THE CRIMINALIZATION OF HOMELESSNESS
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PROFESSOR STEPHEN J. SCHNABLY
http://osaka.law.miami.edu/~schnably/HomelessnessSeminarSyllabus.html
E-mail: schnably@law.miami.edu

Office: G472
Tel.: 305-284-4817

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Plaintiffs to this action seek preliminary injunctive relief on behalf of themselves and a class of homeless individuals alleged to be adversely affected by the City and County of San Francisco’s (the “City’s”) “Matrix Program.” Plaintiffs endorse much of the Program, challenging it not in its entirety, but only insofar as it specifically penalizes certain “life sustaining activities” engaged in by the homeless.

Having considered the arguments of counsel and the papers submitted, the Court hereby denies the requested injunction.

I. Factual Background and Procedural History

A. Law Enforcement Measures as Part of the Matrix Program

Institution of the Matrix Program followed the issuance of a report in April of 1992 by the San Francisco Mayor’s Office of Economic Planning and Development, which attributed to homelessness a $173 million drain on sales in the City. Plaintiffs’ Mot. at 8 & n. 6. In August of 1993, the City announced commencement of the Matrix Program, and the San Francisco Police Department began stringently enforcing a number of criminal laws. Plaintiffs’ Mot. at 7.

The City describes the Program as “initiated to address citizen complaints about a broad range of offenses occurring on the streets and in parks and neighborhoods.... [The Matrix Program is] a directed effort to end street crimes of all kinds.” City’s Opp’n at 6.

The program addresses offenses including public drinking and inebriation, obstruction of sidewalks, lodging, camping or sleeping in public parks, littering, public urination and defecation, aggressive panhandling, dumping of refuse, graffiti, vandalism, street prostitution, and street sales of narcotics, among others.

An illustration of the enforcement efforts characteristic of the Program can be found in a four-page intra-departmental memorandum addressed to the Police Department’s Southern Station Personnel. That memorandum, dated August 10, 1993 and signed by acting Police Captain Barry Johnson, defines “Quality of Life” violations and establishes a concomitant enforcement policy. Condemning a “type of behavior [which] tends to make San Francisco a less desirable place in which to live, work or visit”, the memorandum directs the vigorous enforcement of eighteen specified code sections, including prohibitions against trespassing, public inebriation, urinating or defecating in public, removal and possession of shopping carts, solicitation on or near a highway, erection of tents or structures in parks, obstruction and aggressive panhandling. Rosen Decl., Exh. 7 at 2.

Pursuant to the memorandum,

All station personnel shall, when not otherwise engaged, pay special attention and enforce observed “Quality of Life” violations.... One Officer ... shall, daily, be assigned specifically to enforce all “Quality of Life” violations....

Officers are to stop and advise all individuals pushing shopping carts that said carts are the property of local stores (Grocery/Drug etc.) and that these carts are never sold: Therefore the carts will, in the near future, be confiscated for return to their rightful owner or otherwise disposed of by the police.... Note: This phase of the “Quality of Life” operation will be implemented when appropriate containers, for the contents of the shopping carts, are available....

In a Police Department Bulletin entitled “Update on Matrix Quality of Life Program,” dated September 17, 1993, Deputy Chief Thomas Petrini paraphrased General Order D–6, the source of the intended non-discriminatory policy of the Program’s enforcement measures:

All persons have the right to use the public streets and places so long as they are not engaged in specific criminal activity. Factors such as race, sex, sexual preference, age, dress,
unusual or disheveled or impoverished appearance do not alone justify enforcement action. Nor can generalized complaints by residents or merchants or others justify detention of any person absent such individualized suspicion.

Petrini Decl., Exh. A at 1–2. The memorandum stated that the “[r]ights of the homeless must be preserved”, and included as an attachment a Department Bulletin on “Rights of the Homeless”, which stated that:

[All members of the Department] are obligated to treat all persons equally, regardless of their economic or living conditions. The homeless enjoy the same legal and individual rights afforded to others. Members shall at all times respect these rights....

The Police Department has, during the pendency of the Matrix Program, conducted continuing education for officers regarding non-discriminatory enforcement of the Program. City’s Opp’n at 8. When, in mid-August of 1993, concerns were raised by interests outside the Department about proper enforcement of the ordinances prohibiting lodging and sleeping in public parks, the Department issued a clarification of its policies. See id.; Petrini Decl. at ¶ 3, Exh. B. Again, in mid-November of 1993, inquiries were made of the Police Department concerning the confiscation of grocery store shopping carts.

Since implementation of the Matrix Program, the City estimates that “[a]ccording to unverified statistics kept by the Department”, City’s Opp’n at 6, approximately sixty percent of enforcement actions have involved public inebriation and public drinking, and that other “significant categories” include felony arrests for narcotics and other offenses, and arrests for street sales without a permit. Id. at 7.

Together, enforcement actions concerning camping in the park ..., sleeping in the park during prohibited hours ..., and lodging ... have constituted only approximately 10% of the total.

Plaintiffs, pointing to the discretion inherent in policing the law enforcement measures of the Matrix Program, allege certain actions taken by police to be “calculated to punish the homeless.” Plaintiffs’ Mot. at 9. As a general practice, the Program is depicted by plaintiffs as “target[ing] hundreds of homeless persons who are guilty of nothing more than sitting on a park bench or on the ground with their possessions, or lying or sleeping on the ground covered by or on top of a blanket or cardboard carton.” Id. at 20. On one specific occasion, according to plaintiffs, police “cited and detained more than a dozen homeless people, and confiscated and destroyed their possessions, leaving them without medication, blankets or belongings to cope with the winter cold.”

B. Non-Punitive Aspects of the Matrix Program

The City contests the depiction of Matrix as a singularly focused, punitive effort designed to move “an untidy problem out of sight and out of mind.” Instead, the City characterizes the Matrix Program as “an interdepartmental effort ... [utilizing] social workers and health workers ... [and] offering shelter, medical care, information about services and general assistance. Many of those on the street refuse those services, as is their right; but Matrix makes the choice available.”

The operation of the Matrix Program involves the Department of Social Services, the Department of Public Health, the Police Department and the Department of Public Works. City’s Opp’n at 2–3. The City claims it has attempted to conjoin its law enforcement efforts with referrals to social service agencies. City’s Opp’n at 8. One specific element of the Program seeks to familiarize the homeless with those services and programs available to them. City’s Opp’n at 5. This is accomplished by the dispersal of Department of Social Service social workers throughout the City in order to contact homeless persons. Id.

Another element of the Matrix Program—the Night Shelter Referral Program—attempts to provide temporary housing to those not participating in the longer-term housing program. This effort was begun in December of 1993, and is designed
to offer the option of shelter accommodations to those homeless individuals in violation of code sections pertaining to lodging, camping in public parks and sleeping in parks during prohibited hours. \textit{Id.} at 5–6. The Night Referral Program operates by referring women to a women’s shelter at St. Paulus, and by offering to men transportation and a referral slip to the Salvation Army Lifeboat Lodge; both shelters are located within the San Francisco area. By prior arrangement, the Lodge agreed to set aside a certain number of beds for those referred individuals. \textit{Id.} at 6. The City contends that, of 3,820 referral slips offered to men, only 1,866 were taken, and only 678 actually utilized to obtain a shelter bed reserved for Police referrals. By the City’s reckoning, “[t]hese statistics suggest that some homeless men may prefer to sleep outdoors rather than in a shelter.” \textit{Id.}

\textbf{C. The City’s Efforts in Dealing With Homelessness}

The City emphasizes its history as one of the largest public providers of assistance to the homeless in the State, asserting that “individuals on general assistance in San Francisco are eligible for larger monthly grants than are available almost anywhere else in California.” City’s Opp’n at 1. Homeless persons within the City are entitled to a maximum general assistance of $345 per month—an amount exceeding the grant provided by any of the surrounding counties. \textit{Id.} at 4. General assistance recipients are also eligible for up to $109 per month in food stamps. \textit{Id.} According to the City, some 15,000 City residents are on general assistance, of whom 3,000 claim to be homeless. \textit{Id.} at 4 n. 1.

The City’s Department of Social Services encourages participation in a Modified Payments Program offered by the Tenderloin Housing Clinic. \textit{Id.} at 4. Through this program, a recipient’s general assistance check is paid to the Clinic, which in turn pays the recipient’s rent and remits the balance to the recipient. The Clinic then negotiates with landlords of residential hotels to accept general assistance recipients at rents not exceeding $280 per month. \textit{Id.} at 5.

By its own estimate, the City will spend $46.4 million for services to the homeless for 1993–94. \textit{Id.} at 1, 4. Of that amount, over $8 million is specifically earmarked to provide housing, and is spent primarily on emergency shelter beds for adults, families, battered women and youths. \textit{Id.} at 4. An additional $12 million in general assistance grants is provided to those describing themselves as homeless, and free health care is provided by the City to the homeless at a cost of approximately $3 million. \textit{Id.}

\textbf{D. Enforcement and Effects of the Matrix Program}

The City contends that “few of the Matrix-related offenses involve arrest.” City’s Opp’n at 7. Those persons found publicly inebriated, according to the City, are taken to the City’s detoxification center or district stations until sober. \textit{Id.} “Most of the other violations result in an admonishment or a citation.” \textit{Id.}

Since its implementation, the Matrix Program has resulted in the issuance of over 3,000 citations to homeless persons. Plaintiffs’ Mot. at 8. Plaintiffs contend these citations have resulted in a cost to the City of over $500,000. \textit{Id.} Citations issued for encampment and sleeping infractions are in the amount of $76, according to Alissa Riker, Director of the Supervised Citation Release Program (“SCRP”) with the Center for Juvenile and Criminal Justice. \textit{See} Riker Decl. at ¶ 1. Those cited must pay or contest the citation within twenty-one days; failure to do so results in a $180 warrant for the individual’s arrest, which is issued approximately two months after citation of the infraction. \textit{Id.} at ¶ 3. Upon the accrual of $1,000 in warrants, which equates roughly to the receipt of six citations, an individual becomes ineligible for citation release and may be placed in custody. \textit{Id.} The typical practice, however, is that those arrested for Matrix-related offenses are released on their own recognizance or with “credit for time served” on the day following arrest. Plaintiffs characterize the system as one in which “homeless people are cycled through the criminal justice system and released to continue their lives in the same manner,
except now doing so as ‘criminals.’” Plaintiffs’ Mot. at 9.

According to plaintiffs, the City has conceded the inadequacy of shelter for its homeless. Plaintiffs’ Mot. at 9. Plaintiffs have cited as supporting evidence an application made to the State Department of Housing and Community Development in which the City’s Director of Homeless Services described an “emergency situation” created by the closure of the Transbay Terminal, which had served as “the largest de facto shelter for homeless individuals.”

Plaintiffs have proffered estimates as to the number of homeless individuals unable to find nightly housing. Plaintiffs cite to a survey conducted by Independent Housing Services, a non-profit agency which among its aims seeks the improvement of access to affordable housing for the homeless. See Plaintiffs’ Mot. at 10; Park Decl. at ¶ 2. Begun in July of 1990 and conducted most recently in August of 1993, Park Decl. at ¶¶ 4, 6, the survey tracks the number of homeless individuals turned away each night from shelters in the San Francisco area due to a lack of available bed space. Based on the data of that survey, plaintiffs contend that from January to July of 1993, an average of 500 homeless persons was turned away nightly from homeless shelters. Plaintiffs’ Mot. at 10. That number, according to plaintiffs, increased to 600 upon the closing of the Transbay Terminal. Plaintiffs’ Mot. at 10.

II. Legal Standard

Plaintiffs have at this time moved the Court to preliminarily enjoin the City’s enforcement of certain state and municipal criminal measures which partially define the Matrix Program. Given this posture of the litigation, the Court is called upon to decide whether to grant a preliminary injunction in the exercise of its equitable powers. Such relief constitutes an extraordinary use of the Court’s powers, and is to be granted sparingly and with the ultimate aim of preserving the status quo pending trial on the merits.

As the Court is acting in equity, the decision whether to grant preliminary injunctive relief is largely left to its discretion. See Big Country Foods, Inc. v. Board of Education of Anchorage School District, 868 F.2d 1085, 1087 (9th Cir.1989). However, this discretion has been circumscribed by the presence or not of various factors, notably, the likelihood that the moving party will prevail on the merits and the likelihood of harm to the parties from granting or denying the injunctive relief.

Inasmuch as an injunction creates its own penal code enforceable by the Court’s contempt powers, an additional consideration affecting the Court’s determination to grant injunctive relief is whether or not the terms of the injunction can be stated with sufficient clarity to permit the injunction to be fairly enforced.

DISCUSSION

I. Enforceability Problems Inherent in the Proposed Injunction

Plaintiffs urge the Court to implement an injunction under which:

the City shall be preliminarily enjoined from enforcing, or threatening to enforce, statutes and ordinances prohibiting sleeping, “camping” or “lodging” in public parks, or the obstruction of public sidewalks against the plaintiff class of homeless individuals for life-sustaining activities such as sleeping, sitting or remaining in a public place....

Those problems invariably arising from attempted compliance with the proposed injunction are apparent on the face of the injunction proposed by plaintiffs. To begin with, the injunction would immunize “life-sustaining activities such as sleeping, sitting or remaining in a public place....” Id. (emphasis added). Given this malleable phraseology, the proposal is fundamentally uncertain as to what conduct would be immunized from governmental prohibition. Although the language of the proposed injunction would clearly include many such activities, plaintiffs understandably exclude a variety of acts from their proffered examples of “life sustaining activities.” This exclu-
sion has the effect of removing the reductio ad absurdum of immunizing from punishment such arguably “life-sustaining activities” as urinating and defecating in public and aggressive panhandling, but it is not a limitation called for by the text of the proposed injunction.

The converse of this problem—the proposed injunction’s protection of activities which cannot be contended to be life sustaining—constitutes an additional infirmity with the proposed relief. For example, the proposed injunction would enjoin enforcement of laws prohibiting obstruction of public sidewalks by homeless individuals. When asked by the Court about this aspect of the injunction, plaintiffs’ counsel suggested that if this is seen to be a problem, the City could enact less restrictive alternatives to the present ordinances, such as a prohibition on “obstructing a sidewalk at a time when people actually want to use the sidewalk,... [A]t 3:00 o’clock in the morning ... no one would conceivably want to use that location.” Transcript at 86:18–23. This postulate is not self-evident to the Court; nor can it be taken as axiomatic that preventing other persons from using public sidewalks can be said to be a life sustaining activity.

Responding at the hearing to such concerns, counsel for plaintiffs suggested the proposed injunction could be readily amended, e.g. by striking the “such as” language from the proposed injunction. Even under such an amendment, and assuming plaintiffs would now make a narrowed list of the laws they seek to enjoin, various problems remain which would frustrate or render impossible enforcement of the proposed injunction. The most weighty of these problems is plaintiffs’ stated objective to enjoin only that governmental activity directed at “homeless individuals.” Id. As that phrase is defined by plaintiffs, classification of a person as “homeless” would require an individualized determination whether that person possessed a “fixed, regular, and adequate nighttime residence.” Plaintiffs’ Mot. at 2.

By plaintiffs’ reasoning, any persons who did not possess such a residence would be immunized from enforcement of camping and lodging prohibitions, while those who did possess such a residence would not. The impossibility of such enforcement is best illustrated by concrete example. When asked by the Court whether, under the proposed injunction, the City would be able to cite plaintiff Joyce for public camping, counsel for plaintiffs answered as follows: such citation might be permissible if Joyce had lodging available that night, but would be otherwise impermissible. See Transcript at 77:3–78:13.

Counsel for plaintiffs suggested at the hearing that enforcement difficulties could be mitigated if police would merely ask questions to determine whether the person is “homeless” before citing him. See Transcript at 81:3–5. This suggestion is no solution; the obvious and inevitable permutations of this contemplated enforcement scenario make it plainly unenforceable.

These various, inherent uncertainties militate strongly against the Court’s adoption of the proposed injunction or its proposed amended text.

Given these definitional difficulties, implementation of the proposed injunction would realistically have the effect of requiring the City to altogether cease enforcing the challenged criminal laws. Plaintiffs have essentially acknowledged this result by their argument that, after enjoining enforcement of the listed criminal laws, the Court should continue on to prescribe a narrower “code of conduct” by which only the “homeless” would be immunized from various police enforcement measures. Responding to a question of the Court, counsel for plaintiffs suggested at the hearing that anyone who placed and used three tents on San Francisco’s Civic Plaza for a period of three days would have engaged in unpunishable activity under the proposed injunction. See Transcript at 72:13–73:10. Plaintiffs, in sum, seek an order of this Court which would render the City altogether powerless to enforce its laws under the circumstances now challenged.

The Court cannot at this time sanction such a result. It would at a minimum be inconsistent with the underlying rationale of preliminary injunctive
relief aimed at preservation of the status quo.

Issuance of the proposed injunction would, moreover, necessitate that affirmative steps be taken by police in order to enforce the challenged ordinances, i.e. determining whether the person had a “fixed, regular, and adequate nighttime residence.” The requirement of affirmative conduct has been deemed a factor contrary to preservation of the status quo.

Accordingly, plaintiffs’ proposed order granting injunctive relief must be denied at this time.

II. Under the Posited Legal Theories, Plaintiffs Have Not Demonstrated a Clear Probability of Success on the Merits

A. Whether the Eighth Amendment Prohibits Enforcement of Matrix as Punishing “Status”

Plaintiffs contend enforcement of the Matrix Program unconstitutionally punishes an asserted “status” of homelessness. The central thesis is that since plaintiffs are compelled to be on the street involuntarily, enforcement of laws which interfere with their ability to carry out life sustaining activities on the street must be prohibited. This argument, while arguably bolstered by decisions of courts in other jurisdictions, has not been adopted by any case within the Ninth Circuit. Moreover, it is the opinion of this Court that plaintiffs’ position, if adopted, would represent an improper reach by this Court into matters appropriately governed by the State of California and the City of San Francisco.

2. Whether Homelessness is a “Status,” so that Certain Acts of the Homeless are Protected from Penal Enforcement

   c. Viability of Depicting Homelessness as Status

In moving the Court to implement the proposed injunctive relief, plaintiffs are unable to demonstrate a substantial likelihood of success on the merits of the underlying suit. The ultimate resolution of this lawsuit will require acceptance or rejection of the reasoning in those cases granting constitutional protection to acts derivative of a “status” of homelessness. The conclusion that such acts are protected appears, for various reasons, sufficiently problematic to discourage this Court from following at this time in its jurisprudential path.

Depicting homelessness as “status” is by no means self-evident, as the appellate court in Tobe suggests,7 and as the court in Huntsville presumes. That depiction, made upon serious analysis only in Pottinger, is a dubious extension of Robinson and Powell, and of questionable merit in light of concerns implicating federalism and the proper role of the Court in such adjudications.

Insofar as Pottinger attempts to reason from applicable Supreme Court precedent that homelessness equals a “status,” and that acts derivative of such status are constitutionally protected, the reasoning of that court cannot be said at this stage of the litigation to be sufficiently persuasive to indicate a likely possibility of success on the merits of the underlying suit.

This Court is unable to conclude at this time that the extension of the Eighth Amendment to the “acts” at issue here is warranted by governing authorities. Plaintiffs argue that the failure of the City to provide sufficient housing compels the conclusion that homelessness on the streets of San Francisco is cognizable as a status. This argument is unavailing at least for the fundamental reason that status cannot be defined as a function of the discretionary acts of others.9

On no occasion, moreover, has the Supreme Court invoked the Eighth Amendment in order to protect acts derivative of a person’s status. Robinson prohibited penalizing a person based on their status as having been addicted, whereas the plurality in Powell approved a state’s prosecution of the act of appearing intoxicated in public.

Plaintiffs’ argument that Powell would have been differently decided had the defendant been homeless does not reflect the holding of the case and is sheer speculation. While language in Justice White’s concurrence can be argued to support that contention, such language was dicta. One can only
hypothesize that Justice White would actually have cast his vote differently had the defendant been homeless. Nothing underscores this point more vividly than the fact that Justice White was one of two vigorous dissenters in Robinson.

As an analytical matter, more fundamentally, homelessness is not readily classified as a “status.” Rather, as expressed for the plurality in Powell by Justice Marshall, there is a “substantial definitional distinction between a ‘status’ ... and a ‘condition,’....” 392 U.S. at 533, 88 S.Ct. at 2155. While the concept of status might elude perfect definition, certain factors assist in its determination, such as the involuntariness of the acquisition of that quality (including the presence or not of that characteristic at birth), see Robinson, 370 U.S. at 665–69 & n. 9, 82 S.Ct. at 1420–21 & n. 9, and the degree to which an individual has control over that characteristic.

Examples of such “status” characteristics might include age, race, gender, national origin and illness. The reasoning of the Court in including drug addiction as status involved the analogy of drug addiction to a disease or an illness which might be contracted involuntarily. See id. While homelessness can be thrust upon an unwitting recipient, and while a person may be largely incapable of changing that condition, the distinction between the ability to eliminate one’s drug addiction as compared to one’s homelessness is a distinction in kind as much as in degree. To argue that homelessness is a status and not a condition, moreover, is to deny the efficacy of acts of social intervention to change the condition of those currently homeless.

The Court must approach with hesitation any argument that science or statistics compels a conclusion that a certain condition be defined as a status. The Supreme Court has determined that drug addiction equals a status, and this Court is so bound. But the Supreme Court has not made such a determination with respect to homelessness, and because that situation is not directly analogous to drug addiction, it would be an untoward excursion by this Court into matters of social policy to accord to homelessness the protection of status.

In addition to the fact that homelessness does not analytically fit into a definition of a status under the contours of governing case law, the effects which would ensue from such a determination by this Court would be staggering. Courts seeking analytical consistency with such a holding would be required to provide constitutional protection to any condition over which a showing could be made that the defendant had no control. The natural consequence of such a recognition was clear to Justice White, who wrote that “[i]f it is ‘cruel and unusual punishment’ to convict appellant for addiction [i.e. status], it is difficult to understand why it would be any less offensive ... to convict him for use on the same evidence of use which proved he was an addict. [i.e. acts derivative of status].” Robinson, 370 U.S. at 688, 82 S.Ct. at 1431–32 (dissenting opn.).

Consistent with these concerns is the devastating impact on state and local law enforcement efforts which a declaration of status would effect. As Justice Marshall wrote in Powell, recognition by federal courts of such status would create a “constitutional doctrine of criminal responsibility” in conflict with “essential considerations of federalism....” 392 U.S. at 535, 88 S.Ct. at 2155. In the same vein, ... this Court is convinced that adopting the central thesis of plaintiffs in this case would be an equally revolutionary doctrinal decision and would be an equally inappropriate intrusion into state and local authority.

Although the plaintiffs’ Eighth Amendment challenge to the Matrix Program law enforcement activities will appropriately be subject to further scrutiny in this case, on this record the plaintiffs have not demonstrated a probability of success on the merits of this claim.

B. Whether Matrix Violates the Equal Protection Clause

In the present case, plaintiffs have not at this time demonstrated a likelihood of success on the merits of the equal protection claim, since the City’s action has not been taken with an evinced intent to
discriminate against an identifiable group. As discussed above, various directives issued within the Police Department mandate the non-discriminatory enforcement of Matrix. See, e.g., “Update on Matrix Quality of Life Program,” Petrini Decl., Exh. A at 1–2 (providing that “[r]ights of the homeless must be preserved”); Department Bulletin on “Rights of the Homeless”, discussed in Petrini Decl. at ¶ 2 (stating that “[all members of the Department] are obligated to treat all persons equally, regardless of their economic or living conditions. The homeless enjoy the same legal and individual rights afforded to others. Members shall at all times respect these rights....”). Further, the Police Department has, during the pendency of the Matrix Program, conducted continuing education for officers regarding non-discriminatory enforcement of the Program.

Even were plaintiffs able at this time to prove an intent to discriminate against the homeless, the challenged sections of the Program might nonetheless survive constitutional scrutiny. Only in cases where the challenged action is aimed at a suspect classification, such as race or gender, or premised upon the exercise of a fundamental right, will the governmental action be subjected to a heightened scrutiny. See Feeney, 442 U.S. at 271–74, 99 S.Ct. at 2292–93.

C. Whether the Matrix Program Impermissibly Burdens the Right to Travel

This argument proffered by plaintiffs is essentially a subset of equal protection analysis, in which the right to travel is deemed a fundamental right which a state government may not abridge unless necessary to achieve a compelling state interest. See Shapiro v. Thompson, 394 U.S. 618, 627–35, 89 S.Ct. 1322, 1328–31, 22 L.Ed.2d 600 (1969). The right to travel has found its strongest expres-
sion in the context of attempts by states to discourage the immigration of indigents. The application of strict scrutiny to such laws, however, has been limited to those which are facially discriminatory.

The Matrix Program does not facially discriminate between those who are, and those who might be, the City’s residents. Accordingly, the application of strict scrutiny to the Program would be unwarranted. See City’s Opp’n at 20. Again, plaintiffs cite Pottinger, Huntsville and Tobe in support of their argument; this Court cannot conclude at this time that each case is sufficiently persuasive that it should now be followed.

Applying strict scrutiny to the challenged enforcement efforts, the court in Pottinger found the City’s arrests violative of the right to travel. These decisions constitute extensions of the right to travel which may well be unwarranted under governing Supreme Court precedent. Initially, to the extent these cases apply strict scrutiny to facially neutral laws impacting intrastate travel, they may be wrongly decided. Assuming the right to travel encompasses protection to intrastate travel, it is nevertheless doubtful that facially neutral laws impacting intrastate travel should be subjected to such strict scrutiny. “Both the United States Supreme Court and [the California Supreme Court] have refused to apply the strict construction test to legislation ... which does not penalize travel and resettlement [through disparate treatment] but merely makes it more difficult for the outsider to establish his residence in the place of his choosing.” Insofar as the courts in Pottinger and Tobe invalidate not facially discriminatory measures, but police efforts adversely impacting the homeless, those decisions are not sufficiently persuasive to convince this Court of any likelihood of success on the merits of the right to travel claim.

D. Whether the Matrix Program Violates Plaintiffs’ Rights to Due Process of Law

1. Punishing the Homeless for Sitting or Sleeping in Parks

Plaintiffs claim that San Francisco Park Code section 3.12 has been applied by police in an unconstitutional manner. That section provides,

No person shall construct or maintain any building, structure, tent or any other thing in any park that may be used for housing accommodations or camping, except by permission from the Recreation and Park Commission.

San Francisco, Cal., Park Code § 3.12 (1981). Plaintiffs contend the Police Department has impossibly construed this provision to justify citing, arresting, threatening and “moving along” those “persons guilty of nothing more than sitting on park benches with their personal possessions or lying on or under blankets on the ground.” Plaintiffs’ Mot. at 21–22. Plaintiffs have submitted declarations of various homeless persons supporting the asserted application of the San Francisco Park Code section. See, e.g., Homeless Decls. at 34 (lying down atop blankets eating lunch), 121 (“sleeping on bench”), 125 (“sleeping on boxes”).

It appears, if plaintiffs have accurately depicted the manner in which the section is enforced, that the section may have been applied to conduct not covered by the section and may have been enforced unconstitutionally.

E. The Reasonableness of Police Seizures of Property

Plaintiffs contend that under the auspices of “cleaning up the streets,” the City has been responsible for the confiscation and destruction of the private property of the homeless in violation of the Fourth Amendment to the United States Constitution, as well as the California Constitution and California Civil Code section 2080. Plaintiffs’ Mot. at 24.

Under the Fourth Amendment prohibition of “unreasonable searches and seizures,” U.S. Const. amend IV, a seizure has been found to occur whenever “there is some meaningful interference with an individual’s possessor interests in that property.” Soldal v. Cook County, 506 U.S. 56,
A seizure is deemed unreasonable if the government’s legitimate interest in the search or seizure does not outweigh the individual’s interest in the property seized.

Police Department General Order No. Q–1, presumably enacted pursuant to Cal.Civ.Code § 2080.6, provides a detailed procedure for the identification and safekeeping of property which comes into the possession of the police. That property which is believed to be abandoned must be “returned to its rightful owner at the district station if the property cannot be connected to a crime and is otherwise legal to possess.” “General Order Q–1,” Rosen Decl., Exh 10 at 5.

Plaintiffs argue the City has failed to comply with the requirements of Civil Code section 2080 or with General Order Q–1, and that the resulting procedures utilized by police have effected a constitutional violation. In conjunction with their argument, plaintiffs cite numerous supporting declarations. See, e.g. T. Smith Decl. (all personal belongings including medicine confiscated and destroyed).

Initially, the City defends on the basis that there is no reasonable expectation of privacy when property is left unattended in public places, citing United States v. Wider, 951 F.2d 1283 (D.C.Cir.1991) (satchel left on public steps). As plaintiffs correctly argue, however, this is true only where the property is intentionally abandoned. See id. (crack cocaine intentionally abandoned by suspect fleeing from police).

Fourth Amendment protections therefore attach to unattended property, and a constitutional analysis is appropriate in the present case. The City argues that, while the law protects unabandoned property left in public places, neither state nor local laws protect abandoned property. The City argues the distinction between abandoned and unabandoned property involves a “difficult determination”, and that *864 in order to insure that unabandoned property is stored and held for possible return to its owner, “the City recently has promulgated policies to address this issue.” City’s Opp’n at 27. Specifically, the City cites the practice of the Department of Public Works which directs that property of value found in encampment or other public places is to be bagged, tagged and held at a dispatch office for its owner within ninety days. Id.

Given this new procedure, the constitutionality of which is not challenged by plaintiffs, it is clear that the Fourth Amendment argument cannot constitute the basis for injunctive relief at this time. Plaintiffs argue only that the procedure was begun belatedly—on January 3, 1994—and seemed “timed to anticipate legal action.” Reply at 30 & n. 25. Plaintiffs’ unsubstantiated assertion that the injunction should be granted to prevent a “likelihood of recurrence,” id. at 30, is speculative. Such a likelihood is sufficiently attenuated that a grant of injunctive relief, though perhaps appropriate before the new procedure was implemented, should not issue at this time. See City of Los Angeles v. Lyons, 461 U.S. 95, 110–12, 103 S.Ct. 1660, 1670, 75 L.Ed.2d 675 (1983) (equitable relief unavailable where no showing of any real or immediate threat that plaintiff will be wronged again).

CONCLUSION

In common with many communities across the country, the City is faced with a homeless population of tragic dimension. Today, plaintiffs have brought that societal problem before the Court, seeking a legal judgment on the efforts adopted by the City in response to this problem.

The role of the Court is limited structurally by the fact that it may exercise only judicial power, and technically by the fact that plaintiffs seek extraordinary pre-trial relief. The Court does not find that plaintiffs have made a showing at this time that constitutional barriers exist which preclude that effort. Accordingly, the Court’s judgment at this stage of the litigation is to permit the City to continue enforcing those aspects of the Matrix Program now challenged by plaintiffs.

Accordingly, plaintiffs’ motion for a preliminary injunction is DENIED.
BAXTER, Associate Justice.

The Court of Appeal invalidated, on constitutional grounds, an ordinance of the City of Santa Ana (Santa Ana) which banned “camping” and storage of personal property, including camping equipment, in designated public areas. We granted the petitions for review of Santa Ana and the People to consider whether the ordinance is valid on its face and whether either of the actions involved in the consolidated appeal stated an “as applied” challenge to the ordinance.

We conclude only a facial challenge was perfected in the lower courts and that the Santa Ana ordinance is valid on its face. It does not impermissibly restrict the right to travel, does not permit punishment for status, and is not unconstitutionally vague or overbroad, the only constitutional claims pursued by plaintiffs.

We shall, therefore, reverse the judgment of the Court of Appeal.

I. BACKGROUND

In October 1992, Santa Ana added article VIII, section 10–400 et seq. (the ordinance) to its municipal code. The declared purpose of the ordinance was to maintain public streets and other public areas in the city in a clean and accessible condition. Camping and storage of personal property in those areas, the ordinance recited, interfered with the rights of others to use those areas for the purposes for which they were intended.

The ordinance provides:

“Sec. 10–402. Unlawful Camping.

“It shall be unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in the following areas, except as otherwise provided:

“(a) any street;

“(b) any public parking lot or public area, improved or unimproved.

“Sec. 10–403. Storage of Personal Property in Public Places.

“It shall be unlawful for any person to store personal property, including camp facilities and camp paraphernalia, in the following areas, except as otherwise provided by resolution of the City Council:

“(a) any park;

“(b) any street;

“(c) any public parking lot or public area, improved or unimproved.”

Plaintiffs in these consolidated actions are: (1) homeless persons and taxpayers who appealed from a

1 Section 10–401 of the ordinance defines the terms:

“(a) Camp means to pitch or occupy camp facilities; to use camp paraphernalia.

“(b) Camp facilities include, but are not limited to, tents, huts, or temporary shelters.

“(c) Camp paraphernalia includes, but is not limited to, tarpaulins, cots, beds, sleeping bags, hammocks or non-city designated cooking facilities and similar equipment.

“(d) Park means the same as defined in section 31–1 of this Code.

“(e) Store means to put aside or accumulate for use when needed, to put for safekeeping, to place or leave in a location.

“(f) Street means the same as defined in section 1–2 of this Code.”
superior court order which struck “to live temporarily in a camp facility or outdoors” from the ordinance, but otherwise denied their petition for writ of mandate by which they sought to bar enforcement of the ordinance (Tobe), and (2) persons who, having been charged with violating the ordinance, demurred unsuccessfully to the complaints and thereafter sought mandate to compel the respondent municipal court to sustain their demurrers (Zuckernick).

Plaintiffs offered evidence to demonstrate that the ordinance was the culmination of a four-year effort by Santa Ana to expel homeless persons. There was evidence that in 1988 a policy was developed to show “vagrants” that they were not welcome in the city. To force them out, they were to be continually moved from locations they frequented by a task force from the city’s police and recreation and parks departments; early park closing times were to be posted and strictly enforced; sleeping bags and accessories were to be disposed of; and abandoned shopping carts were to be confiscated. Providers of free food were to be monitored; sprinklers in the Center Park were to be turned on often; and violations of the city code by businesses and social service agencies in that area were to be strictly enforced. This effort led to a lawsuit which the city settled in April 1990.

Santa Ana then launched an August 15, 1990, sweep of the civic center area arresting and holding violators for offenses which included blocking passageways, drinking in public, urinating in public, jaywalking, destroying vegetation, riding bicycles on the sidewalk, glue sniffing, removing trash from a bin, and violating the fire code. Some conduct involved nothing more than dropping a match, leaf, or piece of paper, or jaywalking. The arrestees were handcuffed and taken to an athletic field where they were booked, chained to benches, marked with numbers, and held for up to six hours, after which they were released at a different location. Homeless persons among the arrestees claimed they were the victims of discriminatory enforcement. The municipal court found that they had been singled out for arrest for offenses that rarely, if ever, were the basis for even a citation.

In October 1990, Santa Ana settled a civil action for injunctive relief, agreeing to refrain from discriminating on the basis of homelessness, from taking action to drive the homeless out of the city, and from conducting future sweeps and mass arrests. That case, which was to be dismissed in 1995, was still pending when the camping ordinance was passed in 1992.

Evidence in the form of declarations regarding the number of homeless and facilities for them was also offered. In 1993 there were from 10,000 to 12,000 homeless persons in Orange County and 975 permanent beds available to them. When National Guard armories opened in cold weather, there were 125 additional beds in Santa Ana and another 125 in Fullerton. On any given night, however, the number of shelter beds available was more than 2,500 less than the need.

The Court of Appeal majority, relying in part on this evidence, concluded that the purpose of the ordinance—to displace the homeless—was apparent. On that basis, it held that the ordinance infringed on the right to travel, authorized cruel and unusual punishment by criminalizing status, and was vague and overbroad. The city contends that the ordinance is constitutional on its face. We agree. We also conclude that, if the Tobe petition sought to mount an as applied challenge to the ordinance, it failed to perfect that type of challenge.

II. PRELIMINARY CONSIDERATIONS

A. Facial or As Applied Challenge.

Plaintiffs argue that they have mounted an as applied challenge to the ordinance as well as a facial challenge. While they may have intended both, we conclude that no as applied challenge to the ordinance was perfected. The procedural posture of the Zuckernick action precludes an as applied
challenge, which may not be made on demurrer to a complaint which does not describe the allegedly unlawful conduct or the circumstances in which it occurred. The Tobe plaintiffs did not clearly allege such a challenge or seek relief from specific allegedly impermissible applications of the ordinance. Moreover, assuming that an as applied attack on the ordinance was stated, the plaintiffs did not establish that the ordinance has been applied in a constitutionally impermissible manner either to themselves or to others in the past.

Because the Court of Appeal appears to have based its decision in part on reasoning that would be appropriate to a constitutional challenge based on a claim that, as applied to particular defendants, the Santa Ana ordinance was invalid, we must first consider the nature of the challenge made by these petitioners.

1. The Tobe petition.

An as applied challenge assumes that the statute or ordinance violated is valid and asserts that the manner of enforcement against a particular individual or individuals or the circumstances in which the statute or ordinance is applied is unconstitutional. All of the declarants who had been cited under the ordinance described conduct in which they had engaged and that conduct appears to have violated the ordinance. None describes an impermissible means of enforcement of the ordinance or enforcement in circumstances that violated the constitutional rights the petition claimed had been violated. None demonstrated that the circumstances in which he or she was cited affected the declarant’s right to travel. None states facts to support a conclusion that any punishment, let alone cruel and unusual punishment proscribed by the Eighth Amendment, had been imposed. Since no constitutionally impermissible pattern, or even single instance, of constitutionally impermissible enforcement was shown, no injunction against such enforcement could be issued and none was sought by plaintiffs.

Because the Tobe plaintiffs sought only to enjoin any enforcement of the ordinance and did not demonstrate a pattern of unconstitutional enforcement, the petition must be considered as one which presented only a facial challenge to the ordinance.

2. The Zuckernick petition.

None of the complaints in the Zuckernick proceedings included any allegations identifying the defendant as an involuntarily homeless person whose violation of the ordinance was involuntary and/or occurred at a time when shelter beds were unavailable. Although the petition for writ of mandate included allegations regarding Santa Ana’s past efforts to rid the city of its homeless population, those allegations, even if true, were irrelevant to the legal sufficiency of the complaints. (Harman v. City and County of San Francisco (1972) 7 Cal.3d 150, 166, 101 Cal.Rptr. 880, 496 P.2d 1248; People v. Williams (1979) 97 Cal.App.3d 382, 391, 158 Cal.Rptr. 778.)

Therefore, while we are not insensitive to the importance of the larger issues petitioners and amici curiae seek to raise in these actions, or to the disturbing nature of the evidence which persuaded the Court of Appeal to base its decision on what it believed to be the impact of the ordinance on homeless persons, the only question properly before the municipal and superior courts and the Court of Appeal for decision was the facial validity of the ordinance.

This court’s consideration will, therefore, be limited to the facial validity of the ordinance.

B. Motive of Legislators.

The Court of Appeal also considered the evidence of Santa Ana’s past attempts to remove homeless persons from the city significant evidence of the purpose for which the ordinance was adopted. It then
considered that purpose in assessing the validity of the ordinance. While the intent or purpose of the legislative body must be considered in construing an ambiguous statute or ordinance (Code Civ.Proc., § 1859; People v. Pieters (1991) 52 Cal.3d 894, 898–899, 276 Cal.Rptr. 918, 802 P.2d 420), the motive of the legislative body is generally irrelevant to the validity of the statute or ordinance.

The Court of Appeal relied in part on Pottinger v. City of Miami (S.D.Fla.1992) 810 F.Supp. 1551, 1581, for its assumption that consideration of the motives of the Santa Ana City Council may be considered in assessing the validity of the ordinance. That is not the rule in this state, but even were it so, Pottinger was not a challenge to the facial validity of the Miami ordinance in question there. Moreover, the district court’s conclusion that the ordinance was invalid as applied was not based on the motives of the legislators in enacting the ordinance. The court considered internal memoranda and evidence of arrest records as evidence of the purpose underlying enforcement of the ordinance against homeless persons.

Absent a basis for believing that the ordinance would not have been adopted if the public areas of Santa Ana had been appropriated for living accommodation by any group other than the homeless, or that it was the intent of that body that the ordinance be enforced only against homeless persons (see, e.g., Parr v. Municipal Court (1971) 3 Cal.3d 861, 92 Cal.Rptr. 153, 479 P.2d 353), the ordinance is not subject to attack on the basis that the city council may have hoped that its impact would be to discourage homeless persons from moving to Santa Ana.

We cannot assume ... that the sole purpose of the Santa Ana ordinance was to force the homeless out of the city. The city had agreed to discontinue such attempts when it settled the prior litigation. The record confirms that the city faced a problem common to many urban areas, the occupation of public parks and other public facilities by homeless persons. Were we to adopt the approach suggested by the dissent, any facially valid ordinance enacted by a city that had once acted in a legally impermissible manner to achieve a permissible objective could be found invalid on the basis that its past conduct established that the ordinance was not enacted for a permissible purpose. Absent evidence other than the enactment of a facially valid ordinance, we cannot make that assumption here.

With these considerations in mind, we now turn to the constitutional bases for the decision of the Court of Appeal.

III. FACIAL VALIDITY OF THE SANTA ANA ORDINANCE

A. Right to Travel.

Although no provision of the federal Constitution expressly recognizes a right to travel among and between the states, that right is recognized as a fundamental aspect of the federal union of states. “For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.” (Passenger Cases (1849) 48 U.S. (7 How.) 283, 492, 12 L.Ed. 702 (dis. opn. of Taney, C.J.).)

In the Passenger Cases, supra, 48 U.S. (7 How.) 283 the court struck down taxes imposed by the States of New York and Massachusetts on aliens who entered the state from other states and countries by ship. The basis for the decision, as found in the opinions of the individual justices, was that the tax invaded the power of Congress over foreign and interstate commerce. The opinion of Chief Justice Taney, in which he disagreed with the majority on the commerce clause issue, also addressed the tax as applied to citizens of the United States arriving from other states. That tax he believed to be impermissible. Some later decisions of the court trace recognition of the constitutional right of unburdened interstate travel to
that opinion. (See, e.g., Shapiro v. Thompson (1969) 394 U.S. 618, 630, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600.) And, relying on the dissenting opinion of the Chief Justice in the Passenger Cases, the court struck down a tax on egress from the State of Nevada in Crandall v. Nevada (1867) 73 U.S. (6 Wall.) 35, 18 L.Ed. 745, holding that the right of interstate travel was a right of national citizenship which was essential if a citizen were to be able to pass freely through another state to reach the national or a regional seat of the federal government.

Other cases find the source of the right in the privileges and immunities clause. In Paul v. Virginia (1868) 75 U.S. (8 Wall.) 168, 19 L.Ed. 357, the court rejected a challenge predicated on the privileges and immunities clause made by a corporation to a tax imposed by the State of Virginia on out-of-state insurance companies. In so doing, it recognized interstate travel as a right guaranteed to citizens. “It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.” (Id., at p. 180, italics added.)

In the Slaughter–House Cases (1872) 83 U.S. (16 Wall.) 36, 21 L.Ed. 394, the court equated the rights protected by the privileges and immunities clause to those in the corresponding provision of the Articles of Confederation which provided that the inhabitants of each state were to have “‘the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State....’” (83 U.S. at p. 75.)

The privileges and immunities clause was also the source of the right of interstate travel as an incident of national citizenship recognized by the court in Twining v. New Jersey (1908) 211 U.S. 78, 97, 29 S.Ct. 14, 19, 53 L.Ed. 97 and United States v. Wheeler (1920) 254 U.S. 281, 293, 41 S.Ct. 133, 134, 65 L.Ed. 270. In Williams v. Fears (1900) 179 U.S. 270, 274, 21 S.Ct. 128, 129, 45 L.Ed. 186, the right was held to be one protected by the Fourteenth Amendment as well as other provisions of the Constitution. “Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.” (Id., at p. 274, 21 S.Ct. at p. 129.) Again, in Kent v. Dulles (1958) 357 U.S. 116, 127, 78 S.Ct. 1113, 1119, 2 L.Ed.2d 1204, freedom to travel was recognized as “an important aspect of the citizen’s ‘liberty.’” (See also Edwards v. California (1941) 314 U.S. 160, 177, 183, 62 S.Ct. 164, 168, 171, 86 L.Ed. 119 (conc. opns. of Douglas, J. and Jackson, J.).)

The right to travel, or right of migration, now is seen as an aspect of personal liberty which, when united with the right to travel, requires “that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.” (Shapiro v. Thompson, supra, 394 U.S. 618, 629, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600; see also United States v. Guest (1966) 383 U.S. 745, 757–758, 86 S.Ct. 1170, 1177–1178, 16 L.Ed.2d 239.)

In a line of cases originating with Shapiro v. Thompson, supra, 394 U.S. 618, 89 S.Ct. 1322, the court has considered the right to travel in the context of equal protection challenges to state laws creating durational residency requirements as a condition to the exercise of a fundamental right or receipt of a state benefit. In those cases the court has held that a law which directly burdens the fundamental right of migration or interstate travel is constitutionally impermissible. Therefore a state may not create
classifications which, by imposing burdens or restrictions on newer residents which do not apply to all residents, deter or penalize migration of persons who exercise their right to travel to the state.

In Shapiro, where public assistance was denied residents who had lived in the state for less than one year, the court held that durational residence as a condition of receiving public assistance constituted invidious discrimination between residents, and that if a law had no other purpose than chilling the exercise of a constitutional right such as that of migration of needy persons into the state the law was impermissible. (Shapiro v. Thompson, supra, 394 U.S. 618, 627, 631, 89 S.Ct. 1322, 1327, 1329.) Further, “any classification which serves to penalize the exercise of [the right of migration], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.” (Id. at p. 634, 89 S.Ct. at p. 1331.)

Next, durational residence requirements for voting were struck down by the court in Dunn v. Blumstein (1972) 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274. Again the question arose as an equal protection issue. The court held that the state must have a compelling reason for the requirement because it denied residents the right to vote, a fundamental political right, and because the law “classif[ies] ... residents on the basis of recent travel, penalizing those persons ... who have gone from one jurisdiction to another during the qualifying period. Thus, the durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel.” (Id. at p. 338, 92 S.Ct. at p. 1001.) The court emphasized the imposition of a “direct” burden on travel: “Obviously, durational residence laws single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly.” (Ibid.) It also took care to point out, as it had in Shapiro v. Thompson, supra, 394 U.S. 618, 638, fn. 21, 89 S.Ct. 1322, 1333, fn. 21, that a law which did not penalize residents on the basis of recent travel would not be vulnerable to a similar challenge. The court explained: “Where, for example, an interstate migrant loses his driver’s license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State’s age requirement is not a penalty imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive.” (405 U.S. at p. 342, fn. 12, 92 S.Ct. at p. 1003, fn. 12.)

The court’s focus on whether the law directly burdened, by penalizing, interstate travel continued in Memorial Hospital v. Maricopa County (1974) 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306, in which a durational residence requirement for indigent, nonemergency medical care at county expense was challenged. The court held that the restriction denied newcomers equal protection, impinged on the right to travel by denying basic necessities of life, and penalized interstate migration. (Id. at pp. 261–262, 94 S.Ct. at pp. 1083–1084; see also Benson v. Arizona State Board of Dental Examiners (9th Cir.1982) 673 F.2d 272, 277 [licensing requirement that did not disadvantage newcomers vis-a-vis previous residents did not penalize exercise of right to travel].)

In each of these cases the court had before it a law which denied residents a fundamental constitutional right (voting) or a governmental benefit (public assistance, medical care) on the basis of the duration of their residence. The law created two classes of residents. In Zobel v. Williams (1982) 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672, where the right to share in oil revenues was based on the duration of residence in Alaska, the court noted that the right to travel analysis in those cases, which did not create an actual barrier to travel, was simply a type of equal protection analysis. “In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents. In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to
travel cases have examined, in equal protection terms, state distinctions between newcomers and longer
term residents.” (Id. at p. 60, fn. 6, 102 S.Ct. at p. 2313, fn. 6.)

The right of intrastate travel has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution. (In re White (1979) 97 Cal.App.3d 141, 158 Cal.Rptr. 562.) There
the court concluded that a condition of probation which barred a defendant convicted of prostitution
from designated areas in the City of Fresno should be modified to avoid an overly restrictive impact on
the defendant’s right to travel. The court held that “the right to intrastate travel (which includes
intramunicipal travel) is a basic human right protected by the United States and California Constitutions
as a whole. Such a right is implicit in the concept of a democratic society and is one of the attributes
of personal liberty under common law. (See 1 Blackstone, Commentaries 134; U.S. Const., art. IV, § 2 and
the 5th, 9th and 14th Amends.; Cal. Const., art. I, § 7, subd. (a) and art. I, § 24....)” (Id. at p. 148, 158
Cal.Rptr. 562.) In White, as in the early United States Supreme Court cases, the court addressed a direct
burden on travel.

Neither the United States Supreme Court nor this court has ever held, however, that the incidental
impact on travel of a law having a purpose other than restriction of the right to travel, and which does
not discriminate among classes of persons by penalizing the exercise by some of the right to travel, is
constitutionally impermissible.

By contrast, in a decision clearly relevant here, a zoning law which restricted occupancy to family units
or nonfamily units of no more than two persons was upheld by the Supreme Court, notwithstanding any
incidental impact on a person’s preference to move to that area, because the law was not aimed at
transients and involved no fundamental right. (Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 7, 94
S.Ct. 1536, 1540, 39 L.Ed.2d 797.)

Courts of this state have taken a broader view of the right of intrastate travel, but have found violations
only when a direct restriction of the right to travel occurred. (Adams v. Superior Court (1974) 12 Cal.3d
562, the petitioner had been barred directly from traveling to specified areas. In In re Marriage of
Fingert (1990) 221 Cal.App.3d 1575, 271 Cal.Rptr. 389, a parent had been ordered to move to another
county as a condition of continued custody of a child. Indirect or incidental burdens on travel resulting
from otherwise lawful governmental action have not been recognized as impermissible infringements of
the right to travel and, when subjected to an equal protection analysis, strict scrutiny is not required. If
there is any rational relationship between the purpose of the statute or ordinance and a legitimate
government objective, the law must be upheld. (Adams v. Superior Court, supra, 12 Cal.3d 55, 61–62,
115 Cal.Rptr. 247, 524 P.2d 375.)

This court has also rejected an argument that any legislation that burdens the right to travel must be
subjected to strict scrutiny and sustained only if a compelling need is demonstrated. In Associated Home
Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473, an
initiative ordinance which banned issuance of new building permits until support facilities were
available was challenged as an impermissible burden on the right to travel. We rejected the argument
because the impact of the ordinance was only an indirect burden on the right to travel. The ordinance did
not penalize travel and resettlement, although an incidental impact was to make it more difficult to
establish residence in the place of one’s choosing. (Id. at pp. 602–603, 135 Cal.Rptr. 41, 557 P.2d 473;
530.)

We do not question the conclusion of the Court of Appeal that a local ordinance which forbids sleeping
on public streets or in public parks and other public places may have the effect of deterring travel by persons who are unable to afford or obtain other accommodations in the location to which they travel. Assuming that there may be some state actions short of imposing a direct barrier to migration or denying benefits to a newly arrived resident which violate the right to travel, the ordinance does not do so. It is a nondiscriminatory ordinance which forbids use of the public streets, parks, and property by residents and nonresidents alike for purposes other than those for which the property was designed. It is not constitutionally invalid because it may have an incidental impact on the right of some persons to interstate or intrastate travel.

As we have pointed out above, to succeed in a facial challenge to the validity of a statute or ordinance the plaintiff must establish that “‘the act’s provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions.’” (Arcadia Unified School Dist. v. State Dept. of Education, supra, 2 Cal.4th 251, 267, 5 Cal.Rptr.2d 545, 825 P.2d 438, quoting Pacific Legal Foundation v. Brown, supra, 29 Cal.3d 168, 180–181, 172 Cal.Rptr. 487, 624 P.2d 1215.) All presumptions favor the validity of a statute. The court may not declare it invalid unless it is clearly so. (Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.3d 805, 814–815, 258 Cal.Rptr. 161, 771 P.2d 1247.)

Since the Santa Ana ordinance does not on its face reflect a discriminatory purpose, and is one which the city has the power to enact, its validity must be sustained unless it cannot be applied without trenching upon constitutionally protected rights. The provisions of the Santa Ana ordinance do not inevitably conflict with the right to travel. The ordinance is capable of constitutional application. The ordinance prohibits “any person” from camping and/or storing personal possessions on public streets and other public property. It has no impact, incidental or otherwise, on the right to travel except insofar as a person, homeless or not, might be discouraged from traveling to Santa Ana because camping on public property is banned. An ordinance that bans camping and storing personal possessions on public property does not directly impede the right to travel. (People v. Scott (1993) 20 Cal.App. 4th Supp. 5, 13, 26 Cal.Rptr.2d 179.) Even assuming that the ordinance may constitute an incidental impediment to some individuals’ ability to travel to Santa Ana, since it is manifest that the ordinance is capable of applications which do not offend the Constitution in the manner suggested by petitioners and the Court of Appeal, the ordinance must be upheld.

Our conclusion that the Santa Ana ordinance does not impermissibly infringe on the right of the homeless, or others, to travel, finds support in the decision of the United States District Court in Joyce v. City and County of San Francisco (1994) 846 F.Supp. 843. The plaintiffs, on behalf of a class of homeless individuals, sought a preliminary injunction to prevent implementation of a program of enforcement (the Matrix Program) of state and municipal laws which were commonly violated by the homeless residents of the City. Among the laws to be enforced were those banning “camping” or “lodging” in public parks and obstructing sidewalks. It was claimed, inter alia, that the Matrix Program infringed on the right to travel. The court rejected that argument and refused to require the City to show a compelling state interest to justify any impact the program might have on the right of the class members to travel. It noted that the program was not facially discriminatory as it did not distinguish between persons who were residents of the City and those who were not. In so doing, the court suggested that the opinion of the Court of Appeal in this case was among those which constituted extensions of the right to travel that appeared to be “unwarranted under the governing Supreme Court precedent.” (Id. at p. 860.) We agree.

The right to travel does not, as the Court of Appeal reasoned in this case, endow citizens with a “right to live or stay where one will.” While an individual may travel where he will and remain in a chosen location, that constitutional guaranty does not confer immunity against local trespass laws and does not
create a right to remain without regard to the ownership of the property on which he chooses to live or stay, be it public or privately owned property.

Moreover, lest we be understood to imply that an as applied challenge to the ordinance might succeed on the right to travel ground alone, we caution that, with few exceptions, the creation or recognition of a constitutional right does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy that right. (*Harris v. McRae* (1980) 448 U.S. 297, 317–318, 100 S.Ct. 2671, 2688–2689, 65 L.Ed.2d 784; *Maher v. Roe* (1977) 432 U.S. 464, 471–474, 97 S.Ct. 2376, 2380–2383, 53 L.Ed.2d 484.) Santa Ana has no constitutional obligation to make accommodations on or in public property available to the transient homeless to facilitate their exercise of the right to travel. (*Lindsey v. Normet* (1972) 405 U.S. 56, 74, 92 S.Ct. 862, 874, 31 L.Ed.2d 36.) Petitioners’ reliance on *Clark v. Community for Creative Non–Violence* (1984) 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221, for the proposition that Santa Ana is obliged to provide areas in which camping is permitted on public property is misplaced. The issue in *Clark* was whether the refusal of the National Park Service to permit demonstrators who wished to call attention to the plight of the homeless to sleep in Lafayette Park and on the Mall in the nation’s capital violated the First Amendment rights of the demonstrators. The court held that it did not, as other areas were available for the purpose. *Clark* dealt with an affirmative right—that of free speech—which could be restricted in public fora only by reasonable, content-neutral time, place and manner restrictions. (*Id.* at p. 293, 104 S.Ct. at p. 3069). The court expressly recognized the authority of the National Park Service “to promulgate rules and regulations for the use of the parks in accordance with the purposes for which they were established.” (468 U.S. at p. 289, 104 S.Ct. at p. 3067.) Petitioners in this case make no claim that the right they seek, to camp on public property in Santa Ana, is expressive conduct protected by the First Amendment. There is no comparable constitutional mandate that sites on public property be made available for camping to facilitate a homeless person’s right to travel, just as there is no right to use public property for camping or storing personal belongings.

The Court of Appeal erred in holding that the Santa Ana ordinance impermissibly infringes on the right of the homeless to travel.

**B. Punishment for Status.**

The Court of Appeal invalidated the ordinance for the additional reason that it imposed punishment for the “involuntary status of being homeless.” On that basis the court held the ordinance was invalid because such punishment violates the Eighth Amendment prohibition of cruel and unusual punishment, and the ban on cruel or unusual punishment of article I, section 17 of the California Constitution. We disagree with that construction of the ordinance and of the activity for which punishment is authorized. The ordinance permits punishment for proscribed conduct, not punishment for status.

The holding of the Court of Appeal is not limited to the face of the ordinance, and goes beyond even the evidence submitted by petitioners. Neither the language of the ordinance nor that evidence supports a conclusion that a person may be convicted and punished under the ordinance solely on the basis that he or she has no fixed place of abode. No authority is cited for the proposition that an ordinance which prohibits camping on public property punishes the involuntary status of being homeless or, as the Court of Appeal also concluded, is punishment for poverty. *Robinson v. California* (1962) 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758, on which the court relied, dealt with a statute which criminalized the status of being addicted to narcotics. The court made it clear, however, that punishing the conduct of using or possessing narcotics, even by an addict, is not impermissible punishment for status. (370 U.S. at pp. 664, 666, 82 S.Ct. at pp. 1419–1420.)
A plurality of the high court reaffirmed the Robinson holding in *Powell v. State of Texas* (1968) 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254, where it rejected a claim that punishment of an alcoholic for being drunk in public was constitutionally impermissible. “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 p. 533, 88 S.Ct. at p. 2155.)

As the district court observed in *Joyce v. City and County of San Francisco*, supra, 846 F.Supp. 843, 857, the Supreme Court has not held that the Eighth Amendment prohibits punishment of acts derivative of a person’s status. Indeed, the district court questioned whether “homelessness” is a status at all within the meaning of the high court’s decisions. “As an analytical matter, more fundamentally, homelessness is not readily classified as a ‘status.’ Rather, as expressed for the plurality in *Powell* by Justice Marshall, there is a ‘substantial definitional distinction between a “status” ... and a “condition”....’ 392 U.S. at 533, 88 S.Ct. at 2155. While the concept of status might elude perfect definition, certain factors assist in its determination, such as the involuntariness of the acquisition of that quality (including the presence or not of that characteristic at birth), see *Robinson*, 370 U.S. at 665–69 & [fn.] 9, 82 S.Ct. at 1420–21 & [fn.] 9, and the degree to which an individual has control over that characteristic.” (846 F.Supp. at p. 857.)

The declarations submitted by petitioners in this action demonstrate the analytical difficulty to which the Joyce court referred. Assuming arguendo the accuracy of the declarants’ descriptions of the circumstances in which they were cited under the ordinance, it is far from clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations.

The Court of Appeal erred, therefore, in concluding that the ordinance is invalid because it permits punishment for the status of being indigent or homeless.

C. Vagueness and Overbreadth.

The Court of Appeal concluded that the Santa Ana ordinance was vague and overbroad. It based its vagueness conclusion on the nonexclusive list of examples of camping “paraphernalia” and “facilities” in the definitions of those terms. Those definitions were so unspecific, the court reasoned, that they invited arbitrary enforcement of the ordinance in the unfettered discretion of the police. The overbreadth conclusion was based on reasoning that the ordinance could be applied to constitutionally protected conduct. In that respect the court held that the verb “store” was overbroad as it could be applied to innocent conduct such as leaving beach towels unattended at public pools and wet umbrellas in library foyers.

1. Vagueness.

The Tobe respondents and the People, real party in interest in the Zuckernick matter, argue that the Court of Appeal failed to apply the tests enunciated by the United States Supreme Court and this court in applying the vagueness doctrine. It has isolated particular terms rather than considering them in context. We agree.

A penal statute must define the offense with sufficient precision that “ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” (*Kolender v. Lawson*, *supra*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903;

To satisfy the constitutional command, a statute must meet two basic requirements: (1) the statute must be sufficiently definite to provide adequate notice of the conduct proscribed; and (2) the statute must provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. (Williams v. Garcetti, supra, 5 Cal.4th 561, 567, 20 Cal.Rptr.2d 341, 853 P.2d 507; Walker v. Superior Court (1988) 47 Cal.3d 112, 141, 253 Cal.Rptr. 1, 763 P.2d 852; People v. Superior Court (Caswell) (1988) 46 Cal.3d 381, 389–390, 250 Cal.Rptr. 515, 758 P.2d 1046.) Only a reasonable degree of certainty is required, however. (46 Cal.3d at p. 391, 250 Cal.Rptr. 515, 758 P.2d 1046.) The analysis begins with “the strong presumption that legislative enactments ‘must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.’ ” (Walker v. Superior Court, supra, 47 Cal.3d at p. 143, 253 Cal.Rptr. 1, 763 P.2d 852.)

The Court of Appeal erred in holding that the ordinance is unconstitutionally vague. The terms which the Court of Appeal considered vague are not so when the purpose clause of the ordinance is considered and the terms are read in that context as they should be. (Williams v. Garcetti, supra, 5 Cal.4th 561, 569, 20 Cal.Rptr.2d 341, 853 P.2d 507; see also, Clark v. Community for Creative Non–Violence, supra, 468 U.S. 288, 290–291, 104 S.Ct. 3065, 3067–3068, 82 L.Ed.2d 221; United States v. Musser (D.C.Cir.1989) 873 F.2d 1513; United States v. Thomas (D.C.Cir.1988) 864 F.2d 188, 197–198; ACORN v. City of Tulsa (10th Cir.1987) 835 F.2d 735, 744–745.) Contrary to the suggestion of the Court of Appeal, we see no possibility that any law enforcement agent would believe that a picnic in a public park constituted “camping” within the meaning of the ordinance or would believe that leaving a towel on a beach or an umbrella in a library constituted storage of property in violation of the ordinance.

The stated purpose of the ordinance is to make public streets and other areas readily accessible to the public and to prevent use of public property “for camping purposes or storage of personal property” which “interferes with the rights of others to use the areas for which they were intended.” No reasonable person would believe that a picnic in an area designated for picnics would constitute camping in violation of the ordinance. The ordinance defines camping as occupation of camp facilities, living temporarily in a camp facility or outdoors, or using camp paraphernalia. The Court of Appeal’s strained interpretation of “living,” reasoning that we all use public facilities for “living” since all of our activities are part of living, ignores the context of the ordinance which prohibits living not in the sense of existing, but dwelling or residing on public property. Picnicking is not living on public property. It does not involve occupation of “tents, huts, or temporary shelters” “pitched” on public property or residing on public property.

Nor is the term “store” vague. Accumulating or putting aside items, placing them for safekeeping, or leaving them in public parks, on public streets, or in a public parking lot or other public area is prohibited by the ordinance. When read in light of the express purpose of the ordinance—to avoid interfering with use of those areas for the purposes for which they are intended—it is clear that leaving a
towel on a beach, an umbrella in the public library, or a student backpack in a school, or using picnic supplies in a park in which picnics are permitted is not a violation of the ordinance.

Unlike the Court of Appeal, we do not believe that People v. Mannon (1989) 217 Cal.App.3d Supp. 1, 265 Cal.Rptr. 616, and People v. Davenport (1985) 176 Cal.App.3d Supp. 10, 222 Cal.Rptr. 736, which upheld application of similar ordinances, were wrongly decided.

In Mannon the Appellate Department rejected a claim that the defendants were not “camping” within the definition of a Santa Barbara city ordinance. The court reasoned: “There is nothing ambiguous about the meaning of the word ‘camp.’ The definition is ‘to pitch or occupy a camp ... to live temporarily in a camp or outdoors.’ (Webster’s Third New Intern. Dict. (1965) p. 322.) The illustrations of the word ‘camp’ utilized in the municipal code do not vary the traditional meaning of that word, they merely supplement it. The illustrations are consistent with the ordinary meaning of the word, i.e., living temporarily in the outdoors.... [A] reasonable person would understand ‘camp’ to mean to temporarily live or occupy an area in the outdoors, and would not be deceived or mislead by the undertaking of further explanation in the municipal code.” (217 Cal.App.3d at pp. Supp. 4–5, 265 Cal.Rptr. 616.)

The ordinance is not vague. It gives adequate notice of the conduct it prohibits. It does not invite arbitrary or capricious enforcement. The superior court properly rejected that basis of the Tobe plaintiffs’ challenge to the ordinance. The Court of Appeal erred in reversing that judgment on that ground.

2. Overbreadth.

The Court of Appeal reasoned that the ordinance was broader than necessary since it banned camping on all public property. There is no such limitation on the exercise of the police power, however, unless an ordinance is vulnerable on equal protection grounds or directly impinges on a fundamental constitutional right.

If the overbreadth argument is a claim that the ordinance exceeds the police power of that city, it must also fail. There is no fundamental right to camp on public property; persons who do so are not a suspect classification; and neither of the petitions claims that the ordinance is invidiously discriminatory on its face. The Legislature has expressly recognized the power of a city “to regulate conduct upon a street, sidewalk, or other public place or on or in a place open to the public” (Pen.Code, § 647c) and has specifically authorized local ordinances governing the use of municipal parks. (Pub.Res.Code, § 5193.) Adoption of the ordinance was clearly within the police power of the city, which may “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const., art. XI, § 7; Fisher v. City of Berkeley (1984) 37 Cal.3d 644, 676, 209 Cal.Rptr. 682, 693 P.2d 261; Birkenfeld v. City of Berkeley, supra, 17 Cal.3d 129, 159–160, 130 Cal.Rptr. 465, 550 P.2d 1001.) As the more than 90 cities and the California State Association of Counties that have filed an amicus curiae brief in this court have observed, a city not only has the power to keep its streets and other public property open and available for the purpose to which they are dedicated, it has a duty to do so. (San Francisco Street Artists Guild v. Scott (1974) 37 Cal.App.3d 667, 674, 112 Cal.Rptr. 502.)

The Court of Appeal also failed to recognize that a facial challenge to a law on grounds that it is overbroad and vague is an assertion that the law is invalid in all respects and cannot have any valid application (Village of Hoffman Estates v. Flipside, Hoffman Estates (1982) 455 U.S. 489, 494, fn. 5, 102 S.Ct. 1186, 1191, fn. 5, 71 L.Ed.2d 362), or a claim that the law sweeps in a substantial amount of constitutionally protected conduct. The concepts of vagueness and overbreadth are related, in the sense
that if a law threatens the exercise of a constitutionally protected right a more stringent vagueness test applies. (*Id.* at p. 499, 102 S.Ct. at p. 1194; *Kolender v. Lawson, supra*, 461 U.S. 352, 358–359, fn. 8, 103 S.Ct. 1855, 1858–1859, fn. 8, 75 L.Ed.2d 903.)

Neither the Tobe plaintiffs nor the Zuckernick petitioners have identified a constitutionally protected right that is impermissibly restricted by application or threatened application of the ordinance. There is no impermissible restriction on the right to travel. There is no right to use of public property for living accommodations or for storage of personal possessions except insofar as the government permits such use by ordinance or regulation. Therefore, the ordinance is not overbroad, and is not facially invalid in that respect. It is capable of constitutional application.

Since the ordinance is not unconstitutionally overbroad, and the facial vagueness challenge must fail, the Court of Appeal erred in ordering dismissal of the complaints in the Zuckernick prosecution and enjoining enforcement of the ordinance.

**IV. DISPOSITION**

The judgment of the Court of Appeal is reversed.
DUHÉ, Circuit Judge:

Appellants, the City of Dallas, et al., appeal from the district court’s August 18, 1994 memorandum opinion and order granting in part and denying in part Appellees’ application for preliminary injunction. Because we find that Appellees are without standing to raise their Eighth Amendment claim, we reverse, vacate the preliminary injunction and remand with instructions to dismiss Appellees’ Eighth Amendment claims.

I. BACKGROUND

Plaintiffs, seeking to represent a class of homeless persons, filed this action asserting that various City of Dallas (City) ordinances, as enforced, violated their First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendment rights. On May 20, 1994, the district court, after a hearing, entered a temporary restraining order (TRO) enjoining the City from arresting, harassing and/or otherwise interfering with Appellees and those they represent. On June 2, 1994, the court granted in part and denied in part Appellees’ motion for preliminary injunction. Specifically, the district court dissolved that portion of the TRO that enjoined the City from enforcing the Texas Criminal Trespass Statute.2

On August 18, 1994, after additional briefing, the district court reconsidered and modified his June 2nd order.

The district court concluded that, as applied, the sleeping in public ordinance failed to pass constitutional muster under an Eighth Amendment analysis,4 and entered a preliminary injunction enjoining its enforcement. However, the court concluded that the remaining ordinances were constitutionally valid. Appellees have not filed a cross-appeal; therefore only the district court’s Eighth Amendment ruling on the sleeping in public ordinance is presently before the court.

II. STANDING

Appellants assert that Appellees lack standing to raise an Eighth Amendment challenge to the sleeping in public ordinance. We agree. Although this issue is raised for the first time on appeal, standing is jurisdictional, and may be raised at any time.

The law is well settled that “a plaintiff who has not been prosecuted under a criminal statute does not normally have standing to challenge the statute’s constitutionality.” See, Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (“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 crimes1

Nonetheless, Appellees urge us to follow the lead of Joyce v. City and County of San Francisco5 wherein the district court spun certain language out of the Supreme Court’s Ingraham v. Wright opinion to weave a new theory of Eighth Amendment jurisprudence out of whole cloth. In Joyce, the district court rejected the City and County of San Francisco’s assertion that plaintiffs

1 It is equally evident that the state does not incur Eighth Amendment liability even where injury occurs as the result of official conduct, unless the individual was being held in custody after criminal conviction. See Ingraham v. Wright, 430 U.S. at 664, 97 S.Ct. at 1409 (Corporal punishment of school children does not violate Eighth Amendment); Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (In excessive force suit brought under 42 U.S.C. § 1983, “the less protective Eighth Amendment standard applies ‘only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.’ ”); Lynch v. Cannatella, 810 F.2d 1363, 1375 (5th Cir.1987) (same); Hewitt v. Truth or Consequences, 758 F.2d 1375, 1377 n. 2 (10th Cir.1985), cert. denied, 474 U.S. 844, 106 S.Ct. 131, 88 L.Ed.2d 108 (1985) (same); D’Aguanno v. Gallagher, 50 F.3d 877, 879 n. 2 (11th Cir.1995) (Deputy sheriff’s conduct toward homeless people could not constitute Eighth Amendment violation where homeless persons had not been convicted of any crime.)
lacked Eighth Amendment standing to challenge the constitutionality of certain ordinances because they had not been convicted of violating the ordinances. An examination of the *Ingraham* case readily displays the fallacy of the court’s conclusion.

In *Ingraham v. Wright*, the Supreme Court recognized that the Cruel and Unusual Punishments Clause [of the Eighth Amendment] 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.

430 U.S. at 667, 97 S.Ct. at 1410 (citations omitted, emphasis supplied). The *Joyce* court relied on the above emphasized language for the proposition that an accused may challenge a statute, prior to conviction, on the basis that it is outside the Eighth Amendment’s “substantive limits on what can be made criminal.” 846 F.Supp. at 853.

However, the *Joyce* court ignored the remaining language of the *Ingraham* opinion. As stated previously, *Ingraham* stands for the proposition that the Eighth Amendment “was designed to protect those convicted of crimes.” *Ingraham v. Wright*, 430 U.S. at 664, 97 S.Ct. at 1409. The mere fact that a convicted person can attack the Eighth Amendment validity of a law does not affect this basic tenet. In fact, an examination of *Robinson v. California,* the case on which the Court relied for its conclusion that the Eighth Amendment places substantive limits on the criminal law, runs contrary to *Joyce*’s holding; because *Robinson* involved a post conviction challenge to the validity of a California law. *Robinson v. California*, 370 U.S. at 663, 82 S.Ct. at 1418–19. The *Joyce* court plainly reached an incorrect result on this issue, and we have found no other authority supporting Appellees’ proposition.

We have thoroughly examined the designated record on appeal. While we find that numerous tickets have been issued, we find no indication that any Appellees have been convicted of violating the sleeping in public ordinance. “[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.” *O’Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974).

As the Supreme Court has set forth previously, “[t]he case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government. The Art. III doctrine that requires a litigant to have ‘standing’ to invoke the power of the court is perhaps the most important of these doctrines.” *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Appellees do not have standing to raise an Eighth Amendment challenge to the sleeping in public ordinance, and therefore the district court was without jurisdiction to issue the preliminary injunction enjoining its enforcement.

III. CONCLUSION

We REVERSE the holding of the district court on Appellees’ Eighth Amendment challenge, VACATE the preliminary injunction and REMAND with instructions to dismiss Appellees’ Eighth Amendment challenge for lack of standing.

REVERSED, VACATED and REMANDED with instructions.
KOZINSKI, Circuit Judge. 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. 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. 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. 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). 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. 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. 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.”).

Plaintiffs and the dissent point to *Brown v. Louisiana,* 383 U.S. 131, 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.). 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).

**305** 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.”). 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.

**AFFIRMED.**

PREGERSON, Circuit Judge, dissenting:

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). 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).

*307 It is undeniable that city sidewalks are public forums meant for a variety of expressive activities in addition to walking. 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. 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. 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 *308 for non-expressive activities, requires more careful scrutiny than the majority opinion offers. 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. 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 *309 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.2 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.

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

2 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).
“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. 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.

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. 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.”

*311 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.
I. BACKGROUND
   A. FACTS

James Joel is a homeless person. Twice in 1998, City police officers found Joel sleeping on the sidewalk and arrested him for violating Section 43.52 of the City Code. Joel’s first arrest was February 28, 1998, for which he spent one day in jail. He pleaded guilty and was sentenced to time served. His second arrest was March 2, 1998. To that charge, Joel pleaded not guilty and remained in jail until March 9, 1998, at which time the City prosecutor declined to prosecute.

Section 43.52 of the City Code provides:

Camping Prohibited; exceptions.

1. For the purposes of this section, “camping” is defined as:
   (a) Sleeping or otherwise being in a temporary shelter out-of-doors; or
   (b) Sleeping out-of-doors; or
   (c) Cooking over an open flame or fire out-of-doors.

2. Camping is prohibited on all public property, except as may be specifically authorized by the appropriate governmental authority.

3. Camping is prohibited on all property in the City used for residential purposes; provided, however, that camping is permitted on such property with the permission and consent of the property owner.

To assist the police in enforcing city ordinances, the City promulgated a handbook entitled the Most Used City Ordinance Book, which the parties refer to by the acronym “MUCOB.” The notes concerning Section 43.52 that are contained in the MUCOB read as follows:

Local court rulings have held that in order to “camp”, the suspect must do more than simply fall asleep on city property. There must be some indication of actual camping. One or more of the following should exist before an arrest under this section is appropriate:

1. the property must be public property, including highway overpasses;
2. the suspect is inside a tent or sleeping bag, or the suspect is asleep atop and/or covered by materials (i.e. bedroll, cardboard, newspapers), or inside some form of temporary shelter;
3. the suspect has built a campfire;
4. the suspect is asleep and when awakened volunteers that he has no other place to live. Homeless persons should additionally be advised of alternative shelter available at the Coalition for the Homeless.
5. Upon arrest, evidence of camping (sleeping bags, bedroll, cardboard, newspapers, etc.), should not be destroyed, but should be seized and placed in Property and Evidence. Other personal property of the Defendant, which is not evidence, should be taken to the Orange County Jail with the Defendant.

Simply being asleep in a public place during late night or early morning hours makes the camping case stronger, but is not alone sufficient to justify an arrest under this section unless there is some indicia of true “camping” as noted above.

The Coalition for the Homeless of Central Florida, Inc. is an organization which provides shelter, food, housing, education, and support services to the homeless. It operates a 3.3 acre campus in downtown Orlando, including a Men’s Pavilion that accommodates 500 homeless men and provides them with shelter, meals, showers, and laundry facilities. The Coalition charges a one dollar per day fee for staying in the shelter and is open 24 hours per day, year-round. The 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. Other local organizations also exist to provide shelter and resources for the homeless in Orlando.

II. DISCUSSION
   A. THE EQUAL PROTECTION CLAIM
If an ordinance does not infringe upon a fundamental right or target a protected class, equal protection claims relating to it are judged under the rational basis test; specifically, the ordinance must be rationally related to the achievement of a legitimate government purpose.

Homeless persons are not a suspect class, nor is sleeping out-of-doors a fundamental right. Consequently, rational basis review is appropriate.

Applying the first step of the rational basis test, we readily conclude that the City could have been pursuing a legitimate governmental purpose with Section 43.52. It could have been seeking to promote aesthetics, sanitation, public health, and safety by enacting an ordinance to prevent sleeping out-of-doors on public property. As for the second step, a rational basis exists for believing that prohibiting sleeping out-of-doors on public property would further aesthetics, sanitation, public health, and safety.

Joel contends that even if Section 43.52 satisfies the rational basis test, it still violates equal protection principles because it encourages “discriminatory, oppressive and arbitrary enforcement.” Joel has not proven that Section 43.52 was enacted for the purpose of discriminating against the homeless. Consequently, a disparate effect on the homeless does not violate equal protection.

C. CRUEL AND UNUSUAL PUNISHMENT

Joel argues that Section 43.52 violates his Eighth Amendment right to be free of cruel and unusual punishment (as applicable through the Fourteenth Amendment) because it punishes persons as a result of their status of being homeless. He argues that the MUCOB guidelines show that a person’s homeless status, combined with sleeping, constitutes a criminal offense. Joel relies upon Robinson, as well as Pottinger v. City of Miami. See also Johnson v. City of Dallas, 860 F.Supp. 344, 350 (N.D.Tex.1994) (holding that “sleeping in public ordinance as applied against the homeless is unconstitutional”), rev’d on other grounds, 61 F.3d 442 (5th Cir.1995).

In concluding that the ordinances in those cases violated the Eighth Amendment rights of the homeless, the district courts in Pottinger and Johnson explicitly relied on the lack of sufficient homeless shelter space in those cases, which the courts reasoned made sleeping in public involuntary conduct for those who could not get in a shelter.

By contrast, here the City has presented unrefuted evidence that the Coalition, a large homeless shelter, has never reached its maximum capacity and that no individual has been turned away because there was no space available or for failure to pay the one dollar nightly fee. Consequently, even if we followed the reasoning of the district courts in Pottinger and Johnson this case is clearly distinguishable. The ordinance in question here does not criminalize involuntary behavior. Section 43.52 targets conduct, and does not provide criminal punishment based on a person’s status. We hold that it does not violate the Eighth Amendment.

1 In his initial brief to this Court, Joel objects to the City’s evidence establishing that there is sufficient space in homeless shelters:

[T]his issue was never litigated by Mr. Joel. The question of adequate housing was never raised in Mr. Joel’s complaint and he never addressed the issue during pretrial discovery. The city filed an affidavit from a local shelter director but Mr. Joel never attempted to determine whether the affidavit was factual. In other words, there may or may not be adequate “housing” in Orlando. However, from Mr. Joel’s perspective, this has nothing to do with whether the ordinance discriminates against the homeless.

Similarly, in his reply brief he states:

... Mr. Joel is explaining to the court that he never litigated whether there were enough homeless shelters in Orlando because that has nothing to do with whether the ordinance is facially constitutional ... shelter space has nothing to do with whether Section 43.52 violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Having made the strategic decision not to contest in the district court the City’s proof that there is sufficient shelter space, Joel may not question that proof now.
WARDLAW, Circuit Judge.

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 2–10. 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]; 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. 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.

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 “‘conjunctural’ 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. Comparét–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.” 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.


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.’”

The Supreme Court reversed Robinson’s conviction:

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. 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 affects 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. Although this principle did not determine the outcome in Powell, it garnered the considered support of a majority of the Court.

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
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, \textit{cf.} \textit{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); \textit{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, \textit{cf.} \textit{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. \textit{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, \textit{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, \textit{Powell,} 392 U.S. at 551, 88 S.Ct. 2145 (White, J., concurring in the judgment); \textit{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. \textit{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. \textit{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.

RYMER, J., dissenting:

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.

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 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.

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. …
Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019)

ORDER

The Opinion filed September 4, 2018, and reported at 902 F.3d 1031, is hereby amended. The amended opinion will be filed concurrently with this order.

The panel has unanimously voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Future petitions for rehearing or rehearing en banc will not be entertained in this case.

Opinion

BERZON, Circuit Judge:

“The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.”

— Anatole France, The Red Lily

We consider whether the Eighth Amendment’s prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to. We conclude that it does.

The plaintiffs-appellants are six current or former residents of the City of Boise (“the City”), who are homeless or have recently been homeless. Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police for violating one or both of two city ordinances. The first, Boise City Code § 9-10-02 (the “Camping Ordinance”), makes it a misdemeanor to use “any of the streets, sidewalks, parks, or public places as a camping place at any time.” The Camping Ordinance defines “camping” as “the use of public property as a temporary or permanent place of dwelling, lodging, or residence.” Id. The second, Boise City Code § 6-01-05 (the “Disorderly Conduct Ordinance”), bans “[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private ... without the permission of the owner or person entitled to possession or in control thereof.”

All plaintiffs seek retrospective relief for their previous citations under the ordinances. Two of the plaintiffs, Robert Anderson and Robert Martin, allege that they expect to be cited under the ordinances again in the future and seek declaratory and injunctive relief against future prosecution.

In Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007), a panel of this court concluded that “so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]” for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals “for involuntarily sitting, lying, and sleeping in public.” Jones is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We agree with Jones’s reasoning and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them. Two of the plaintiffs, we further hold, may be entitled to retrospective and prospective relief for violation of that Eighth Amendment right.

I. Background

The district court granted summary judgment to
the City on all claims. We therefore review the record in the light most favorable to the plaintiffs. *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014).

Boise has a significant and increasing homeless population. According to the Point-in-Time Count (“PIT Count”) conducted by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County — the county of which Boise is the seat — in January 2014, 46 of whom were “unsheltered,” or living in places unsuited to human habitation such as parks or sidewalks. In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered. The PIT Count likely underestimates the number of homeless individuals in Ada County. It is “widely recognized that a one-night point in time count will undercount the homeless population,” as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

There are currently three homeless shelters in the City of Boise offering emergency shelter services, all run by private, nonprofit organizations. As far as the record reveals, these three shelters are the only shelters in Ada County.

One shelter — “Sanctuary” — is operated by Interfaith Sanctuary Housing Services, Inc. The shelter is open to men, women, and children of all faiths, and does not impose any religious requirements on its residents. Sanctuary has 96 beds reserved for individual men and women, with several additional beds reserved for families. The shelter uses floor mats when it reaches capacity with beds.

Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter. In 2010, Sanctuary reached full capacity in the men’s area “at least half of every month,” and the women’s area reached capacity “almost every night of the week.” In 2014, the shelter reported that it was full for men, women, or both on 38% of nights. Sanctuary provides beds first to people who spent the previous night at Sanctuary. At 9:00 pm each night, it allots any remaining beds to those who added their names to the shelter’s waiting list.

The other two shelters in Boise are both operated by the Boise Rescue Mission (“BRM”), a Christian nonprofit organization. One of those shelters, the River of Life Rescue Mission (“River of Life”), is open exclusively to men; the other, the City Light Home for Women and Children (“City Light”), shelters women and children only.

BRM’s facilities provide two primary “programs” for the homeless, the Emergency Services Program and the New Life Discipleship Program. The Emergency Services Program provides temporary shelter, food, and clothing to anyone in need. Christian religious services are offered to those seeking shelter through the Emergency Services Program. The shelters display messages and iconography on the walls, and the intake form for emergency shelter guests includes a religious message.

Homeless individuals may check in to either BRM facility between 4:00 and 5:30 pm. Those who arrive at BRM facilities between 5:30 and 8:00 pm may be denied shelter, depending on the reason for their late arrival; generally, anyone arriving after 8:00 pm is denied shelter.

Except in winter, male guests in the Emergency Services Program may stay at River of Life for up to 17 consecutive nights; women and children in the Emergency Services Program may stay at City Light for up to 30 consecutive nights. After the time limit is reached, homeless individuals who do not join the Discipleship Program may not return to a BRM shelter for at least 30 days. Participants in the Emergency Services Program must return to the shelter every night during the applicable 17-day or 30-day period; if a resident fails to check in to a
BRM shelter each night, that resident is prohibited from staying overnight at that shelter for 30 days. BRM’s rules on the length of a person’s stay in the Emergency Services Program are suspended during the winter.

The Discipleship Program is an “intensive, Christ-based residential recovery program” of which “[r]eligious study is the very essence.” The record does not indicate any limit to how long a member of the Discipleship Program may stay at a BRM shelter.

The River of Life shelter contains 148 beds for emergency use, along with 40 floor mats for overflow; 78 additional beds serve those in non-emergency shelter programs such as the Discipleship Program. The City Light shelter has 110 beds for emergency services, as well as 40 floor mats to handle overflow and 38 beds for women in non-emergency shelter programs. All told, Boise’s three homeless shelters contain 354 beds and 92 overflow mats for homeless individuals.

A. The Plaintiffs

Plaintiffs Robert Martin, Robert Anderson, Lawrence Lee Smith, Basil E. Humphrey, Pamela S. Hawkes, and Janet F. Bell are all homeless individuals who have lived in or around Boise since at least 2007. Between 2007 and 2009, each plaintiff was convicted at least once of violating the Camping Ordinance, the Disorderly Conduct Ordinance, or both. With one exception, all plaintiffs were sentenced to time served for all convictions; on two occasions, Hawkes was sentenced to one additional day in jail. During the same period, Hawkes was cited, but not convicted, under the Camping Ordinance, and Martin was cited, but not convicted, under the Disorderly Conduct Ordinance.

Plaintiff Robert Anderson currently lives in Boise; he is homeless and has often relied on Boise’s shelters for housing. In the summer of 2007, Anderson stayed at River of Life as part of the Emergency Services Program until he reached the shelter’s 17-day limit for male guests. Anderson testified that during his 2007 stay at River of Life, he was required to attend chapel services before he was permitted to eat dinner. At the conclusion of his 17-day stay, Anderson declined to enter the Discipleship Program because of his religious beliefs. As Anderson was barred by the shelter’s policies from returning to River of Life for 30 days, he slept outside for the next several weeks. On September 1, 2007, Anderson was cited under the Camping Ordinance. He pled guilty to violating the Camping Ordinance and paid a $25 fine; he did not appeal his conviction.

Plaintiff Robert Martin is a former resident of Boise who currently lives in Post Falls, Idaho. Martin returns frequently to Boise to visit his minor son. In March of 2009, Martin was cited under the Camping Ordinance for sleeping outside; he was cited again in 2012 under the same ordinance.

B. Procedural History

The plaintiffs filed this action in the United States District Court for the District of Idaho in October of 2009. All plaintiffs alleged that their previous citations under the Camping Ordinance and the Disorderly Conduct Ordinance violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, and sought damages for those alleged violations under 42 U.S.C. § 1983. Cf. Jones, 444 F.3d at 1138. Anderson and Martin also sought prospective declaratory and injunctive relief precluding future enforcement of the ordinances under the same statute and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

After this litigation began, the Boise Police Department promulgated a new “Special Order,” effective as of January 1, 2010, that prohibited enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on public property on any night when no shelter had “an available overnight space.” City police implemented the Special Order through a two-step procedure.
known as the “Shelter Protocol.”

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full. Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any person away because of a lack of space, and neither BRM shelter has ever reported that it was full.

If all shelters are full on the same night, police are to refrain from enforcing either ordinance. Presumably because the BRM shelters have not reported full, Boise police continue to issue citations regularly under both ordinances.

In July 2011, the district court granted summary judgment to the City. It held that the plaintiffs’ claims for retrospective relief were barred under the Rooker-Feldman doctrine and that their claims for prospective relief were mooted by the Special Order and the Shelter Protocol. *Bell v. City of Boise*, 834 F.Supp.2d 1103 (D. Idaho 2011). On appeal, we reversed and remanded. *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013). We held that the district court erred in dismissing the plaintiffs’ claims under the Rooker-Feldman doctrine. *Id.* at 897. In so holding, we expressly declined to consider whether the favorable-termination requirement from *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), applied to the plaintiffs’ claims for retrospective relief. Instead, we left the issue for the district court on remand. *Bell*, 709 F.3d at 897 n.11.

*Bell* further held that the plaintiffs’ claims for prospective relief were not moot. The City had not met its “heavy burden” of demonstrating that the challenged conduct — enforcement of the two ordinances against homeless individuals with no access to shelter — “could not reasonably be expected to recur.” *Id.* at 898, 901 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). We emphasized that the Special Order was a statement of administrative policy and so could be amended or reversed at any time by the Boise Chief of Police. *Id.* at 899–900.

Finally, *Bell* rejected the City’s argument that the plaintiffs lacked standing to seek prospective relief because they were no longer homeless. *Id.* at 901 & n.12. We noted that, on summary judgment, the plaintiffs “need not establish that they in fact have standing, but only that there is a genuine issue of material fact as to the standing elements.” *Id.* (citation omitted).

On remand, the district court again granted summary judgment to the City on the plaintiffs’ § 1983 claims. The court observed that *Heck* requires a § 1983 plaintiff seeking damages for “harm caused by actions whose unlawfulness would render a conviction or sentence invalid” to demonstrate that “the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal ... or called into question by a federal court’s issuance of a writ of habeas corpus.” 512 U.S. at 486–87, 114 S.Ct. 2364. According to the district court, “a judgment finding the Ordinances unconstitutional ... necessarily would imply the invalidity of Plaintiffs’ [previous] convictions under those ordinances,” and the plaintiffs therefore were required to demonstrate that their convictions or sentences had already been invalidated. As none of the plaintiffs had raised an Eighth Amendment challenge as a defense to criminal prosecution, nor had any plaintiff successfully appealed their conviction, the district court held that all of the plaintiffs’ claims for retrospective relief were barred by *Heck*. The district court also rejected as barred by *Heck* the plaintiffs’ claim for prospective injunctive relief under § 1983, reasoning that “a ruling in favor of Plaintiffs on even a prospective § 1983 claim would demonstrate the invalidity of any confinement stemming from those convictions.”
Finally, the district court determined that, although *Heck* did not bar relief under the Declaratory Judgment Act, Martin and Anderson now lack standing to pursue such relief. The linchpin of this holding was that the Camping Ordinance and the Disorderly Conduct Ordinance were both amended in 2014 to codify the Special Order’s mandate that “[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter.” Boise City Code §§ 6-01-05, 9-10-02. Because the ordinances, as amended, permitted camping or sleeping in a public place when no shelter space was available, the court held that there was no “credible threat” of future prosecution. “If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs ....” The court emphasized that the record “suggests there is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity” and that “there has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families.”

This appeal followed.

II. Discussion

...

C. The Eighth Amendment

At last, we turn to the merits — does the Cruel and Unusual Punishments Clause of the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter? We hold that it does, for essentially the same reasons articulated in the now-vacated *Jones* opinion.

The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const., amend. VIII. The Cruel and Unusual Punishments Clause “circumscribes the criminal process in three ways.” *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401. First, it limits the type of punishment the government may impose; second, it proscribes punishment “grossly disproportionate” to the severity of the crime; and third, it places substantive limits on what the government may criminalize. *Id.* It is the third limitation that is pertinent here.

“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.” *Robinson v. California*, 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Cases construing substantive limits as to what the government may criminalize are rare, however, and for good reason — the Cruel and Unusual Punishments Clause’s third limitation is “one to be applied sparingly.” *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401.

*Robinson*, the seminal case in this branch of Eighth Amendment jurisprudence, held a California statute that “made the ‘status’ of narcotic addiction a criminal offense” invalid under the Cruel and Unusual Punishments Clause. 370 U.S. at 666, 82 S.Ct. 1417. The California law at issue in *Robinson* was “not one which punished a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration”; it punished addiction itself. *Id.* Recognizing narcotics addiction as an illness or disease — “apparently an illness which may be contracted innocently or involuntarily” — and observing that a “law which made a criminal offense of ... a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment,” *Robinson* held the challenged statute a violation of the Eighth Amendment. *Id.* at 666–67, 82 S.Ct. 1417.

As *Jones* observed, *Robinson* did not explain at length the principles underpinning its holding.
See Jones, 444 F.3d at 1133. In Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), however, the Court elaborated on the principle first articulated in Robinson.

Powell concerned the constitutionality of a Texas law making public drunkenness a criminal offense. Justice Marshall, writing for a plurality of the Court, distinguished the Texas statute from the law at issue in Robinson on the ground that the Texas statute made criminal not alcoholism but conduct — appearing in public while intoxicated. “[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in Robinson; nor has it attempted to regulate appellant’s behavior in the privacy of his own home.” Id. at 532, 88 S.Ct. 2145 (plurality opinion).

The Powell plurality opinion went on to interpret Robinson as precluding only the criminalization of “status,” not of “involuntary” conduct. “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’ ....” Id. at 533, 88 S.Ct. 2145.

Four Justices dissented from the Court’s holding in Powell; Justice White concurred in the result alone. Notably, Justice White noted that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter. “For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. ... For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment — the act of getting drunk.” Id. at 551, 88 S.Ct. 2145 (White, J., concurring in the judgment).

The four dissenting Justices adopted a position consistent with that taken by Justice White: that under Robinson, “criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change,” and that the defendant, “once intoxicated, ... could not prevent himself from appearing in public places.” Id. at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Thus, five Justices gleaned from Robinson the principle 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.” Jones, 444 F.3d at 1135; see also United States v. Robertson, 875 F.3d 1281, 1291 (9th Cir. 2017).

This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. As Jones reasoned, “[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human.” Jones, 444 F.3d at 1136. Moreover, any “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.” Id. As a result, just as the state may not criminalize the state of being “homeless in public places,” the state may not “criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets.” Id. at 1137.
Our holding is a narrow one. Like the Jones panel, “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 ... at any time and at any place.” Id. at 1138. We hold only that “so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],” the jurisdiction cannot prosecute homeless individuals for “involuntarily sitting, lying, and sleeping in public.” Id. That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.1

We are not alone in reaching this conclusion. As one court has observed, “resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. ... As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment — sleeping, eating and other innocent conduct.” Pottinger v. City of Miami, 810 F.Supp. 1551, 1565 (S.D. Fla. 1992); see also Johnson v. City of Dallas, 860 F.Supp. 344, 350 (N.D. Tex. 1994) (holding that a “sleeping in public ordinance as applied against the homeless is unconstitutional”), rev’d on other grounds, 61 F.3d 442 (5th Cir. 1995).

Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a blanket or other basic bedding. The Disorderly Conduct Ordinance, on its face, criminalizes “[o]ccupying, lodging, or sleeping in any building, structure or place, whether public or private” without permission. Boise City Code § 6-01-05. Its scope is just as sweeping as the Los Angeles ordinance at issue in Jones, which mandated that “[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way.” 444 F.3d at 1123.

The Camping Ordinance criminalizes using “any of the streets, sidewalks, parks or public places as a camping place at any time.” Boise City Code § 9-10-02. The ordinance defines “camping” broadly:

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).

Id. It appears from the record that the Camping Ordinance is frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed

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1 Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible. See Jones, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the “universal and unavoidable consequences of being human” in the way the ordinance prescribes. Id. at 1136.
indicia of “camping” — the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property — are present. For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside “wrapped in a blanket with her sandals off and next to her,” for sleeping in a public restroom “with blankets,” and for sleeping in a park “on a blanket, wrapped in blankets on the ground.” The Camping Ordinance therefore can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements. We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.
Regulating Cleanups of Homeless Encampments
Stephen J. Schnably*

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As the visible presence of persons experiencing homelessness has grown in major cities across the country in recent years,¹ and moved to the forefront of national politics,² the impulse to criminalize homelessness has persisted. In a major report issued in 2012, the United States

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Interagency Council on Homelessness (USICH) defined criminalization as “formal and informal law enforcement policies … adopted to limit where individuals who experience homelessness can congregate, and [to] punish those who engage in life-sustaining or natural human activities in public spaces.”

In recent years, many local governments have turned to “cleanups” of homeless encampments, or tent cities, a seemingly more benign response to homelessness than engaging in a concerted policy of repeatedly arresting individuals for, in effect, living in public. These cleanups respond to a sharp rise in the number and visibility of homeless encampments, as a report by the National Law Center on Homelessness and Poverty documents. The brutality of many of these cleanups, in which municipalities seize all the belongings of the individuals in the encampment, has provoked major challenges in court as well as some efforts to regulate them through local ordinances.

This article examines four recently adopted sets of rules regulating cleanups in Denver, Los Angeles, Miami, and Washington, D.C. The first three were adopted in response to federal court challenges to the practice of cleanups. The fourth was adopted voluntarily as part of a general city program to deal with homeless encampments. A close examination of these four sets of rules

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5 These four sets of rules are not addressed in the National Law Center’s comprehensive report on encampments. See Tent City, USA, supra note 4. Three of them were adopted after the issuance of the report (Denver, Los Angeles, and Miami). The implementation of the DC rules is described
highlights the limits of any effort to regularize the practice of cleanups with the aim of protecting the rights and respecting the dignity of persons experiencing homelessness. The rules adopted in Denver, in particular, also point the way to another approach, aimed at preventing the poor public health conditions in many encampments—conditions typically invoked as justifying cleanups—by affirmatively providing services to those who have no choice but to live in public.

I. Criminalization and Cleanups of Homeless Encampments

Criminalization of homelessness can take many forms. These include laws that ban sleeping in public, living in vehicles, loitering, panhandling or begging, and sitting or lying down in public spaces. These laws may be enforced on an individual basis, but municipalities also resort to police sweeps of homeless encampments, clearing out areas where there are visible groups of people living in public. Seizure and destruction of homeless individuals’ property is another common tactic, sometimes on the pretense that it has been abandoned, and other times as part of the process of evicting individuals from encampments. Further, police may simply order persons experiencing homelessness to leave or move on from a given areas, without any claim of a violation of a statute.


7 Housing Not Handcuffs, supra note 6, at 40-41.

8 At issue in Lavan v. City of Los Angeles, 693 F.3d 1022 (9th Cir. 2012), cert. denied, 570 U.S. 918 (2013), was Los Angeles’ policy of treating homeless persons’ property as “abandoned” the moment it was set down in any public space. As the lower court had put it, the city argued that “because the homeless in this case stepped away momentarily to, inter alia, get water or shower, they abandoned all their possessions and the City was then free to seize and destroy them.” Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1013 (C.D. Cal. 2011). See also Housing Not Handcuffs, supra note 6, at 40-41.

9 Housing Not Handcuffs, supra note 6, at 53.
Local governments have increasingly adopted criminalization.\(^{10}\) What motivates resort to this policy is typically “the frustration of business owners, community residents, and civic leaders who feel that street homelessness infringes on the safety, attractiveness, and livability of their cities.”\(^{11}\) The strategy behind criminalization is to respond to these pressures by erasing (or at least reducing) the public visibility of homeless individuals—without addressing the underlying causes of homelessness, or making permanent housing, temporary shelter, and other services available.\(^{12}\) This erasure may be accomplished by driving people experiencing homelessness out of a particular area of a city, or by at least pressing them to be less visible.\(^{13}\)

A number of courts have held that criminalization violates the Eighth Amendment and other constitutional protections.\(^{14}\) Beyond the question of its legality, moreover, criminalization contributes immensely to the insecurity and harshness of being forced to live on the streets. In addition, arrests and destruction of property make it harder for those experiencing homelessness

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\(^{10}\) The National Law Center on Homelessness and Poverty has tracked resort to criminalization in 187 cities nationwide since 2006, and has found significant increases in that period, with the last three years since 2016 no exception to that trend. Housing Not Handcuffs, \textit{supra} note 6, at 37-49.

\(^{11}\) Searching Out Solutions \textit{supra} note 3, at 5.


\(^{13}\) Schnably, \textit{supra} note 12, at 555-61.

to find housing or jobs.\textsuperscript{15} And criminalizing homelessness is more expensive for cities than providing shelter or permanent housing and other services.\textsuperscript{16}

One notable trend in response to the rise in street homelessness in major cities is an emphasis on cleaning up encampments in response to what local officials typically deem a public health crisis.\textsuperscript{17} This response may seem reasonable, even inevitable: encampments can become the site of vermin, human waste, trash, discarded needles, and the like, posing a genuine public health threat. It may also seem more humane, contrasting with repeatedly arresting individuals who have nowhere else to go for resting or sleeping on a sidewalk.

At the same time, the root cause of the public health problem is the absence of essential services for those who have no choice but to live on the streets.\textsuperscript{18} For example, the absence of available public bathrooms in most downtowns—a contrast to the great increase in the number of bathrooms in private homes over the past half century\textsuperscript{19}—creates a situation where people living on the streets have no practical alternative but to relieve themselves (typically as discreetly as possible) in public spaces.\textsuperscript{20} The problem is made worse by the uncertain access that people

\textsuperscript{15} Housing Not Handcuffs, \textit{supra} note 6, at 63-70.
\textsuperscript{16} Housing Not Handcuffs, \textit{supra} note 6, at 71-74.
\textsuperscript{17} This was how the court characterizing the cleanups in 2018 in Miami, even though many of the areas subject to cleanups in which homeless persons’ belongings were destroyed were not part of the one location in the Overtown area as to which local officials had declared a public health crisis. Pottinger v. City of Miami, 359 F. Supp. 3d at 1189.
\textsuperscript{18} The claim that people who are homeless are there by choice or as the consequence of earlier bad choices—or that they have no agency as a consequence of mental health or substance abuse problems—is not infrequently made, especially in the context of claims that pressure must be exerted on those living on the streets to get them to accept services. It is, for example, implicit in the Council of Economic Advisors’ assumption that there is a demand for homelessness which increases when its conditions are made more favorable. See State of Homelessness, \textit{supra} note 2, at 5-7. For an insightful response to such claims, see Tent City, USA, \textit{supra} note 4, at 17-19.
\textsuperscript{19} Derek Thompson, \textit{America Is Overrun with Bathrooms}, The Atlantic, Jan. 23, 2020.
\textsuperscript{20} LEZLIE LOWE, NO PLACE TO GO: HOW PUBLIC TOILETS FAIL OUR PRIVATE NEEDS 54-57, 61-62 (2018).
experiencing homelessness have to private bathrooms in stores, businesses, and restaurants. The result is bad for the urban landscape, and equally poor for those experiencing homelessness, who would rather use a toilet. Many factors drive the absence of public bathrooms, even in the face of good reason to believe that more public bathrooms would benefit everyone, not just those experiencing homelessness. Sadly, one factor is a persistent belief, even among some homeless services providers, that providing public bathrooms somehow enables or encourages people to be homeless.

Indeed, the term “cleanups” obscures one common feature of them—that those living on the streets in an area that is “cleaned up” may be evicted from the area, told to leave and not return. It is not simply the accumulation of trash that is addressed, but the visible presence of

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22 Joey Flechas, In Shadow of Super Bowl, City Faces Homelessness Issues, Miami Herald, Feb. 1, 2020; Robertson, supra note 21.
23 LOWE, supra note 20, at 59.
24 Robertson, supra note 21 (views of chair of Miami-Dade County Homeless Trust). See To Control Homelessness, Consultant Suggests Clearwater Change Rules, Withdraw Street Feedings, Tampa Bay Times, May 18, 2012 (advice by Robert Marbut to city to “crack down on urban enablers like open bathrooms, lax police enforcement and … ‘renegade food’ giveaways from charities and church groups”). For a critique, see David Peery, Public Toilets Enable Homelessness?, Miami Herald, Dec. 19, 2019.
25 See, e.g., Justin Wm. Moyer, D.C. Clears Longtime Homeless Encampment near Union Station, Washington Post, Jan. 16, 2020 (noting policy announced by mayor that after clearing of an encampment, people living in tents there will not be allowed to return). In hearings before the court on a motion to hold the City of Miami in contempt for violating the Pottinger Consent Decree, plaintiffs presented evidence that people were told to leave areas being cleaned up and not come back. As an email from the City manager’s office to Chief of Police put it, “It is imperative that [cleanups of encampments] be coordinated with police in these locations and patrolled in the future to ensure that homeless individuals do not return to these locations.” Pottinger v. City of Miami, 359 F. Supp. 3d at 1189. The district court, noting that the email had been careful to mention the importance of complying with the Consent Decree, interpreted this statement as representing a desire “to prevent the squalor and unsanitary conditions from re-manifesting after completing a clean-up.” Id.
homeless persons themselves. In this sense a practice of regular “cleanups” of homeless encampments shares much with criminalization.

II. Four Recent Regulations of Cleanups: Denver, Los Angeles, Miami, and Washington, D.C.

There have been recent notable challenges to the practice of cleanups of homeless encampments in Denver, Los Angeles, and Miami. In all three cases, plaintiffs asserted that the cleanups were at worst pretexts to seize and destroy the property of those experiencing homelessness, and at best were conducted with utter disregard for their rights. For people with no place to live, losing their belongings can be devastating. The loss of blankets, tents, and the like makes it harder to sleep and seek protection from the elements. The loss of clothes and shoes make

26 See Manuela Tobias, Many Homeless Residents Refuse Help. But If They Accepted It, Fresno Couldn’t Help Them, The Fresno Bee, Aug. 25, 2019 (noting that with cleanups, “homeless residents … frequently pack their belongings into makeshift carts on their way to the next temporary camp”); id. (“Another homeless resident . . . dubbed the result ‘the homeless shuffle’”).


28 Mitchell v. City of Los Angeles, No. 16-cv-01750-SJO-JPR (C.D. Cal. Mar. 17, 2016) (Amended Complaint). See Gale Holland and David Zahniser, L.A. Agrees to Let Homeless People Keep Skid Row Property—and Some in Downtown Aren’t Happy, L.A. Times, May 29, 2019. There has been extensive litigation in Los Angeles over authorities’ repeated sweeps of homeless encampments and seizure of property. See Gale Holland, Although L.A. Mayor Calls Latest Crackdown on Homeless Camps a Success, Legal Issues Cloud City’s Plans, L.A. Times, Oct. 24, 2018. See, e.g., Lavan v. City of Los Angeles, 693 F.3d 1022, 1033 (9th Cir. 2012) (rejecting position that “the government may seize and destroy with impunity the worldly possessions of a vulnerable group in our society”), cert. denied, 570 U.S. 918 (2013). The City is also bound by the Ninth Circuit’s important recent decision in Martin v. City of Boise, 920 F.3d 584 (9th Cir.) (Eighth Amendment prohibits criminalizing sitting or sleeping on public property if no shelter is available), cert. denied, 140 S.Ct. 674 (2019).

daily life harder and may even occasion loss of work. The loss of medicines, identification, eye
glasses, journals, and items with sentimental value like family photographs can be especially
calamitous. Further, these cleanups are often the occasion for “closing” an encampment,
scattering individuals elsewhere. Yet the larger, more visible encampments tend to arise in areas
with access to services, and often reflect a sense of (relative) safety in numbers.

In Denver and Los Angeles, federal consent decrees now govern the practice of cleanups. In
Miami, two administrative regulations, both enacted in connection with a now-terminated
consent decree that protected against the criminalization of homelessness, govern the practice.

30 See Geiger, supra note 5, at 63-79.
31 Geiger, supra note 5, at 43-62. At the same time, some encampments in less visible areas may
be tolerated by local officials, with pressure on those experiencing homelessness to stay in those
areas. See Chris Herring, The New Logics of Homeless Seclusion: Homeless Encampments in
32 For the Denver consent decree, see Stipulated Motion for Preliminary Approval of Class Action
Settlement and for Fairness Hearing, Exhibit 1, Full and Final Release and Settlement Agreement,
Lyall v. City and County of Denver, No. 16-cv-02155-WJM-SKC (D. Colo. Apr. 22, 2019)
(hereinafter “Denver Consent Decree”). The main provisions governing cleanups are set out in
Exhibit A to the Denver Consent Decree, but the body of the Decree has important provisions as
well. See also Final Judgment, Lyall v. City of Denver, No. 16-cv-02155-WJM-SKC (D. Colo.
33 For the Los Angeles Decree, see Stipulated Order of Dismissal, Exhibit A (Settlement and
Release Agreement), Mitchell v. City of Los Angeles, No. 16-cv-01750-SJO-JPR (C.D. Cal. May
31, 2019) (hereinafter “LA Consent Decree”).
34 One regulation is City of Miami Police Departmental Order 11, Chapter 10. See Miami Police
Department, Departmental Orders 564-68 (Feb. 27, 2018) (hereinafter “Miami Police DO 11”),
available at https://www.miami-police.org/DeptOrders/MPD_Departmental_Orders.pdf. This
Departmental Order was adopted pursuant to a consent decree in Pottinger v. City of Miami, 810
F. Supp. 1551 (S.D. Fla. 1992). See Final Order Approving Settlement and Dismissing Case,
Pottinger v. City of Miami, No. 88-cv-02406-FAM (S.D. Fla. Oct. 1, 1998), and was modified in
2014, see Order Granting Joint Motion to Approve Settlement, Pottinger v. City of Miami, No. 88-
cv-02406-FAM (S.D. Fla. Mar. 10, 2004). The consent decree required the City to adopt a Police
Departmental Order to protect the property of homeless individuals and to limit the City’s power
to arrest them for misdemeanors for life-sustaining conduct such as obstructing sidewalks or being
in the park after hours. See Settlement Agreement § V.7, Pottinger v. City of Miami, 88-cv-02406-
FAM, DE 382, at 5 (hereinafter “Pottinger Consent Decree”); Addendum to Settlement
Agreement, Pottinger v. City of Miami, 88-cv-02406-FAM, DE 525-1 (hereinafter “Addendum to
Pottinger Consent Decree”). The Police Departmental Order remains in effect even after the
The District of Columbia, moreover, voluntarily adopted a set of guidelines in connection with an announced policy against permitting large encampments of people experiencing homelessness. 34

These four cities are not the only ones to have formally addressed the criteria and procedures for dealing with homeless encampments. The National Law Center on Homelessness & Poverty reported in 2017 that at least two cities—Indianapolis and Charleston, West Virginia—termination of the consent decree in 2019. Pottinger v. City of Miami, 359 F. Supp.3d 1177, 1196-97 (S.D. Fla. 2019), appeal filed.

The other regulation is a city administrative policy, Treatment of Homeless Persons’ Property, City of Miami Policy No. APM-1-19 (Jan. 14, 2019) (hereinafter “Miami Property APM-1-19”), available through http://archive.miamigov.com/employeerel/pages/CityAdminPolicies/admin_policy.asp. The policy was filed with the court in connection with a hearing on plaintiffs’ motion to hold the City in contempt for violating the Pottinger consent decree and the City’s motion to terminate the decree. Because the policy was filed after the close of evidence, the court did not take it into account. See Pottinger, 359 F. Supp.3d at 1182 n.6. In contrast to the Police Departmental Order, then, this administrative policy was developed unilaterally by the City of Miami. The policy remains in effect today.

have adopted ordinances on the subject.\textsuperscript{35} In Seattle and San Francisco, comprehensive ordinances on homeless encampments and cleanups were proposed but not adopted.\textsuperscript{36} There are at least five other cities that have entered into settlements of federal lawsuits challenging cleanups of encampments, in which they have agreed to some restrictions on handling of the property of homeless individuals.\textsuperscript{37} The more recent rules, moreover, are notably comprehensive (if, as will be shown, imperfect) and so are worthy of a close examination, with some reference to the earlier rules where useful.

One fundamental characteristic that all four sets of rules have in common is that they leave very broad discretion in the hands of municipal authorities to select sites for cleanups. They all refer to responding to threats to public health or safety and leave it at that.\textsuperscript{38} While the emphasis on cleanups has come in response to the rise of larger encampments of people living on the streets, moreover, the rules do not limit cleanups to larger encampments.

The rules do, however, impose rules requiring advance notice of cleanups. They also restrict what property can be seized or destroyed. And they provide for storage of belongings the city takes into custody during a cleanup.\textsuperscript{39}

\textsuperscript{35} Tent City, USA, \textit{supra} note 4, App. V and VI, at 108-12. The Charleston ordinance was enacted in response to a lawsuit challenging the city’s dismantling of an encampment in January 2016. See \textit{id.} at 60.

\textsuperscript{36} Tent City, USA, \textit{supra} note 4, App. VII and VIII, at 113-21.

\textsuperscript{37} Tent City, USA, \textit{supra} note 4, App. IX, at 121-22 (settlements relating to Pittsburgh, Akron, Honolulu, Pomona, and Sacramento).

\textsuperscript{38} The rules apply city-wide in Miami, Denver, and DC, but only to a 50-block area in downtown Los Angeles. LA Consent Decree ¶ 4.a, at 4, and Exhibit B.

\textsuperscript{39} Two are largely framed in terms of how the city will deal with property; two refer more broadly to cleanups, but property is a central issue.
Advance notice requirements vary. DC provides for 14 days’ advance written notice by a posting in the area; Miami, and Denver, at least 7 days advance posting in the area; and Los Angeles, at least 24 hours. The significance of the notice, however, depends very much on the context. In DC, the 14 days’ notice is for what the Protocol deems a “Standard Disposition,” as opposed to an “Immediate Disposition” in which no advance notice at all is required. The Protocol allows an Immediate Disposition where municipal authorities determine, in their complete discretion, that property belonging to homeless individuals “must be disposed of immediately due to an emergency, health risk, or safety risk.” The Denver decree likewise permits the city to provide less than 7 days’ notice for a cleanup if “the City determines that a public health or safety risk exists which requires it.” But it also requires the city to document that risk and keep the documentation for a year.

How useful is advance notice to those living on the street? The answer is deeply contextual, as a glance at the LA consent decree shows. That decree might appear to be the least protective, with only 24 hours’ advance notice. But the reality may well be different. For one thing, in DC, the initial posting for a Standard Disposition does not include the actual date of the cleanup. The Final Notice with that date is posted only 48 hours before it takes place, and it may come later than

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40 DC Encampments Protocol § VI.A(1), at 5.
41 Miami APM-1-19, IV.2 at 4 (“City personnel will place notices of Cleanup operation, at least seven (7) days prior to the cleaning date.”). Denver Consent Decree, Ex. A, § A.1, at 14.
42 LA Consent Decree ¶ 4.b.ii at 4. The advance notice provided in other cities varies from 48 hours (Akron and Sacramento), to 7 days (Pittsburgh), to 14 days (Charleston, West Virginia), to 15 days (Indianapolis). See Tent City, USA, supra note 4, App. V, VI, IX, at 108-12, 122-23.
45 Denver Consent Decree, Ex. A, § A.1, at 14. As the experience with the Indianapolis ordinance shows, a city can make robust use of an emergency exception. Tent City, USA, supra note 4, at 58-59.
the fourteenth day after the initial notice is posted. With this uncertainty, two weeks’ advance notice may function less like a planning device than a sword of Damocles. It is the 48-hour Final Notice—not too different from LA’s 24-hour notice—that carries the most significance. Moreover, the LA consent decree mandates that people in the area being cleaned up be given a 30-minute warning prior to the start, giving them time to move their belongings out of the way.\footnote{LA Consent Decree ¶ 4.b.ii at 4.} It also forbids the city from closing off more than one block at a time, an important protection.\footnote{LA Consent Decree ¶ 4.b.iii at 4.} These protections are mostly absent in the other sets of rules.\footnote{In practice, DC may also have a somewhat useful last-minute warning as well. The Protocol provides for DHS personnel to arrive a half hour before the cleanup starts to see who would like to pack their belongings for city storage. DC Encampments Protocol § VI.C, at 8. The original Encampments Protocol provided an hour’s advance notice. 2016 DC Encampments Protocol § VI.C, at 6. It is not clear why the period was cut in half. Honolulu similarly provides only a half hour for individuals to move their property from an area to be cleaned up. See Tent City, USA, \textit{supra} note 4, App. IX, at 122. Charleston provides an hour. See Tent City, USA, \textit{supra} note 4, App. VI, at 111.} One protection missing from all four sets of rules are limits on how early in the day the cleanup may start. In Denver, for example, the city has started them as early as four in the morning, waking up people with blaring horns or sirens.\footnote{See McGhee, \textit{supra} note 27. The same occurred in Miami, where cleanups started as early as 6:00 am, with police cars with loudspeakers and bright lights rousting people from sleep and ordering them to move. \textit{See}, e.g., Transcript of Evidentiary Hearing, September 26, 2018, Pottinger v. City of Miami, No. 88-cv-02406-MORENO, DE 675, at 12-13 (testimony of Robert Rhodes). The district court accepted the testimony but justified the early start “so as not to impede both vehicular and pedestrian traffic.” Pottinger v. City of Miami, 359 F. Supp.3d at 1191.} Even limitations of the sort that Los Angeles places on when cleanups take place may be stronger on paper than in practice. For example, both Los Angeles and DC both provide for severe-weather suspensions of cleanups. Los Angeles forbids proceeding with a cleanup if it is raining or below 50 degrees.\footnote{LA Consent Decree ¶ 4.b.v, at 5.} DC commits not to carry out a planned cleanup if a hypothermia or
hyperthermia alert is in place, which is a rather more stringent standard.\textsuperscript{52} Further, both contain a significant exception. The LA Consent Decree provides that the cleanup may proceed if “the Bureau of Sanitation determines that a cleanup is necessary to respond to an urgent condition risking public health or safety.”\textsuperscript{53} In DC, a cleanup may take place even if a hypothermia or hyperthermia alert is in place if city officials determine that it must be done immediately “due to an emergency, security risk, health risk, or safety risk.”\textsuperscript{54} The District’s practice makes clear that it will indeed carry out a planned cleanup even in very cold winter conditions.\textsuperscript{55}

The content of the required posted notice is broadly similar in all four regulations, including the date of the cleanup, and a number to call for more information.\textsuperscript{56} The Denver decree goes a step further, including as Exhibits the forms of the various posted notices.\textsuperscript{57} This seems a useful way to ensure that notices consistently meet the listed requirements.

The four sets of rules are significantly different in terms of what happens between the time the notice is posted and the cleanup takes place. Only one of the four, the DC regulation, expressly provides for outreach to those living in the area to offer shelter, permanent housing, or other

\textsuperscript{52} DC Encampments Protocol § VI.F, at 9.
\textsuperscript{53} LA Consent Decree ¶ 4.b.v, at 5.
\textsuperscript{54} DC Encampments Protocol § VII, at 9; \textit{id.} at § VI.F, at 9.
\textsuperscript{55} Between January 1 and 31, 2020, DC issued ten hypothermia alerts, as noted in @DCHumanServ, the Twitter account of the Department of Human Services. These covered Jan. 1-2, 4-5, 6, 7, 8-10, 16-23, 23-27, 27-28, and 29-31. Available at \url{https://twitter.com/DCHumanServ}. Yet it conducted a cleanup of an underpass where people were living, ordering them out by January 9. \textit{See} Heim and Moyer, \textit{supra} note 34. \textit{See also id.} (charge by attorney for homeless that the “city picked the snowiest and coldest time of the year to kick 40 people out of their homes” under an underpass in early January 2020).
\textsuperscript{56} DC Encampments Protocol § VI.A(1), at 5; LA Consent Decree ¶ 4.d.ii, at 5; Denver Consent Decree, Ex. A, §§ A.3, A.4, at 15; Miami Property APM-1-19§§ IV.4.c, 5.d.
services—but only “when they are available.” The City of Miami Protocol says nothing about outreach, but City officials state that in practice they provide outreach in the interim, and set aside shelter beds sufficient to accommodate individuals who want shelter. In general, it does not appear that any city commits not to undertake a cleanup of a homeless encampment unless there is adequate shelter space for all those living at the encampment. The closest to such a commitment is Indianapolis’ ordinance, which provides that a cleanup may not proceed until there is sufficient shelter space for all the people at the encampment, but also provides for an exception in case of emergency. Charleston does provide for outreach during the period leading up to a cleanup; it further provides that if by the date of the cleanup there is no shelter for everyone at the encampment who wants it, those who have been unable to be placed “may” remain at the encampment site until shelter is located.

All the regulations provide for the disposition of property during a cleanup. Two of them call broadly for respect for the property of those experiencing homelessness. The Denver Consent

58 DC Encampments Protocol § VI.B, at 6. DC does provide a legal right to shelter in hypothermic or hyperthermic conditions, but it does not carry out encampment cleanups in those circumstances. See text accompanying note 52.
59 See text accompanying note 52.
60 Testimony of David Rosemond, Assistant Director of Neighborhood Enforcement Team, City of Miami, 11/1/2018, at 29, 43-44.
61 See Tent City, USA, supra note 4, App. VI, at 111-12.
62 For Los Angeles, see LA Consent Decree ¶ 4.b, 4.c, at 4, 5 (forbidding seizure of property “absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, is evidence of a crime, or is contraband”).

As to Miami, see Miami Police DO 11 § 10.7.1 (“The City shall respect the personal property of all homeless persons,… In no event shall any officer destroy any personal property known to belong to a homeless person or readily recognizable as property of a homeless person” unless it is contaminated or a health hazard”). The federal consent decree that gave rise to the Miami Police Departmental Order clearly applied to all city employees, not just the police. While it is doubtful that non-police employees would consider themselves specifically bound by the Police Departmental Order, the City’s position is that even after termination of the decree, it will observe the decree’s protections. It would have been better, however, for the City to expressly incorporate this language into the Administrative Protocol.
Decree has no similar general prohibition, but it does incorporate as a general provision, “govern[ing] every section” of the Consent Decree, a pre-existing city protocol that gives detailed protection to homeless individuals’ property. The DC Encampments Protocol, perhaps reflecting its origins, contains no general affirmation of respect for the property of homeless individuals.

There are four major issues relating to the handling of property, and the rules vary widely on each. First, what property at the site may the City discard, even if the owner is present? All four regulations provide that property that presents a public health or safety risk may be discarded, though the degree of specificity varies widely. Miami broadly permits disposal of “items that present a hazard to the health and safety of City Personnel or the Public,” with a non-exhaustive list of a few examples. DC lists very specific types of property that may be discarded, but also adds a general proviso that city officials may dispose of any property that city workers deem “hazardous” and “unsafe to store.” Further, the protections against disposal of property apply only during a “Standard Disposition.” In cases of an emergency cleanup without advance notice (an “Immediate Disposition”) any property “must be disposed of immediately due to an emergency, health risk, or safety risk.”

Denver and LA have more stringent requirements. Denver permits property to be discarded only if it poses an “immediate risk to public health or safety,” and “trash” is defined very

63 Denver Consent Decree, Ex. A, § A.5, at 16. Even though the protocol pre-existed the consent decree, its incorporation into the decree is significant, given the enforcement provisions. Denver Consent Decree ¶ 15, at 4.
64 Miami Property APM-1-19 § A, at 1; Miami Property APM-1-19 § 1.2.a, at 2; Miami Police DO 11 § 10.7.1 (permitting police officers to destroy homeless individuals’ property if it is “contaminated or otherwise poses a health hazard to an officer or to members of the public”).
65 DC Encampments Protocol § VI.C, at 7-8 (listing “live animals,” “illegal items,” “infested with bugs explosives,” “wet or heavily soiled items,” and “foods or liquids”).
66 DC Encampments Protocol § VI.C, at 8.
68 Denver Consent Decree, Ex. A § A.5.a, at 16.
specifically. LA requires “an objective reasonable belief” that the property “presents “an immediate threat to public health or safety, is evidence of a crime, or is contraband.” LA and Miami provide that bulky items such as mattresses, furniture, or large appliances may be discarded. Denver allows mattresses to be disposed of, but not furniture.

Second, what happens to property that is not subject to disposal, where the owner is not present at the time? Miami and LA provide that property may be disposed of if there is good reason to believe it is abandoned. Denver may in effect have a strong presumption against deciding property is abandoned. DC, by contrast, appears to reserve maximum discretion to itself as to how treat property present at a cleanup site. A closely related issue, not uncommon during cleanups, is what happens to property if the owner is not present when the cleanup begins, returns while it is in progress and finds that it has been set aside for disposal (for example, by being placed on a garbage truck) or for storage? In practice, city workers have broad discretion, and may refuse

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69 Denver Consent Decree, Ex. A § A.5.b, at 16. Denver mandates a presumption that if “there is any question concerning whether an item should be considered as trash or valuable property, the City will assume the property has value and it should be stored.” Denver Consent Decree, Ex. A § A.5.f, at 16. By contrast, Miami permits disposal of anything that City workers deem “refuse.” Miami Property APM-1-19 § I.2.c, at 2, an undefined term.

70 LA Consent Decree ¶ 4.b, at 4. The tendency toward incompleteness is evident in the fact that three of the sets of rules deal with weapons and contraband, LA Consent Decree ¶ 4.b, at 4; Denver Consent Decree, Ex. A § A.5.d, at 16; DC Encampments Protocol § VI.C, at 8, and one (Miami) is silent.

71 Miami Property APM-1-19, § I.2.b, at 2; Miami Police DO § 10.7.4; LA Consent Decree ¶ 4.e, at 6.


73 Miami Property APM-1-19, § C, at 5; Miami Police DO § 10.7.3; LA Consent Decree ¶ 4.b., at 4.

74 Denver’s presumption, see footnote note 69 supra, may function as a protection against too-easy determination of abandonment.

75 The Protocol provides that signs be posted advising that “property left on site during the cleanup time may be immediately destroyed,” and that “some unattended, non-hazardous property may be stored, in the District’s discretion.” DC Encampments Protocol § VI.A(1), at 5.
to give the property back, as happened in some Miami cleanups. Only LA expressly addresses the issue, providing that medicine, medical equipment, and ID must be returned on request, with city workers having discretion to take other property to storage if it has already been set aside for storage.

Third, what property must be stored by the city, whether at the request of the owner or even if not claimed by anyone present during the cleanup? All four provide for city storage of certain property. Miami, Denver, and LA take the approach of identifying certain kinds of property as vital, requiring city workers to take them to storage if no one is present to claim them. In Miami this includes items like identification, medicine, personal papers, clothing, or bedding. Denver gives protects medicine, ID, and the like, but more broadly “[a]ny items of personal property that could reasonably be assume to have value to any person,” and lists examples, including tents, sleeping bags, musical instruments, phones, and furniture. LA takes the approach of requiring the storage rather than disposal of any property that is unattended but not abandoned, so long as it is not a public health or safety threat or evidence of a crime or contraband.

DC and Miami both provide that individuals may request storage of their property; the Denver and Los Angeles consent decrees, in contrast, do not provide for this possibility. While the

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76 See Pottinger v. City of Miami, 359 F. Supp. 3d at 1192.
77 LA Consent Decree ¶ 4.c.iv, at 4-5.
78 Miami Property APM-1-19 § II.2.a, at 2; Miami Property APM-1-19 § II.2.c, at 3. The Police Departmental Order, adopting the language of the Pottinger Consent Decree, expressly singles out for heightened protection “personal items such as identification, medicines and eyeglasses and other small items of importance.” Miami Police DO § 10.7.2.1.
79 Denver Consent Decree, Ex. A. §§ A.5.c, e, at 16.
81 DC Encampments Protocol § VI.C, at 7; Denver Consent Decree, Ex. A, §§ A.3, A.4, at 15; Miami Property APM-1-19 §§ III.3, IV.4.c, at 3, 4. Of course, this right does not extend to property
former approach might appear more beneficial to those living on the streets, in fact it appears to rest on a practice of removing all property belonging to homeless people in an area, whether by disposal or taking it away for storage. In contrast, the Los Angeles and Denver decrees contemplate that only property that is left attended and is not abandoned will be taken off for storage.82 In DC, moreover, the amount of property that may stored is limited to what the owner can fit within two 40-gallon storage boxes or bins (provided by the city) during the half hour immediately preceding the cleanup.83

Fourth, how long will property be stored, and how may the owner retrieve it? DC and Denver provide for 60 days, and LA and Miami, 90 days.84 Denver provides that medicines must be retained until the expiration date, and identification indefinitely, unless it has an expiration date.85 All of them provide for signs to be posted in the area post-cleanup, with information on the storage facility.86 Los Angeles, alone among the four, sets a strict timeline for how soon property subject to immediate disposal (e.g., if deemed a public health hazard). See text accompanying notes 64-67.

82 See LA Consent Decree ¶ 4.b, at 4; Denver Consent Decree, Ex. A § A.5, at 16 (referring to “unattended” property).
83 DC Encampments Protocol § VI.C, at 7. The Protocol gives District employees discretion to reject storage of a tent in one of the bins if they decide it is not functional. DC Encampments Protocol §VI.C, at 7. The other three sets of rules do not place volume limits on the property that may be stored, but in the parts of Los Angeles outside the area covered by the consent decree, city officials limit what can be kept on the street to what fits in a 60-gallon container. See Holland and Zahniser, supra note 28. Indianapolis restricts storage to what fits in a 96-gallon container. See Tent City, USA, supra note 4, App. V, at 108-09.
84 DC Encampments Protocol § VI.C, at 7; Denver Consent Decree, Ex. A § A.3d, at 15; LA Consent Decree ¶ 4.d.i, at 10; Miami APM-1-1-19 §§ III.3, IV.5.a, V.2, V4, at 3, 4, 5. Time periods in other jurisdictions vary from as short as 14 days (Charleston, West Virginia), to 30 days (Akron), to 45 days (Honolulu), to 60 days (Indianapolis). See Tent City, USA, supra note 4, App. V, VI, IX, at 108-12, 122-23.
85 Denver Consent Decree, Ex. A., § J, at 36.
that has been taken for storage must be made available to the owner. Miami requires the city to contact owners who have put a name tag with contact information on their property. In terms of accessibility, DC and Denver both have requirements as to the hours the storage facility operates; the Miami and LA agreements are silent as to the hours of operation.

Finally, the four sets of rules vary significantly as to compliance. The Miami and DC rules, adopted as regulations, make no provision for complaints, enforcement, or even input by those experiencing homelessness. Indeed, the DC Protocol expressly disclaims the creation of any rights. The LA and Denver rules, embodied in consent decrees, do. Both provide for court enforcement after good faith efforts to resolve disputes informally. The Denver decree also creates an Advisory Group consisting of persons experiencing homelessness and their representatives, which is to meet with City officials every three months.

III. The Lessons of Recent Experience: Limitations and the Need for New Approaches

What lessons might we draw from a detailed comparison of these four sets of rules? One has to do with the importance of a process that goes beyond government officials formulating rules and procedures in the usual way. It is hardly a surprise that rules that emerge from negotiation,

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87 LA Consent Decree ¶4.d.v, at 6 (medication, tents, sleeping bags, blankets and other vital property must be available at storage center within 24 hours of seizure; other property, within 72 hours).
88 Miami Property APM-1-19, IV.5.d, at 5; see also Miami Property APM-1-11, II, at 2-3.
89 DC Encampments Protocol § VI.D, at 8 (“normal government business hours”); Denver Consent Decree, Ex. A, § A.6, at 16-17 (6-8:30 am Monday, Tuesday, Wednesday, and Friday, and noon-6:00 pm on Thursdays).
90 DC Encampments Protocol § I, at 1 (“This protocol does not create any enforceable third party rights on behalf of any member of the public or any individual whose property may be the subject of this protocol.”).
with court proceedings in the background—as was the case with Denver and Los Angeles, and partly in Miami—are in general more precise and protective.

The DC Encampments Protocol shows signs of lack of careful attention in drafting (or a propensity for ambiguity that leaves municipal authorities with maximum discretion). For example, the original Encampments Protocol did not include a severe-weather exception, even though in practice city officials may have taken that into account. The severe-weather exception was added only in the 2019 revision. It is hard to know, moreover, what persons experiencing homelessness are to make of their property protections from the ambiguous signage posted before a cleanup. The original Encampments Protocol was even worse, providing for signs that seemed to state flatly that any property at the site on the day of a cleanup would be destroyed.

The drafting of the Miami Administrative Policy shows a similar lack of clarity on basic questions. For example, it provides that police are bound by it (except in case of a conflict with Police Departmental Order 11), but as noted earlier does not provide that the property protections of Police Departmental Order 11 (and the underlying Pottinger Consent Decree) apply to all city employees. It refers to seizure or disposal of all “unattended” property, without clarifying what that term means. Suppose, for example, the owner has stepped away briefly but asked someone else to watch over it. Another section of the Policy may answer this question, referring to seizure and disposal of property “when the Homeless Person is not present,” which may mean the owner,

93 See Geiger, supra note 5, at 64.
94 See supra note 52.
95 See text accompanying note 75 and note 75.
96 See 2016 DC Encampments Protocol § VI.A(1), at 4 (posted signs would say only that “any items not remove by the cleanup deadline are subject to removal and disposal”).
97 See supra note 62.
98 Miami APM-19-1 §§ II.2, V, at 2, 5
99 Miami APM-19-1 § IV.5.
though that is not clear. If the term does refer to the owner, the Policy—by allowing property to be treated as “unattended” that an individual other than the owner identifies as belonging to someone—is entirely inconsistent with the basic requirement of the Consent Decree, incorporated into the current Miami Police Departmental Order, that no “personal property known to belong to a homeless person, or readily recognizable as property of a homeless person (i.e. clothing and other belongings organized or packaged together in a way indicating it has [not] been abandoned” should be destroyed.100

Nothing, of course, stops municipalities from reaching out to those experiencing homelessness and their advocates to include them in a serious way in the drafting of procedures. The Denver model of an Advisory Group may point to one way to accomplish this. In formulating rules in the future, moreover, those engaged in formulating them would do well to consult prior attempts. No one of the sets of rules discussed here is as good as something that drew on all of them could be.

Moreover, legislation regulating cleanups may well be preferable to the simple promulgation of administrative rules. Legislation engages communities and provides opportunities for the public, including those with the greatest stake in the matter to play a role in its formulation. The need to gather broad support for a constructive approach to dealing with the challenges that homelessness poses may help ensure that an ordinance will be backed by greater commitment. At the same time, there is no gainsaying one advantage of litigation, and securing a court order or a

100 Miami Police DO § 10.7.2.3. This language is taken from the Pottinger Consent Decree. See Pottinger Consent Decree, § VII.14.F.1, DE 382 at 12; Addendum to Pottinger Consent Decree, § VII.14.F.1, 525-1, at 7. The Departmental Order inadvertently omits the word “not.”
consent decree. The Denver Consent Decree expressly provides for attorneys fees to a prevailing party in an action to enforce it.101

The most important lesson, though, may be the inherent limitation of any attempt to regularize cleanups and ban the indiscriminate destruction of property that too often accompanies them. As Geiger notes, “‘cleanups’ are violent. During cleanups, people experiencing homelessness lose their property and exert a huge amount of energy in moving their belongings, both of which are major stress inducers for an already vulnerable population.”102

The rules reduce this violence, and perhaps to some extent the stress. That is a valuable achievement. But even regulated cleanups are still stressful and energy consuming.103 One need only imagine being forced to move from one apartment to another several times a month, with the possibility of losing all of one’s belongings if something goes wrong. Further, not everyone can be present at every cleanup. People living on the streets work, have medical appointments, and countless other reasons why they might be absent, even with notice. All the regulations provide

102 Geiger, supra note 5, at 64; Nuala Sawyer, Sweeps of Homeless Camps in S.F. Are Creating a Public Health Crisis, USC Annenberg Center for Health Journalism Fellowship Posts, Mar. 21, 2019 (“Victims of encampment sweeps also suffer from losing their community, however informal and temporary it might be. As camps are broken up and people scatter, they lose a life-saving safety net.... There are also significant mental health side effects of these sweeps. Starting over from scratch is exhausting for many homeless people, and combined with the loss of community, many people rely on drugs like speed to stay awake at night to better protect themselves against theft, rape and physical assault.”), available at https://www.centerforhealthjournalism.org/2019/03/14/sweeps-homeless-camps-sf-are-creating-public-health-crisis. For a description of particularly brutal series cleanups in Fresno in the early 2000s, in which encampments were repeatedly bulldozed, see Jessie Speer, The Right to Infrastructure: A Struggle for Sanitation in Fresno, California Homeless Encampments, 37(7) Urban Geography 1049, 1054 (2016). See also Civil Rights Litigation Clearinghouse, Case Profile, Kincaid v. City of Fresno, PB-CA-0005 (account of the litigation successfully challenging this practice), available at https://www.clearinghouse.net/detail.php?id=11218.
103 See Patrick Geiger and Aaron Howe, D.C.’s Homeless Encampment ‘Cleanups’ Are Only Making Things Worse, Washington Post, April 19, 2019. The stress from having only a half hour or hour to pack up one’s belongings, see supra, note 49 is likely considerable.
for municipal seizure of belongings of persons not present at the time of the cleanup, with some but not all of belongings carted off to storage. This is better than having the belongings simply thrown in the trash, but the challenges of retrieving property from a storage center likely add to the stress.

More effective strategies like Housing First, and in the long run, serious efforts to provide for affordable housing,104 are obviously essential. The Denver consent decree, though, points to an additional strategy in the interim. It addresses the fact that larger encampments or even smaller groupings of people living on the streets become unsafe and unclean because of the lack of services. Rather than simply restrain and regulate the cleanups, the decree requires the provision of some storage lockers, more trash receptacles (especially in the summer), two to four Port-o-Lets, and needles/sharps boxes for disposal of syringes. The locations of these services is to be discussed with the Advisory Group.105 The consent decree also provides for greater access to the city’s recreational centers,106 and calls for attempting to procure a Mobile Health Unit for those living on the streets.107 It also calls for expanding the Denver Day Works program—a “supported work program designed to provide a low- to no-barrier work experience for people throughout the

See Marta Oliver Craviotto, Miami Finally Has a Strategy to Tackle Its Housing Affordability Crisis, Miami Herald, Jan. 7, 2020.
105 Denver Consent Decree, Ex. A, § E, at 18-19. Similarly, the settlement that Pomona entered into calls for the city to fund a center with storage lockers that homeless individuals may use. See Tent City, USA, supra note 4, App. IX, at 123.
city who are experiencing homelessness, while also connecting participants to supportive services such as food, shelter, and other necessities.”

The Denver consent decree bears some resemblance to other innovative approaches, including authorizing encampments in certain areas with services, legalizing the creation of encampments on private property with the owner’s permission, and creating low-barrier emergency shelters. Another approach might be to create resource centers in downtown areas, where persons experiencing homelessness could have access to showers, lockers, meals, and other services during the day. What all these approaches have in common is a recognition that so long as homelessness persists, basic decency mandates affirmative efforts to reduce the harm of having to live on the streets. Regulating cleanups is a step in that direction, but—even as an interim policy pending effective efforts to end homelessness—ultimately an inadequate one.

108 Denver Human Services, Denver Day Works, available at https://www.denvergov.org/content/denvergov/en/denver-human-services/be-supported/jobs/denver-day-works.html. See Denver Consent Decree, Ex. A, § L, at 20. The consent decree, however, expressly disclaims any legal commitment to secure the funds. Id.
109 See Housing Not Handcuffs, supra note 6, at 100-02; Tent City, USA, supra note 4, at 66-81. See also Speer, supra note 102, at 1064-65 (arguing for “infrastructural rights” in encampments, such as provision of toilets).
110 The National Law Center’s “Encampment Principles and Practices” provide a useful framework for efforts to deal with encampments constructively and with dignity for those experiencing homelessness. See Tent City, USA, supra note 4, at 14-15.