforce Los Angeles Municipal Code ("LAMC") section 41.18(d) between the hours of 9:00 p.m. and 6:00 a.m., except as set forth in Paragraphs 2 and 3 below. The Los Angeles Police Department will keep this policy in effect and operate according to this policy until an additional 1250 units of permanent supportive housing are constructed within the City of Los Angeles, at least 50 per cent of which are located in Skid Row and/or greater downtown Los Angeles. These units shall be constructed as housing for current or formerly chronically homeless persons and shall not include housing units already existing as low income housing units and/or occupied as low income housing within the past 6 months.

2. LAMC section 41.18(d) will be enforceable at all times at locations within ten (10) feet of any operational and utilizable entrance, exit, driveway or loading dock.

3. Measurement of Distance

a) Entrance/Exit to Building: 10 feet measured perpendicularly from the outer edges of the opening, along the exterior wall of the building, and from those points the area encompassed by the measurement shall extend to the curb line.

b) Entrance/Exit to Parking Lot: 10 feet measured perpendicularly from the outer edges of the driveway, and from those points the area encompassed by the measurement shall extend to the curb line.

c) Loading Dock: 10 feet measured perpendicularly from the outer edges of the opening, whether raised or not, and from those points the area encompassed by the measurement shall extend to the curb line.

4. No person shall be cited or arrested for a violation of LAMC section 41.18(d) unless a peace officer for the City of Los Angeles has first given the person a verbal warning regarding such section and reasonable time to move and the person has not complied with that warning.

5. The Settling Parties agree that this Settlement Agreement is limited to LAMC section 41.18(d) as presently codified and will not apply to any ordinance enacted by Appellee City of Los Angeles in the future, nor will this Settlement Agreement serve to limit Appellee City's right to repeal or amend said section.

6. Upon the Settling Parties' execution of this Settlement Agreement, the Settling Parties shall file a joint motion in the Ninth Circuit pursuant to Federal Rules of Appellate Procedure, Rule 42(b) seeking to:

a) vacate the Ninth Circuit opinion (Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006)) as moot; and

b) remand to the District Court for further proceedings in accordance Paragraph 7 of this Settlement Agreement.

If the Ninth Circuit does not grant the joint motion in its entirety, this Settlement Agreement is rendered void in its entirety.

7. Upon remand from the Ninth Circuit pursuant to Paragraph 6 of this Settlement Agreement, Plaintiffs-Appellants will dismiss the action with prejudice against all defendants.

8. The Settling Parties reserve all rights regarding recovery of attorneys' fees.

_____
Carol A. Sobel, Esq.
For Plaintiffs-Appellants

_____
Mark Rosenbaum, Esq.
For Plaintiffs-Appellants

_____
Richard H. Llewellyn, Jr., Esq.
For Defendants-Appellees