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When Punishing Innocent Conduct Violated the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual Crimes

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WHEN PUNISHING INNOCENT CONDUCT VIOLATES THE EIGHTH AMENDMENT: APPLYING THE *ROBINSON* DOCTRINE TO HOMELESSNESS AND OTHER CONTEXTUAL "CRIMES"

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I. INTRODUCTION

This Comment will discuss the state of the forty-year-old constitutional principle (the so-called "*Robinson* doctrine") that criminally sanctioning a person's membership in a status violates the Eighth Amendment to the United States Constitution.[1] A corollary to the doctrine is that the state is free, at least under the Eighth Amendment, to punish conduct, so long as it is not punishing mere status.[2]

Today, the *Robinson* doctrine is in some ways a dead letter[3] because legislatures are seemingly free—barring non-Eighth Amendment constitutional restrictions—to criminalize any conduct they want.[4]

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[1] *See* Robinson v. California, 370 U.S. 660, 667 (1962); *see also* Powell v. Texas, 392 U.S. 514, 533 (1968).

[2] *See Powell*, 392 U.S. at 532; *Robinson*, 370 U.S. at 664.

[3] Indeed, a contemporary account of *Robinson*'s impact predicted that "unless *Robinson* is to be 'a derelict on the waters of the law,' the Court itself will have to refine its decision and provide a reasonably clear constitutional rationale upon which it can be based, and according to which similar cases can be decided." Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 655 (1966) (footnote omitted) [hereinafter *The Cruel and Unusual Punishment Clause*]. The Court has not fulfilled the note author's desire for a "clear constitutional rationale" and has not addressed the Robinson doctrine since 1968.

[4] *See* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 965-66 (1999); Juliette Smith, *Arresting the Homeless for Sleeping in Public: A*

However, the doctrine continues to be invoked by homeless litigants challenging laws that criminalize otherwise innocent conduct—such as sleeping, eating, and urinating—that becomes unlawful when performed in public,[5] and by defendants who are addicted to alcohol and who claim they are being punished for their status as alcoholics.[6] Although the laws these litigants challenge do not, as a technical matter, punish the status of homelessness or alcoholism, they do create situations in which it becomes impossible for homeless people or alcoholics not to break the law.[7] Thus, while such laws technically punish acts in accordance with *Robinson*, the acts they punish—particularly those targeted by laws challenged by the homeless—are often innocent, life-sustaining, and/or reflexive.[8]

The semantic distinction between status and act is somewhat tenuous to begin with, and in the context of homelessness and chronic alcoholism, it arguably loses all meaning, since being a member of a given status may make it impossible to avoid performing certain actions.[9] However, an alternative reading of *Robinson* that would protect the homeless from "camping ordinances" that punish public conduct—under which reading the state would have the power to punish only volitional behavior[10]—seems to lead to a slippery slope: if we cannot punish acts that derive from status, then punishing even exceptionally culpable conduct may be considered cruel and unusual if the behavior is compulsive.[11]

In the past decade, courts and scholars have struggled to define a principle that would prevent the state from imposing liability on the

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Paradigm for Expanding the Robinson Doctrine, 29 COLUM. J.L. & SOC. PROBS. 293, 317-18 (1996).

[5] *See* discussion *infra* Part III.

[6] *See* People v. Kellogg, 14 Cal. Rptr. 3d 507 (Cal. Ct. App. 2004); Jackson v. Commonwealth, 604 S.E.2d 122 (Va. Ct. App. 2004).

[7] *See* Wes Daniels, *"Derelicts," Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 707-08 (1997); Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 YALE L. & POL'Y REV. 1, 41 (1996); Robert C. McConkey, III, *"Camping Ordinances" and the Homeless: Constitutional and Moral Issues Raised by Ordinances Prohibiting Sleeping in Public Areas*, 26 CUMB. L. REV. 633, 643 (1995); Smith, *supra* note 4, at 328; June Rene Fox, Comment, *Constitutionality of the Arrest of the Homeless Under the Basis of Cruel and Unusual Punishment*, 20 W. ST. U. L. REV. 649, 657 (1993).

[8] *See In re* Eichorn, 81 Cal. Rptr. 2d 535, 539 (Cal. Ct. App. 1998) ("Sleep is a physiological need, not an option for humans."); Daniels, *supra* note 7, at 705.

[9] *See The Cruel and Unusual Punishment Clause*, *supra* note 3, at 651 ("[T]he question arises whether a prohibition against punishment for the condition would also extend to certain acts closely related to the condition.").

[10] *See* Powell v. Texas, 392 U.S. 514, 568 (1968) (Fortas, J., dissenting).

[11] *See id.* at 534.

homeless for conduct like sleeping and eating in public without creating a rule that would de-criminalize conduct that is truly culpable.[12] This Comment will argue that such a principle exists. Under the Eighth Amendment, innocent conduct may be de-criminalized without de-criminalizing culpable conduct if courts ignore the semantic categories of "status" and "conduct," and make objective determinations about whether targeted conduct is innocent or culpable.

Whether conduct is innocent or culpable may seem overly vulnerable to arbitrary determination. However, this determination may be made objectively by referring to the criminal code where the challenged statute is codified. If the code criminalizes conduct in all circumstances—for instance, premeditated homicide—then that conduct is culpable. If the code criminalizes conduct only in a certain context—e.g., sleeping in public—then the conduct is innocent.[13] Of course, some innocent conduct *becomes* culpable in certain contexts—driving is culpable behavior when the driver is drunk–but if a person cannot avoid the context in which his innocent conduct becomes criminal conduct, he should be exempt from criminal prosecution.[14] This approach will not only yield fairer outcomes to litigants who are prosecuted for victimless conduct. It will also yield public policy benefits by compelling states and cities to address their homeless problems.

Before proposing a new way of interpreting and applying the Robinson doctrine, this Comment will examine the history of the doctrine and its applications in a variety of legal contexts. The section immediately following will discuss the doctrinal framework—beginning with *Robinson v. California*—against which laws banning innocent conduct derivative of a litigant's status are challenged, and will dissect the reasoning behind the

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[12] *See, e.g.*, Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995); Church v. City of Huntsville, 30 F.3d 1332 (11th Cir. 1994); Johnson v. City of Dallas, 860 F. Supp. 344 (N.D. Tex. 1994); Joyce v. City & County of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994); Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995); Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386 (Cal. Ct. App. 1994); Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992); Smith, *supra* note 4, at 319-21.

[13] *See infra* Part VI.

[14] This contextual approach is not unrelated to the common law defense of necessity. The difference lies in the burden of proof. The necessity defense is an affirmative defense that the defendant has the burden of proving by a preponderance of the evidence. *See In re* Eichorn, 81 Cal. Rptr. 2d 535, 539 (Cal. Ct. App. 1998). In *Eichorn*, a California appeals court held that a homeless defendant could raise a necessity defense to a camping ordinance under factual circumstances where all of the shelter beds within the municipality were filled on the night of his arrest. *Id.* at 536; *see also* Antonia K. Fassanelli, Note, In re Eichorn: *The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 AM. U. L. REV. 323, 324-25 (2000).

Supreme Court precedents that produced the doctrine.[15] Part III is a discussion of two recent cases involving alcoholic defendants—a homeless defendant who is a chronic alcoholic,[16] and an alcoholic who was "interdicted" by the state of Virginia and then charged with violating an interdiction order by purchasing alcohol[17]—and will examine how modern courts have applied the *Robinson* doctrine.[18] In both cases, the defendants' *Robinson* arguments were rejected.[19] The statutes at issue in these cases reveal how judicial application of the *Robinson* doctrine allows legislatures to rely on the criminal law to target social problems as a substitute for complex, non-punitive solutions.[20]

Part IV will discuss two leading cases[21] involving classes of homeless litigants challenging camping ordinances.[22] These cases reveal how alternative readings of the *Robinson* doctrine lead to divergent outcomes, and enable courts to manipulate definitions of status and conduct.[23] Part V will discuss the policy arguments in favor of, and against, camping ordinances, and will argue that declaring these laws unconstitutional will yield public policy benefits.[24] Finally, Part VI will propose an alternative interpretation of the *Robinson* doctrine that will permit the State to target culpable conduct, but prevent legislatures from persecuting the homeless and other litigants who have no choice but to break the law.[25]

II. BACKGROUND

The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[26] In 1962, the Supreme Court decided in *Robinson v. California* that a statute making it a crime to be addicted to narcotics was cruel and unusual punishment in violation of the Eighth Amendment.[27]

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[15] *See infra* Part II.

[16] People v. Kellogg, 14 Cal. Rptr. 3d 507 (Cal. Ct. App. 2004).

[17] Jackson v. Commonwealth, 604 S.E.2d 122 (Va. Ct. App. 2004).

[18] *See infra* Part III.

[19] *See Kellogg*, 14 Cal. Rptr. 3d at 516; *Jackson*, 604 S.E.2d at 126.

[20] *See infra* Part III.

[21] Joyce v. City & County of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994); Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

[22] *See infra* Part IV.

[23] *See infra* Part IV.

[24] *See infra* Part V.

[25] *See infra* Part VI.

[26] U.S. CONST. amend. VIII.

[27] Robinson v. California, 370 U.S. 660, 667 (1962).

The few facts of *Robinson* described by the Court are unremarkable. Robinson was arrested in Los Angeles after a police officer "had occasion to examine [his] arms one evening."[28] This officer testified at Robinson's jury trial that he had "observed 'scar tissue and discoloration on the inside'" of Robinson's right arm.[29] He also testified that Robinson "admitted to the occasional use of narcotics."[30] Another police officer testified, apparently as an expert, that the marks on Robinson's arms were the result of the use of hypodermic needles to inject narcotics.[31] Robinson testified that the marks on his arm actually resulted "from an allergic condition contracted during his military service," and denied having admitted to his arresting officer that he used drugs.[32] Two witnesses corroborated his testimony.[33]

The trial judge instructed the jury that Robinson could be convicted under the statute either for using, or being addicted to, narcotics.[34] He explained that

> [t]o be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms.[35]

The jury convicted Robinson "of the offense charged."[36] Apparently, it did not return a special verdict, so whether Robinson was convicted for using or being addicted to drugs is unclear.[37] In any event, Robinson's conviction was upheld by the Los Angeles County Superior Court, which, by statute, was the ultimate state appellate avenue available to Robinson.[38]

The United States Supreme Court reversed.[39] The Court declared that criminally sanctioning Robinson solely for his addiction was, in and of itself, cruel and unusual and analogized punishing drug addiction to punishing an illness:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a

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[28] *Id.* at 661.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 662.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 662-63 (alteration in original).
[36] *Id.* at 663 (internal quotation marks omitted).
[37] *Id.*
[38] *Id.* at 664
[39] *Id.* at 669.

> venereal disease. . . . [I]n light of contemporary human knowledge, a law which made a criminal offense of such [diseases] would doubtless be universally thought to be an infliction of cruel and unusual punishment . . . We cannot but consider the [California statute] as of the same category.[40]

Robinson's holding that a person cannot be held criminally liable simply for being addicted to drugs seems straightforward. As one contemporary scholar put it, however, "*Robinson* raise[d] many more questions than it answer[ed]."[41] Broadly speaking, the case announced a novel constitutional principle, namely that the Eighth Amendment could be used "to limit the concept of a 'crime,'" to the point where the state, "despite its legitimate interest in suppressing and correcting a socially harmful condition, may not without violating standards of decency impose criminal sanctions."[42] That principle seemed to offer "the promise of making fault a constitutional requirement."[43] Some, however, viewed *Robinson* not as a "promise" but as a "portent" of judicial encroachment into the substantive (as opposed to procedural) criminal law, which was traditionally the domain of the States, and of the establishment of a "lack of self-control as a constitutional bar to punishment."[44]

Even when the Court itself seemingly limited *Robinson*'s holding six years after it was decided,[45] there remained—and remains—controversy over whether the case should be read broadly (i.e., requiring volition for criminal liability) or narrowly (i.e., proscribing only the direct criminalization of status).[46]

A. EXPANDING *ROBINSON* BEYOND DRUG ADDICTION

Justice Stewart wrote for the majority in *Robinson*, and his opinion offers some initial clues as to how the case should be read. Most significantly, Stewart's comparison of drug addiction to illness[47] remains important for three reasons. First, it clarifies the Court's position that what

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[40] *Id.* at 666-67.

[41] *The Cruel and Unusual Punishment Clause*, *supra* note 3, at 655.

[42] *Id.*

[43] Kadish, *supra* note 4, at 965.

[44] *Id.*

[45] Powell v. Texas, 392 U.S. 514, 534 (1968).

[46] *Compare* Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 20-23 (1988) (arguing that *Robinson* and *Powell* stand for the principle that non-volitional conduct should not be punished), *with* Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2286 n.149 (1992) (arguing that the holding in *Robinson* prohibits only punishing "mere status" as opposed to "positive conduct").

[47] Robinson v. California, 370 U.S. 660, 666-67 (1962).

is cruel and unusual about criminalizing addiction is not the confinement of addicts, but simply the labeling of addicts as criminal.[48] This argument differs from the Eighth Amendment "proportionality principle," which the Court has used in deciding, for example, the constitutionality of "third strike" statutes under which recidivists may receive long prison sentences for minor offenses.[49] With respect to punishing drug addiction, the cruelty and unusualness derive not from the harshness of the sentence imposed on the addict, but rather from the fact of punishment itself.[50] Therefore, the bar on imposing criminal liability for drug addiction is absolute.

The second reason for the importance of Justice Stewart's comparison of drug addiction to illness is that it suggested that *Robinson*'s holding was not limited to drug addiction, but could be expanded to other conditions or statuses.[51] Indeed, the very list of diseases that Stewart used by way of example seems to indicate that the holding might expand rather far.[52] Mental illness and leprosy, Stewart's first two examples, are typically contracted through no fault of those who are afflicted with them, while venereal disease may well be contracted through voluntary, and even culpable, behavior.[53] Meanwhile, leprosy and venereal disease are usually physical afflictions, while mental illness is not.[54] Similarly, leprosy and

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[48] *Id.* at 665 ("[A] State might establish a program of compulsory treatment for those addicted to narcotics . . . [which] might require periods of involuntary confinement.") (footnote omitted). Justice Douglas, in his concurrence, expanded on the addiction-as-illness theme, providing a catalog of opinions from medical and legal sources that "[t]he addict is a sick person." *Id.* at 668-77 (Douglas, J., concurring).

[49] *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63 (2003).

[50] *Robinson*, 370 U.S. at 667 ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *see* English, *supra* note 46, at 23 ("In *Robinson* . . . the Court extended eighth amendment analysis to include the very definition of criminality.").

[51] *Robinson*, 370 U.S. at 666-67.

[52] *Id.*

[53] *See, e.g.*, Dawn Capp & Joan G. Esnayra, *Perspective: It's All in Your Head—Defining Psychiatric Disabilities as Physical Disabilities*, 23 T. JEFFERSON L. REV. 97, 99 (2000) ("Many mental illnesses have strong hereditary components."); Maureen Anne MacFarlane, Note and Comment, *Equal Opportunities: Protecting the Rights of AIDS-Linked Children in the Classroom*, 14 AM. J.L. & MED. 377, 383 (1989) (noting that leprosy "can be transmitted easily through casual conduct").

[54] *See, e.g.*, Gary J. Ruckelshaus, *Casenote: Fourteenth Amendment & 42 U.S.C. 12182 - The Americans With Disabilities Act Of 1990 - Persons With Asymptomatic HIV Infection Are Entitled to ADA Protection from Discrimination and Such Condition Qualifies as a Physical Impairment that Substantially Limits the Major Life Activity of Reproduction—* Bragdon v. Abbott, *118 S. Ct. 2196 (1998)*, 9 SETON HALL CONST. L.J. 241, 242 n.8 (1998) ("External symptoms of leprosy typically include gross limb paralysis and deformity, ulceration, oozing wounds, blindness, gangrene and skin growths."); Jeffrey Crane, *Clinical Trial for Herpes Drug Enlists University Students*, CHI. TRIB., Sept. 20, 1992, at 12.

venereal disease may be contagious, while mental illness cannot be.[55] Thus, Stewart's analogy suggests that criminalizing *any* status violates the Eighth Amendment, regardless of whether that status is physical or mental, and even if it is attained through voluntary—and culpable—behavior.

The third reason the comparison between addiction and illness is important is because Justice Stewart's claim that no "State at this moment in history" would likely pass a law punishing illness[56] seemed to allude to the Court's Eighth Amendment doctrine that what is cruel and unusual depends on "the evolving standards of decency that mark the progress of a maturing society."[57] Stewart's invocation of *Trop v. Dulles* suggests that the *Robinson* doctrine is not a static doctrine. In the context of homelessness, the dynamism of the doctrine is vital, particularly because *Robinson* was decided a generation before homelessness became a high-profile political issue.[58]

B. THE ARGUMENT FOR LIMITING *ROBINSON*

Justice White's dissenting opinion in *Robinson* pointed out the potential consequences of the Court's holding: "If it is 'cruel and unusual punishment' to convict appellant for addiction, 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."[59] In other words, White cautioned, the line between the status of addiction and the act of satiating that addiction has nothing to do with the cruelty and unusualness of criminally sanctioning an addict, and may easily be eroded to the point where the Eighth Amendment will bar the punishment of *any* purportedly involuntary conduct.[60]

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[55] *See, e.g.*, MacFarlane, *supra* note 53, at 383; Lesley Clark, *Syphilis Rate Drops, but Officials Keep Up Guard*, ORLANDO SENTINEL TRIB., Oct. 23, 1994, at 1.

[56] *Robinson*, 370 U.S. at 666.

[57] Trop v. Dulles, 356 U.S. 86, 101 (1958). Justice Douglas's concurrence in *Robinson* employed similar reasoning, analogizing drug addiction to insanity and pointing out that while the insane "may be confined either for treatment or for the protection of society, they are not branded as criminals." 370 U.S. at 668-69 (Douglas, J., concurring).

[58] *See* CHRISTOPHER JENCKS, THE HOMELESS 1 (1994); Carol L. M. Caton, *Homelessness in Historical Perspective*, *in* HOMELESS IN AMERICA 3, 17 (Carol L. M. Caton ed., 1990).

[59] *Robinson*, 370 U.S. at 688 (White, J., dissenting).

[60] This consequentialist argument was taken to its extreme in Justice Marshall's plurality opinion in *Powell v. Texas*. *See infra* text accompanying notes 67-69. The majority opinion in *Robinson* did not address White's admonition, although it did provide a limiting dictum at least with respect to narcotics: "The broad power of the State to regulate the narcotic drugs traffic within its borders is not here in issue. . . . A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders." 370 U.S. at 664.

Six years after *Robinson*, in *Powell v. Texas*,[61] a four-Justice plurality heeded Justice White's warning and seemingly flattened the potential slippery slope established by the earlier case. In *Powell*, the Court considered the case of an alcoholic who had been found guilty of public intoxication and fined twenty dollars.[62] Powell claimed that his drinking was uncontrollable, and that he was therefore being punished for his status as an alcoholic in violation of the Eighth Amendment.[63]

Justice Marshall, writing for the plurality, upheld Powell's conviction, and reasoned that the State may charge a chronic alcoholic with public intoxication without violating the Eighth Amendment.[64] Marshall wrote that the state, in criminalizing public intoxication, is "impos[ing] upon [the alcoholic] a criminal sanction for public *behavior* which . . . seems a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill or a leper.'"[65] Marshall's opinion echoed White's dissent in *Robinson*, arguing that if punishing acts derivative of a status (as opposed to punishing the status itself) violated the Eighth Amendment, then the result "could only be a constitutional doctrine of criminal responsibility."[66]

Taking this argument to its extreme, Justice Marshall reasoned that, if *Robinson* could be extended to prohibit punishing compulsive behavior arising from one's membership in a status, then "it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill."[67] The *Powell* plurality sought to limit *Robinson*'s holding to a simple principle: "criminal penalties may only be inflicted if the accused has committed some act."[68] *Robinson* thus did not decide "the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'"[69] Simply put, the state may not punish status, but under the Eighth Amendment at least, it may punish any and all conduct it chooses.[70]

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[61] 392 U.S. 514 (1968).
[62] *Id.* at 517.
[63] *Id.* at 532.
[64] *Id.*
[65] *Id.* (emphasis added).
[66] *Id.* at 534.
[67] *Id.*
[68] *Id.* at 533.
[69] *Id.*
[70] *Id.*

C. TWO CONFLICTING READINGS OF *ROBINSON* AND *POWELL*

In spite of the *Powell* plurality's apparent neutralization of *Robinson*, the collective meaning of *Robinson* and *Powell* remains ambiguous, in large part because the concurring opinion of Justice White in *Powell*—the same Justice White who dissented in *Robinson*[71]—seemed to disagree with the plurality on its limitation of the earlier case.[72] White cast the fifth and deciding vote in *Powell*, but in his concurrence he emphasized that his vote was limited to the facts of the case:

> [T]he chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.
>
> Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, *and so could not constitutionally be convicted for drinking*, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk.[73]

In other words, Powell's crime was not being drunk; rather it was leaving a private space where his drunkenness could not be subjected to criminal liability.[74]

As White pointed out, if Powell stayed home, he would not have been criminally liable.[75] Powell was not convicted of being an alcoholic, or even of being drunk: he was convicted of being drunk in public.[76] Thus, the constitutionally punishable crime of public intoxication would seem to involve a spatial or contextual element that transforms innocent behavior into culpable conduct. If the state may punish conduct, but may not punish status, then this contextual element, which arose in *Powell* but not in *Robinson*, blurs the distinction between status and conduct. As an

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[71] *See* Robinson v. California, 370 U.S. 660, 685-89 (1962) (White, J., dissenting).

[72] *See, e.g.*, Foscarinis, *supra* note 7, at 38 ("The differences in rulings on the Eighth Amendment claims [of homeless litigants] can be traced to different interpretations of [*Robinson* and *Powell*]."); McConkey, *supra* note 7, at 644 ("Thus, under *Powell*, it appears that the rule of *Robinson* does not apply to prohibit punishment of 'involuntary' criminal acts."); Smith, *supra* note 4, at 317 ("Because there was not a majority in *Powell* for adoption of the 'pure status' rationale, the case has left lower courts without clear guidance as to whether or not to apply *Robinson* to 'acts' derivative of status.").

[73] *Powell*, 392 U.S. at 549 (White, J., concurring) (emphasis added). The significance of White's contention that Powell, the chronic alcoholic, "could not constitutionally be convicted for drinking," is that drinking is an act. Therefore, White seemed to side with the four dissenting justices in their argument that *Robinson* could not be limited to a status/act reading.

[74] *Id.*

[75] *Id.*

[76] *Id.*

illustration, what if a state made it illegal to walk around outside while being addicted to drugs? Walking around outside is conduct, but being addicted to drugs is a status. A person would not be criminally liable for addiction to drugs until he stepped outside of his house. As a technical matter, that contextual law would pass the *Robinson* test for constitutionality.[77] As noted below, however, Justice White's *Powell* concurrence raises, without explicitly articulating, the complicating factor of the contextual element.[78]

As a doctrinal matter, it remains unclear whether White's vote should count towards the plurality's holding that the State may punish any conduct so long as it is not punishing mere status[79]—or, alternatively, whether his vote should count towards the dissent's interpretation of *Robinson*, under which the State may punish only volitional conduct, that is, conduct which the defendant has the power to prevent.[80]

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[77] *See* Robinson v. California, 370 U.S. 660, 666 (1962).

[78] *See Powell*, 392 U.S. at 548-59 (White, J., concurring).

[79] *Id.* at 532 ("On its face the present case does not fall within [*Robinson*'s] holding, since appellant 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*.").

[80] *Id.* at 567 (Fortas, J., dissenting) ("*Robinson* stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."). For the purposes of this Comment, I will refer to the *Powell* plurality's interpretation of the Robinson doctrine as the "status/act reading" and the dissent's interpretation as the "volitional reading." However, this dichotomy between the status/act and volitional readings is not meant to foreclose additional readings of the doctrine, including the one endorsed by this Comment. *See infra* Part VI. Indeed, scholars have suggested alternative ways of understanding conflicting interpretations of the doctrine. For example, a contemporary analysis of *Robinson* argued that the status/act holding of the case could be read in one of three ways. *The Cruel and Unusual Punishment Clause*, *supra* note 3, at 646. First, one could argue that the holding proscribes only "pure status" crimes—i.e., laws that punish membership in a status that is not predicated on any conduct, as opposed to laws that punish statuses, membership in which requires certain conduct (for example, being a "common thief," while a status, is predicated on one's having committed theft). *Id.* at 646-47. Second, the holding may be read to proscribe only "involuntary" status crimes—i.e., laws that punish, for example, drug addicts who are "born to mothers who are addicts" or whose addiction "may result from medical prescription." *Id.* at 648-49. Finally, the holding may be read to proscribe punishment of "innocent" status crimes—i.e., laws that punish membership in a "status one cannot change." *Id.* at 648. Under this reading, the state would not be permitted to punish an addict—even one who has become addicted through conduct that is entirely voluntary—once he is addicted. *Id.* Building on these three readings of the "constitutional principles underlying the Robinson holding," a more recent commentator has added a fourth reading, which she labels the "'human dignity' rationale for Robinson." Smith, *supra* note 4, at 314. According to this reading, derived from Justice

At the time *Powell* was decided, advocates for reforming the criminal justice system's treatment of addicts, including Powell's lawyers, developed the volitional reading, claiming to have lost "on the facts of [Powell's] case, but [to have] won on the law."[81] They claimed that *Powell* and *Robinson* collectively stand for the principle that the state may not criminally sanction non-volitional conduct.[82] History, however, has not entirely borne out the success of the volitional reading, as "the more common [judicial] interpretation has been to treat the plurality opinion as controlling and *Robinson* as limited to a proscription of status criminality."[83] Nevertheless, some judges have read White's opinion in

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Brennan's concurrence in *Furman v. Georgia*, imprisoning addicts is tantamount to treating "members of the human race as nonhumans" and thus is cruel and unusual. *Id.* at 313-14 (quoting Furman v. Georgia, 408 U.S. 238, 272-73 (Brennan, J., concurring)). However, this commentator acknowledges that, "because the definition of 'inhuman' treatment depends on one's own moral conscience . . . this rationale does not offer much help toward developing a conceptual rubric with which to guide future applications of Robinson." *Id.* at 314.

[81] David Robinson, Jr., Powell v. Texas*: The Case of the Intoxicated Shoeshine Man—Some Reflections a Generation Later by a Participant*, 26 AM. J. CRIM. L. 401, 435 (1999).

[82] The doctrinal foundation of the volitional reading is somewhat complex, and warrants a brief clarification. For the volitional reading to carry the day, the *Powell* plurality's holding—that a chronic alcoholic may be convicted of public intoxication—must be limited to the facts of Powell's case, while *Robinson* must be extended to include Justice White's dictum that "[if] it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion." *Powell*, 392 U.S. at 548 (White, J., concurring) ("Punishing an addict for using drugs convicts for addiction under a different name."). Proponents of the volitional reading argue that White's dictum is congruent with the four dissenters' putative holding that the state may not punish those who are "powerless to choose not to violate the law," *id.* at 567 (Fortas, J., dissenting), and therefore that White's vote should be added to the dissenters' votes to form a majority holding on the law. *See, e.g.*, Smith, *supra* note 4, at 316. The volitional reading may be fortified by White's near joining with the dissenters one month before the Court handed down its opinion. *See* Robinson, *supra* note 81, at 432. However, proponents of the status/act reading have taken some of the bite out of the volitional reading by pointing out that Justice White dissented in *Robinson*, and, after all, concurred in *Powell*, and speculate that White's disputed dictum in *Powell* "was simply illustrating some of the absurdities of [*Robinson*'s] analysis," by applying it to a hypothetical "slippery slope" scenario. *Id.* at 431; *see also* Joyce v. City & County of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994) ("One can only hypothesize that Justice White would actually have cast his vote differently had [Powell] been homeless. Nothing underscores this point more vividly than the fact that Justice White was one of two vigorous dissenters in *Robinson*."). Meanwhile, even some scholars in favor of the constitutionalization of "personal culpability as a condition for conviction" acknowledge that *Powell* limited *Robinson*'s holding and point to White's dissent in Robinson as a "portent." *See, e.g.*, Kadish, *supra* note 4, at 965 ("Justice White . . . thought Justice Stewart's [majority opinion in *Robinson*] would logically demand that it must also be cruel and unusual punishment to punish an addict for using the narcotic to which he is addicted.").

[83] Robinson, *supra* note 81, at 435.

Powell as controlling and have applied it to factual situations involving punishment for non-volitional conduct, as opposed to mere status.[84]

It is worth noting as well that the volitional reading has manifested itself outside of American courthouses. The Model Penal Code suggests a voluntary act requirement as an element of every offense: "A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."[85] Several states have incorporated this voluntary act requirement into their criminal codes.[86] Further, the highest court of Canada has judicially recognized the requirement, albeit through the due process provisions of its Charter of Rights and Freedoms.[87]

White's concurrence in *Powell* is considered by many to be the closest the U.S. Supreme Court has come to consummating its "flirtation with the possibility of a constitutional criminal law doctrine" that would have mandated a voluntary act requirement.[88] However, the status/act reading remains the dominant judicial interpretation of *Robinson* and *Powell*, and the seemingly bright line the status/act reading draws is frequently cited as a rationale for giving it preference over the volitional reading.

III. *KELLOGG* AND *JACKSON*: THE CURRENT STATE OF THE *ROBINSON* DOCTRINE

How bright is the line between status and conduct? This section will discuss two recent cases which have applied strict status/act readings of *Robinson* and *Powell* to the Eighth Amendment claims of criminal defendants. These cases reveal the arbitrary consequences of drawing a purely linguistic distinction between status and conduct.

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[84] *See, e.g.*, Johnson v. City of Dallas, 860 F. Supp. 344, 348-49 (N.D. Tex. 1994) ("Justice White's prescient comments in his concurring opinion relate homelessness to the issue of status as first conceived in *Robinson* . . . ."), *rev'd*, 61 F.3d 442 (5th Cir. 1995); Pottinger v. City of Miami, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992) ("Although Justice White joined the majority in rejecting the appellant's challenge to his conviction, he did so only because he found the record insufficient to support the appellant's claim that his public alcoholic condition compelled him to appear in public while drunk."); People v. Kellogg, 14 Cal. Rptr. 3d 507, 526 (Cal. Ct. App. 2004) (McDonald, J., dissenting). One commentator who opposes this reading of *Powell* has pointed out the reluctance of the plurality—and that of Justice White—to place "constitutional restraints on social policy in the empirically and normatively complex area of substance abuse." Robinson, *supra* note 82, at 402. This same commentator also takes aim at the reasoning of White's opinion. *Id.* at 431.

[85] MODEL PENAL CODE § 2.01(1) (1965).

[86] *See, e.g.*, DEL. CODE ANN. tit. 11, § 242 (2005); OHIO REV. CODE ANN. § 2901.21(1) (West 1997); 18 PA. CONS. STAT. ANN. § 301(a) (West 1998).

[87] The Queen v. Logan, [1990] S.C.R. 731.

[88] Kadish, *supra* note 4, at 966.

A. *STATE V. KELLOGG*: WHITE'S HYPOTHETICAL REALIZED

In June 2004, a California appeals court decided the case of Thomas Kellogg.[89] Kellogg, a homeless alcoholic, had been arrested several times for public intoxication and sentenced to 180 days in jail.[90] He appealed his conviction, arguing that, because he was both homeless and an alcoholic, he had no choice but to appear drunk in public, and therefore punishing him was cruel and unusual.[91]

Kellogg's argument relied on the volitional reading of *Robinson* and *Powell*.[92] Like Leroy Powell, Thomas Kellogg was convicted of "being drunk in a public place"—in other words, he was convicted of an act, as opposed to being punished for his mere "status" of being an alcoholic.[93] Unlike Powell, however, Kellogg "was homeless at the time of his arrest[]."[94] In his *Powell* concurrence, Justice White indicated that his vote would have been different were Leroy Powell homeless:

> The fact remains that some chronic alcoholics must drink and hence must drink somewhere. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. . . . 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.[95]

The majority and dissenting opinions in *Kellogg* are situated on either side of the debate over how—as a matter of doctrinal interpretation—to read *Robinson* and *Powell*.[96] The dissent, while acknowledging that Justice White's concurrence in *Powell* "is not binding on this court,"[97] took pains

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[89] People v. Kellogg, 14 Cal. Rptr. 3d 507 (Cal. Ct. App. 2004).

[90] *Id.* at 511.

[91] *Id.* at 508.

[92] *See supra* Part II.C.

[93] *Kellogg*, 14 Cal. Rptr. 3d at 513.

[94] *Id.* at 510.

[95] Powell v. Texas, 392 U.S. 514, 551 (1968) (White, J. concurring) (emphasis omitted). In a dissenting opinion in *Kellogg*, Justice McDonald pointed out that the facts of *Kellogg* were virtually identical to White's hypothetical scenario of the drunk with no home:

> Justice White's concurring opinion in *Powell* strongly suggests that he would have joined the four dissenting justices had the record in that case shown the defendant was a chronic alcoholic who was not homeless by choice and therefore could not have done his drinking in private or avoid being in public while intoxicated.

14 Cal. Rptr. 3d at 526 (McDonald, J., dissenting).

[96] *See supra* notes 80-85 and accompanying text.

[97] *Kellogg*, 14 Cal. Rptr. 3d at 527 (McDonald, J., dissenting).

to point out that "[f]ive members of the [*Powell*] Court would extend the 'status crime' rationale to matters other than 'mere' status . . . if the conduct were compelled by the condition."[98] The majority was "not persuaded,"[99] although it did not specifically dismiss the authority of White's opinion,[100] and, in fact, drew a comparison between the facts of *Kellogg* and Justice White's analysis of the facts of *Powell*.[101]

Thus, neither the dissent nor the majority in *Kellogg* seem willing either to embrace or to reject Justice White's *Powell* concurrence as authority. In this ambiguous doctrinal context, it seems significant, as the dissent argued, that the facts of *Kellogg* appear to match almost perfectly White's hypothetical of the alcoholic without a home.[102] As the *Kellogg* dissent pointed out, White seemed to imply that he would have voted with the dissent—and hence changed the outcome of the case—had Powell, like Kellogg, been both homeless and addicted to alcohol, and therefore unable to avoid appearing intoxicated in public.[103] Nevertheless, the majority rejected Kellogg's argument that punishing him for public intoxication violated the Eighth Amendment.[104] In upholding Kellogg's conviction and sentence, the court reasoned that Kellogg had been arrested, not merely for being drunk in public, but for posing "a safety hazard" and by "blocking a public way," thus satisfying *Robinson*'s requirement that criminal culpability be based on conduct, as opposed to mere status.[105]

In the same paragraph, however, the court appeared to find Kellogg culpable merely for the potential danger posed by his status, rather than for his actual conduct:

> The facts of Kellogg's public intoxication in the instant case show a clear *potential* for [] harm. He was found sitting in bushes on a freeway embankment in an inebriated

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[98] *Id.* at 526 (internal quotation marks omitted).

[99] *Id.* at 513 (majority opinion).

[100] *See id.* 512-14; *cf.* Joyce v. City of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994) ("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.*") (emphasis added).

[101] *Kellogg*, 14 Cal. Rptr. 3d at 513 (citing Powell v. Texas, 392 U.S. 514, 554 n.5 (1968)) ("[White] acknowledged that the dictates of the defendant's and the public's safety made it constitutional for 'a police officer to arrest any seriously intoxicated person whom he [or she] encountered in a public place.'").

[102] *Powell*, 392 U.S. at 551.

[103] *See id.*; *Kellogg*, 14 Cal. Rptr. 3d at 527 (McDonald, J., dissenting).

[104] *Id.* at 513 (majority opinion).

[105] *Id.*

> state. It is not difficult to imagine the *serious possibility* of danger to himself or others had he wandered off the embankment onto the freeway.[106]

This analysis underscores the difficulty of distinguishing between status and conduct. Was Kellogg's conduct simply appearing drunk in public? Was it appearing drunk on a freeway embankment? Or was it creating a "serious possibility of danger to himself or others"? In any event, it is readily apparent that the distinction provided by the status/act reading is far from a bright line.[107] Justice Marshall, in *Powell*, and Justice White, dissenting in *Robinson*, expressed a similar concern with the volitional reading.[108] The *Kellogg* majority's application of the status/act reading seems particularly unsound in light of the slippery slope arguments of those who favor it.

It is worth noting that in one other respect, the *Kellogg* majority misunderstood *Robinson*. Relying on precedent from the California Supreme Court,[109] the court held that "[b]ased on the guidance provided by *Powell* and *Sundance*, we conclude that the California Legislature's decision to allow misdemeanor culpability for public intoxication, even as applied to a homeless chronic alcoholic such as Kellogg, is neither disproportionate to the offense nor inhumane."[110] However, *Robinson* and *Powell* did not apply a "proportionality principle" to punishing status.[111] As

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[106] *Id.* (emphasis added).

[107] While no court has discussed the issue of linguistic manipulation in the context of an Eighth Amendment claim raised by homeless litigants, a similar issue arises when homeless persons raise void-for-vagueness arguments. For example, in a case decided four years after *Powell*, the Supreme Court struck down a vagrancy ordinance on vagueness grounds, since the language of the statute did not give fair notice of what conduct was prohibited, and therefore encouraged arbitrary enforcement. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). More recently, however, several courts have dismissed vagueness arguments raised by homeless litigants against camping ordinances (i.e., municipal laws that ban the performance of life-sustaining activities—such as sleeping, eating, and urinating—in public). *See, e.g.*, Joyce v. City of San Francisco, 846 F. Supp. 843, 863 (N.D. Cal. 1994); Tobe v. City of Santa Ana, 892 P.2d 1145, 1167 (Cal. 1995). The formal similarity between vagueness and status/act arguments in this context should not be overlooked: vague laws allow arbitrary enforcement by police, while judges may uphold statutes that target status by arbitrarily drawing lines between status and act.

[108] *See Powell*, 392 U.S. at 534 ("Even if we limit our consideration to chronic alcoholics, it would seem impossible to confine the principle within the arbitrary bounds which the dissent seems to envision."); Robinson v. California, 370 U.S. 660, 688 (1962) (White, J., dissenting) ("[T]he Court's opinion bristles with indications of further consequences.").

[109] Sundance v. Municipal Court, 729 P.2d 80 (Cal. 1986).

[110] *Kellogg*, 14 Cal. Rptr. 3d. at 514.

[111] *See supra* Part II.A.

Justice Stewart reasoned in *Robinson*, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[112]

B. *JACKSON V. COMMONWEALTH*: A STATUS BY ANY OTHER NAME

Another recent case underscores the difficulty of distinguishing between status and conduct.[113] In *Jackson*, the defendant had been declared a habitual drunk pursuant to a state statute that allowed local courts to enter an "order of interdiction" against any person who "has shown himself to be a habitual drunkard."[114] Once a person has been interdicted he may be held criminally liable for possessing alcoholic beverages, or being "drunk in public."[115]

Since the interdiction order, Jackson "had received sentences ranging from sixty days to seven months and had not remained out of jail for any period longer than a month."[116] He testified at his trial that "although he knows that it is illegal for him to drink, he cannot stop drinking."[117] Nevertheless, the court rejected his argument that the Virginia law outlawing the purchase of alcohol by interdicted people violated the Eighth Amendment by punishing him for his addiction to alcohol.[118] The court reasoned that the statute "imposes no criminal sanction for the status of being an alcoholic [but rather] forbids specific behavior: possession of alcohol and public drunkenness by interdicted persons."[119]

The *Jackson* court's reasoning seems to adhere closely to the status/act reading of *Robinson* and *Powell*. By purchasing alcohol, Jackson had indeed committed an act, and as a strictly technical matter, he was being punished for that act rather than for his status as an alcoholic.[120] If Jackson had performed this act before being interdicted, however, it would not have been a crime. Thus, under Virginia's statutory scheme, punishing Jackson's status as an alcoholic adds one step to California's direct criminalization of drug addiction in *Robinson*.[121] Once Jackson was interdicted for being an alcoholic, his otherwise innocent conduct could be punished.

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[112] *Robinson*, 370 U.S. at 667.

[113] Jackson v. Commonwealth, 604 S.E.2d 122 (Va. Ct. App. 2004).

[114] VA. CODE ANN. § 4.1-333 (2005).

[115] *Id.* § 4.1-322.

[116] *Jackson*, 604 S.E.2d at 124.

[117] *Id.*

[118] *Id.* at 125.

[119] *Id.*

[120] *Id.*

[121] Robinson v. California, 370 U.S. 660, 661 (1962).

Virginia's statutory scheme may represent a more attenuated way to punish status than the law in *Robinson*. The result, however, is the same: the law essentially waits for the addict to succumb to his addiction, at which point he has committed a crime. Under that status/act reading, *Robinson* is all but a dead letter.

As a textual matter, the Eighth Amendment is intended to prohibit the state from inflicting cruel and unusual punishment.[122] As Justice White noted in his *Robinson* dissent, it is difficult to discern how punishing status directly (as did the law in *Robinson*) is any more cruel or unusual than punishing status indirectly (as does the law in *Jackson*).[123] If the California statutory scheme at issue in *Robinson* allowed the state to interdict prescription drug addicts and then to arrest interdicted addicts for filling prescriptions, it is unlikely that the *Robinson* Court would have found the scheme any less cruel and unusual than the direct criminalization of drug addiction. Thus, the *Jackson* court could easily have ruled differently using the same status/act principle it used to uphold Jackson's conviction.

IV. IS HOMELESSNESS A STATUS UNDER THE MEANING OF *ROBINSON*?

The definition of conduct under the status/act reading of the Robinson doctrine is far from clear. But what about the definition of a status? This section discusses two cases involving homeless plaintiffs challenging municipal ordinances proscribing certain public behavior. These cases both apply status/act readings of *Robinson* and *Powell*, but reach opposite results. In the first case, the court found that the notion of punishing status must include the involuntary or life-sustaining acts that are derivative of status membership, and that the camping ordinances at issue violated the Eighth Amendment.[124] In the second case, the court read the laws in question literally, and found that because they nominally punished conduct and not status, they passed constitutional muster.[125] Before applying these status/act analyses, however, both Courts addressed the threshold question

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[122] U.S. CONST. amend. VIII.

[123] *See Robinson*, 370 U.S. at 688 (White, J., dissenting); *see also* Smith, *supra* note 4, at 312-13 (arguing that a status/act reading of *Robinson* and *Powell* would not prevent the state from inflicting cruel and unusual punishment, but rather would prevent the state from violating the Due Process Clause by limiting the reach of the state's police power, allowing the state only to punish conduct within its borders).

[124] Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) ("The harmless conduct for which [plaintiffs] are arrested is inseparable from their involuntary condition of being homeless.").

[125] Joyce v. City of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994) ("On no occasion . . . has the Supreme Court invoked the Eighth Amendment in order to protect acts derivative of a person's status.").

of whether homelessness is a status, and attempted to formulate broader definitions of status under the meaning of *Robinson*.[126] This question has taken on new relevance in recent months, in the wake of Hurricane Katrina, which left many residents of the Gulf Coast region homeless.[127]

A. *POTTINGER V. CITY OF MIAMI*: A THREE-PART TEST FOR STATUS

In *Pottinger v. City of Miami*, a class of homeless plaintiffs requested that Miami "be enjoined from arresting homeless individuals for inoffensive conduct, such as sleeping or bathing, that they are forced to perform in public."[128] The court held that such arrests violated the Eighth Amendment, and ordered the city to "establish two 'safe zones' where homeless people who have no alternative shelter can remain without being arrested for harmless conduct such as sleeping or eating."[129]

The *Pottinger* court's conclusion that arresting homeless persons for involuntary, life-sustaining activities conduct violated the Eighth Amendment turned on three significant findings of fact that collectively formed what one scholar has termed a "three part test" for determining whether homelessness is a status.[130] The test is contextual: whether homelessness is a status depends on factual determinations in a given case.[131]

The first part of the test is whether homelessness is voluntary or involuntary.[132] At trial, the plaintiffs' witness James Wright, "an expert in the sociology of the homeless," testified that "homeless individuals rarely, if ever, choose to be homeless."[133] Thus, the first part of the test would seem to be satisfied in most situations.

The second part of the test is whether the municipality has adequate shelter space to house its homeless population.[134] In *Pottinger*, because of limited shelter space in the city of Miami—which was exacerbated by a

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[126] *Pottinger*, 810 F. Supp. at 1563-65; *Joyce*, 846 F. Supp. at 857-58.

[127] *See* Sid L. Mohn, *From Extreme Crisis Comes Clarity*, CHI. TRIB., Oct. 2, 2005, at C1:

> Hundreds of thousands of hurricane victims are now dispersed throughout the country, many of them jobless, homeless, physically injured or emotionally traumatized. Unless our public support systems for the poor and the disadvantaged are bolstered in the face of this turmoil, there is a danger this temporary hardship could devolve into a permanent cycle of poverty.

[128] 810 F. Supp. at 1554.

[129] *Id.* at 1584.

[130] Foscarinis, *supra* note 7, at 43.

[131] *Pottinger*, 810 F. Supp. at 1564-65.

[132] *Id.* at 1557.

[133] *Id.*

[134] *Id.* at 1558.

recent natural disaster—"the majority of homeless individuals [in the city] literally have no place to go."[135]

The third part of the test is whether the city has set aside spaces where the homeless may legally perform life-sustaining activities in public.[136] In *Pottinger*, the court found that in Miami, "there is no public place where [the homeless] can perform basic, essential acts such as sleeping without the possibility of being arrested."[137] If the three elements of the test are satisfied, the court implied, homelessness should be considered a status.[138]

Under the alternative readings of *Robinson* and *Powell* discussed above,[139] these findings of fact could potentially yield two opposite outcomes. A status/act reading would lead to a conclusion that sleeping and eating in public are conduct, and therefore, it is within the state's police power to arrest people for performing these acts. However, under a volitional reading, because homeless persons have no choice but to perform these public activities, the laws as applied to them are unconstitutional.

The *Pottinger* court recognized the difficulty of the former reading, and, like the dissenting opinion in *Kellogg*,[140] looked to Justice White's concurring opinion in *Powell* as authoritative:

> To paraphrase Justice White, plaintiffs have no place else to go and no place else to be. This is so particularly at night when the public parks are closed. 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 eighth amendment—sleeping, eating and other innocent conduct.[141]

The underpinnings of this decision, as mentioned above, are threefold, and it is worthwhile to consider each part of the test individually.[142]

1. The First Part of the Pottinger *Test*

The first part—that homeless persons "rarely, if ever, choose to be homeless"[143]—is the most controversial. There is a consensus among social scientists, who have identified a variety of economic and social factors beyond a person's control that may lead an individual to become

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[135] *Id.* at 1559.
[136] *Id.* at 1560.
[137] *Id.*
[138] *Id.* at 1565.
[139] *See supra* Part II.C.
[140] *See supra* Part III.A.
[141] 810 F. Supp. at 1565 (citation omitted).
[142] Foscarinis, *supra* note 7, at 43.
[143] *Pottinger*, 810 F. Supp. at 1557.

homeless,[144] but there is a significant public perception that homelessness is the result of personal moral failure, or even of a choice of lifestyle.[145] There is also a public perception that homeless people are a particularly dangerous or deviant segment of the population:

> There is "a strong tendency for the public to link homelessness to deviant status." A majority (53.5%) of people surveyed in 1990 agreed with at least one of the following statements: homeless people are "more dangerous than other people," are "more likely to commit violent crimes than other people," or "should be kept from congregating in public places in the interest of public safety." . . . Large percentages of opinion poll respondents have favored "criminalization" solutions [to the homeless problem], including . . . prohibitions on panhandling (69.9%), setting up temporary shelter in public parks (69.1%) and sleeping overnight in public places (50.8%).[146]

At times, conflicting images of the homeless—as on the one hand, dangerous and morally culpable, and on the other, helpless—overlap. As one journalist observed, the most common attitude toward the homeless might simply be ambivalence.[147] This ambivalence is exacerbated when one considers that some homeless persons choose not to live in shelters,[148] while others (including Thomas Kellogg) actively refuse social services offered to them.[149] One might see these refusals of assistance as indicators that homelessness is a free choice. However, a determination of homelessness as voluntary or involuntary arguably should not turn on the individual decisions of homeless persons to seek or avoid shelter:

> For most homeless people, there are significant elements of both agency and compulsion in the decisions they make. It may be that for many, homelessness is at some level "voluntary." But the range of choices available to homeless individuals may be so narrow and so unsatisfying that a condition many of us cannot imagine being freely chosen is indeed the least of all possible evils.[150]

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[144] Foscarinis, *supra* note 7, at 8-12.

[145] *See, e.g.*, Debra J. Saunders, *Whither the Special City?*, S.F. CHRON., Nov. 2, 2003, at D4.

[146] Daniels, *supra* note 7, at 720-21 (citing a 1990 survey entitled "Public Attitudes and Beliefs about Homeless People").

[147] Saunders, *supra* note 145.

[148] *See, e.g.*, Corey Kilgannon, *At Home Under Highway, Even as Rats Flee*, N.Y. TIMES, Jan. 23, 2003, at B1.

[149] *See* People v. Kellogg, 14 Cal. Rptr. 3d 507, 508 (Cal. Ct. App. 2004); Saunders, *supra* note 145.

[150] Daniels, *supra* note 7, at 716.

2. *The Second Part of the* Pottinger *Test*

The second part of the *Pottinger* test for whether homelessness is a status—that the homeless have "no place to go"[151]—is intimately related to the first part, that homelessness is not a matter of choice.[152] As one federal district court noted:

> There are not enough beds available at the area shelters to accommodate the demand. Some persons do not meet a particular shelter's eligibility requirements. For many of those homeless in Dallas, the unavailability of shelter is not a function of choice; it is not an issue of choosing to remain outdoors rather than sleep on a shelter's floor because the shelter could not provide a bed that one found suitable enough.[153]

What distinguishes the second element from the first is that whether a homeless person has a place to go will vary depending on what city he lives in, and on whether the city has any available shelter space.[154] Courts upholding anti-sleeping laws simply do not address the simple arithmetic of this element.[155] However, courts striking down camping ordinances invoke the housing shortages in the cities enacting the ordinances:

> The lack of low-income housing or shelter space cannot be underestimated as a factor contributing to homelessness. At the time of trial, Miami had fewer than 700 beds available in shelters for the homeless. Except for a fortunate few, most homeless individuals have no alternative to living in public areas.[156]

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[151] Pottinger v. City of Miami, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992).

[152] *Id.* at 1557.

[153] Johnson v. City of Dallas, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev'd*, 61 F.3d 442 (5th Cir. 1995).

[154] *See, e.g.*, Foscarinis, *supra* note 7, at 40.

[155] *See, e.g.*, Tobe v. City of Santa Ana, 892 P.2d 1145, 1166-67 (Cal. 1995) (no mention of the number of shelter beds available in section of opinion concerning "Punishment for Status"). The opinion in *Tobe* omitted the lower court's factual finding that "[t]he housing element of the city's own 1989 general plan noted, 'The average daily count of homeless persons in Santa Ana is estimated at approximately 3,000 persons.' There was shelter for but 332 of them." Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 387 (Cal. App. Ct. 1994); *see also* Joyce v. City of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994). In *Joyce*, the Court did not dispute plaintiffs' contention "that from January to July of 1993, an average of 500 homeless persons was turned away nightly from homeless shelters." *Id.* at 849. Nevertheless, the Court refused to define homelessness as a status, reasoning that "homelessness does not analytically fit into a definition of a status under the contours of governing case law [and] the effects which would ensue from [a determination of status] would be staggering. *Id.* at 858; *see infra* Part IV.B.

[156] *Pottinger*, 810 F. Supp. at 1558; *see also Johnson*, 860 F. Supp at 350; Church v. City of Huntsville, Civ. A. No. 93-C-1239-S, 1993 WL 646401, at *2 (N.D. Ala. 1993), *vacated*, 30 F.3d 1332 (11th Cir. 1994) ("There is insufficient public housing in Huntsville. As of May 1991, between 400 and 600 families were on the waiting list for public housing in Huntsville. As of that date, there were an estimated 120 homeless persons living on the

3. The Third Part of the Pottinger Test

The third part of the *Pottinger* test is the culmination of the first two: Because homelessness is not a choice, and because the homeless litigant finds himself living in a city with inadequate shelter space, he has no choice but to break the law because "there is no public place where [he] can perform basic, essential acts such as sleeping without the possibility of being arrested."[157]

This part forms the crux of the dispute between advocates for the homeless and those who feel that city governments are entitled to use their police power to keep cities attractive, safe, and clean.[158] The homeless and their advocates view "camping ordinances" as part of a campaign "to drive homeless residents from the city."[159] One federal district court, in granting homeless plaintiffs' request for an injunction against a city's use of such a campaign, described some of the tactics that the municipality had used in an apparent effort to remove the homeless population from its streets:

> It is the unannounced, but nonetheless official, policy of the City of Huntsville to isolate homeless citizens from the established residential areas of the city and ultimately, in the words of Councilman King, ". . . to show these folks where the city limits are . . . ," i.e., to remove this class of citizens from Huntsville. . . . The City of Huntsville uses its inspection department and zoning laws in an uneven manner to discourage the establishment and continued operation of homeless shelters in residential areas of the city. . . . The City of Huntsville uses its police department to facilitate and promote its policy of isolating and removing its homeless citizens from the city. Homeless citizens have been regularly harassed in parks and other public places by Huntsville policemen over a period of time simply because of their status as homeless citizens. On occasion, class members have been detained by Huntsville policemen, taken beyond the city limits of the City of Huntsville, and then abandoned—in literal pursuit of the city's official policy. The homeless are at times harassed by policemen for simply walking or congregating in certain sections of the City of Huntsville. They have been ordered out of city parks by city employees and told not to return, even though they were not violating any laws at the time.[160]

The *Church* court granted the plaintiffs' request for a preliminary injunction against such practices.[161] However, the court did not cite "any specific constitutional provision or case precedent [in holding] that the city

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streets of Huntsville. There is no credible evidence of any improvement in these matters during the last two years.").

[157] *Pottinger*, 810 F. Supp. at 1560.

[158] *See* Maya Nordberg, *Jails Not Homes: Quality of Life on the Streets of San Francisco*, 13 HASTINGS WOMEN'S L.J. 261, 297 (2002).

[159] McConkey, *supra* note 7, at 633.

[160] *Church*, 1993 WL 646401, at *2.

[161] *Id.* at *3.

had a constitutional duty not to discriminate against the homeless."[162] Perhaps as a result of this oversight, the decision was vacated by the Eleventh Circuit.[163] In vacating the decision, the Eleventh Circuit cited a videotape of a City Council meeting in Hunstsville that depicted "a number of homeowners complain[ing] about some real problems resulting from a violation of City ordinances and building codes by and on behalf of the homeless . . . and angrily demand[ing] that the homeless be removed from their neighborhoods *immediately*, regardless of the procedural mandates of state or municipal law."[164]

The circuit court noted that the videotape went on to show two of Huntsville's five City Council members "explaining to their constituents the legal limitations on municipal action, including the need to respect the rights of the homeless."[165]

Notwithstanding the laudable responses of these Council members to their constituents' complaints, the court's description of the Hunstville City Council meeting is illuminating, for it illustrates at least one opinion that the public holds of homeless persons, and is indicative of the sort of political pressure put on local lawmakers to remove the homeless from their communities.[166] As one scholar has observed, these public opinions often lead to legislative policies that marginalize the homeless: "The change in the public's attitude [from sympathy to intolerance] has been reflected in the policies of local governments. A growing number of city administrations have established policies and laws that now make life more difficult, and at times impossible, for the homeless."[167]

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[162] Daniels, *supra* note 7, at 709.

[163] Church v. City of Huntsville, 30 F.3d 1332 (11th Cir. 1994).

[164] *Id.* at 1343-44.

[165] *Id.* at 1344.

[166] The National Coalition for the Homeless, a Washington, D.C. advocacy group, recently published a thorough report of municipal policies that target the innocent behavior of homeless persons. *See* NAT'L COALITION FOR THE HOMELESS, ILLEGAL TO BE HOMELESS: THE CRIMINALIZATION OF HOMELESSNESS IN AMERICA (2004), *available at* http://www.nationalhomeless.org/crimreport/report.pdf [hereinafter N.C.H. REPORT]. The *N.C.H. Report* notes that local governments receive pressure and coercion to criminalize innocent conduct of the homeless from local business owners as well as national lobbying organizations:

> Private property owners are often able to persuade city officials to limit the use of public space and establish Business Improvement Districts, or BIDs. These areas exclude people with no access to private property from public property. [Two conservative think tanks'] recommendations for regulating public space limits the use of common property and seeks to justify exclusion by calling homeless people criminals and threats to public safety.

Id. at 5-6.

[167] Smith, *supra* note 4, at 299.

The *Pottinger* court addressed this seemingly insoluble problem in a novel way: it ordered the parties to

> establish two "safe zones" where homeless people who have no alternative shelter can remain without being arrested for harmless conduct such as sleeping or eating. In establishing these arrest-free zones, counsel should consider the proximity of the areas to feeding programs, health clinics and other services. In addition, the parties are encouraged to develop a procedure for maintaining the areas.[168]

B. *JOYCE V. SAN FRANCISCO*

In contrast to *Pottinger*, a federal district court in California refused to grant a preliminary injunction against the city of San Francisco's "Matrix Program," which, by the City's account, was designed

> to address citizen complaints about a broad range of offenses occurring on the streets and in parks and neighborhoods . . . 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.[169]

The plaintiffs—a class of homeless persons challenging the Matrix Program—raised an Eighth Amendment argument similar to the one raised by Thomas Kellogg: in the case of homeless litigants, Justice White's concurring opinion in *Powell* should be read as controlling.[170]

Applying a status/act reading, the *Joyce* court found, as a preliminary matter, that the Matrix Program, unlike the statute punishing drug addiction in *Robinson*, "targets the commission of discrete acts of conduct, not a person's appearance as a vagrant vel non."[171] Because it was considering whether to grant a preliminary injunction—and therefore whether the plaintiffs could demonstrate "a substantial likelihood of success on the merits of the underlying suit"[172]—the court addressed whether homelessness was a status.[173]

The court made three efforts to avoid classifying homelessness as a status.[174] First, it explicitly rejected the argument in *Pottinger* that the lack of available shelter beds in a city should be a factor in determining whether

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[168] Pottinger v. City of Miami, 810 F. Supp. 1551, 1584 (S.D. Fla. 1992).

[169] Joyce v. City of San Francisco, 846 F. Supp. 843, 846 (N.D. Cal. 1994).

[170] *Id.* at 855.

[171] *Id.*

[172] *Id.* at 856.

[173] *Id.* at 856-58.

[174] *Id.*

homelessness is a status,[175] stating that "status cannot be defined as a function of the discretionary acts of others."[176] Therefore, homelessness is not a status because "the housing provided to the homeless is a matter for the discretion of the City and State."[177]

This first attempt to define status in a manner that would exclude homelessness relies on the principle, expressed by the U.S. Supreme Court,[178] that a state is not constitutionally required to provide housing for its residents.[179] From the perspective of *Robinson*, however, this principle seems irrelevant. For Eighth Amendment purposes, status membership—as evidenced by the drug-addicted defendant in *Robinson*—is not related to one's status in other constitutional contexts.

The *Joyce* court's second effort to exclude homelessness from status differentiated status from mere "condition" by explaining that "[w]hile 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), and the degree to which an individual has control over that characteristic."[180] Like some drug addicts, some homeless people are born homeless, and they therefore acquire their homelessness involuntarily and have no control over whether they have a home.[181] Indeed, "it may also be argued that usually there is a lesser degree of 'choice' or voluntariness involved in becoming homeless than in becoming a drug addict."[182] More importantly, the Court's definition of status in *Robinson* did not turn on whether the defendant had become a drug addict voluntarily or involuntarily.[183]

The *Joyce* court derived its distinction between status and condition from Justice Marshall's plurality opinion in *Powell*.[184] This reference to *Powell* is misleading. Marshall's distinction was between the status of

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[175] *Id.* at 857; *see also* Pottinger v. City of Miami, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992).

[176] *Joyce*, 846 F. Supp. at 857.

[177] *Id.* at 857 n.9 (citations omitted).

[178] *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("The Constitution does not provide judicial remedies for every social and economic ill . . . . Absent constitutional mandate, the assurance of adequate housing [is a legislative function].").

[179] *See Joyce*, 846 F. Supp. at 857 n.9 (citing *Lindsey*).

[180] *Id.* at 857.

[181] *See, e.g.*, Laurie Monsebraaten & Jim Rankin, *Losing a Home for the Homeless*, TORONTO STAR, Feb. 3, 2003, at B4.

[182] McConkey, *supra* note 7, at 642.

[183] Robinson v. California, 370 U.S. 660, 662 (1962). The defendant simply denied that he had used or was addicted to narcotics, and the jury apparently did not believe him. *Id.*

[184] Powell v. Texas, 392 U.S. 514, 533 (1968).

chronic alcoholism and the condition of intoxication.[185] The dissent in *Powell* argued that Leroy Powell's condition of being drunk was "a characteristic part of the pattern of his disease and which, the trial court found, was not the consequence of appellant's volition."[186] Considering the *Powell* Court's understanding of "condition," categorizing homelessness as a condition is not helpful.

The *Joyce* court's third effort to exclude homelessness from status involves the notion that homelessness may be more easily or quickly remedied than drug addiction.[187] As the court stated, "while homelessness can be thrust upon an unwitting [*sic*] 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."[188] The court did not elaborate on what, exactly, the distinction is, but one scholar has speculated that the court "seems to have found significance in the fact that, while a homeless person immediately loses her 'status' when provided with housing, a drug addict's road to recovery is less assured."[189] However, the court "appears to have ignored previous scholarly and judicial discourse on the rationales underlying the *Robinson* doctrine. The relevant inquiry regarding changing a status is not *how quickly* a status can be changed but whether leaving the status is within the defendant's power."[190]

The simplest inquiry into whether a homeless person has the power not to be homeless is the second part in the *Pottinger* test, viz., whether the city has adequate shelter space.[191] However, the *Joyce* court rejected this inquiry when it concluded, contrary to *Robinson*, that "status cannot be defined as a function of the discretionary acts of others."[192]

The *Joyce* court's convoluted definition of status underscores the nagging difficulty at the heart of the *Robinson* doctrine. More disturbing than the logical holes in *Joyce*'s argument for a definition of status, however, is the premise of that argument. If homelessness is not a status, then, according to *Joyce*, it would not violate the Eighth Amendment to punish a person for the "crime" of being homeless. Of course, the Supreme Court has declared vagrancy statutes unconstitutional on Due Process

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[185] *Id.*

[186] *Id.* at 558 (Fortas, J., dissenting).

[187] Joyce v. City of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994).

[188] *Id.*

[189] Smith, *supra* note 4, at 327.

[190] *Id.* at 327-28.

[191] Pottinger v. City of Miami, 810 F. Supp. 1551, 1558 (S.D. Fla. 1992).

[192] *Joyce*, 846 F. Supp. at 857.

grounds.[193] Simply because a law punishing the status of vagrancy has been struck down on vagueness grounds, however, does not mean that the law would pass muster under the Eighth Amendment. Thus, it seems that what is left of *Joyce*'s position is its initial premise for denying the injunction against the challenged sections of the Matrix Program: that these laws "target[] discrete acts of conduct."[194]

V. POLICY IMPLICATIONS OF APPLYING THE *ROBINSON* DOCTRINE TO CAMPING ORDINANCES

Whether courts apply a status/act or a volitional reading of *Robinson* and *Powell*, they ought to recognize the policies behind laws targeting innocent conduct. The two primary policy rationales for camping ordinances—which punish sleeping, eating and other victimless activities when performed in public—are fairly intuitive, although one is considered by many to be legitimate, while the other remains unspoken.

The first rationale includes camping ordinances in a crime-reduction scheme that has come to be known as "quality-of-life enforcement,"[195] and which is designed to create "increased police-citizen contact as a way to create and maintain order in our urban streets and to decrease serious crime."[196] Proponents of this scheme—which is also known as the "order-maintenance approach" or the "Broken Windows" theory[197]—"affirmatively promote youth curfews, anti-gang loitering ordinances, and order-maintenance crackdowns as *milder alternatives* to the theory of incapacitation and increased incarceration."[198] The premise underlying these quality-of-life measures is that cracking down on minor offenses will create an appearance of order in public spaces, which will deter "serious criminal activity."[199]

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[193] *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). *Papachristou* struck down a municipal ordinance making it a criminal offense to be a vagrant on vagueness grounds. *Id.* at 171; *see supra* text accompanying note 68. *Joyce* rejected the plaintiffs' vagueness argument on the ground that the Matrix Program is not "impermissibly vague in all of its applications." 846 F. Supp. at 862.

[194] *Id.* at 855.

[195] Nordberg, *supra* note 158, at 276.

[196] BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 2 (2001).

[197] "Broken Windows" is the title of an influential 1982 article by the sociologists James Q. Wilson and George L. Kelling. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29-38.

[198] HARCOURT, *supra* note 196, at 5.

[199] *Id.* at 2-3.

The second, more hidden, rationale for camping ordinances is that, by allowing the police to harass the homeless through "removal or targeted arrest campaigns" to the point where the homeless can no longer live in a given city, elected officials appear to be "doing something" about the homeless problem in their cities.[200] In other words, camping ordinances, particularly when they become part of a police campaign, eliminate homeless people from the view of the populace by making it illegal for the homeless to live in the city.[201] This rationale is cosmetic[202]—unlike the quality-of-life rationale, it does not target the homeless by way of nominally deterring serious crimes.[203] A policy of cosmetic removal leads to one of two outcomes. The first is a "domino effect": if the homeless cannot live in one city, they are simply forced to move to a more tolerant city.[204] The second is a costly cycle of "arrest, prosecution, and court enforced-service planning."[205]

The second outcome played out in the San Diego Police Department's treatment of Thomas Kellogg.[206] In addition to raising constitutional questions, Kellogg's case is indicative of why a pure status/act reading of *Robinson* and *Powell*, under which camping ordinances are upheld because they nominally punish conduct, lead to unfavorable outcomes from a public

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[200] Nordberg, *supra* note 158, at 275-76.

[201] *See* Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 387 (Cal. Ct. App. 1994) (citing a Santa Ana municipal memo stating that "[a] task force has been formed in an effort to deal with the vagrants. City Council has developed a policy that the vagrants are no longer welcome in the City of Santa Ana.").

[202] *See* N.C.H. REPORT, *supra* note 166, at 16. The report discusses the increased attention that Little Rock, Arkansas law enforcement officials paid to the homeless population of that city just prior to the opening of the Clinton Presidential Center in November of 2004. *Id.* The report notes as well that when the Mayor of Little Rock "was asked whether the sweeps [of homeless populations around this time] had anything to do with tourism, he said, 'Absolutely.'" *Id.* The report found that when it came to mistreating its homeless population, Little Rock was the "meanest city in America." *Id.* at 16-18. Atlanta, Cincinnati, Las Vegas, Gainesville, New York City, Los Angeles, San Francisco, Honolulu, and Austin, TX, rounded out the top ten, in that order. *Id.* at 18-29.

[203] *See* HARCOURT, *supra* note 196, at 2-3.

[204] McConkey, *supra* note 7, at 667 ("[W]here there is a domino effect of neighboring communities adopting similar ordinances, the game of musical chairs may take the form of homeless populations being cycled from one community to another.").

[205] Nordberg, *supra* note 158, at 298.

[206] People v. Kellogg, 14 Cal. Rptr. 3d 507, 508-11 (Cal. Ct. App. 2004); *see supra* Part III.A. As of 2004, there were "2,019 shelter beds and 4,458 homeless people" in San Diego, where Thomas Kellogg was arrested for public intoxication. N.C.H. REPORT, *supra* note 166, at 67. The report cites a homeless advocate, who notes that, due to police crackdowns, "homeless people are sleeping in more remote areas [of the city] to avoid tickets." *Id.* Kellogg was arrested while sitting on a freeway embankment. *Kellogg*, 14. Cal. Rptr. 3d at 508.

policy standpoint.[207] Somewhat paradoxically, the policy implications of applying the status/act reading to homeless persons are most evident in Justice Haller's majority opinion when she is expressing her own sympathy for Kellogg, and describing the compassion of Kellogg's jailers and arresting officers.[208]

Judging from the facts in the opinion, the police who arrested Kellogg, and his jailers, were apparently kind to him.[209] Moreover, this kindness seems to be the result of official police procedures: the officer who arrested Kellogg for the first time, Heidi Hawley, is "a member of the [city's] Homeless Outreach Team," which "consists of police officers, social services technicians, and psychiatric technicians," which, on prior occasions had approached Kellogg to offer him assistance, and which once before had taken Kellogg to the hospital for medical care.[210] In jail, Kellogg received a variety of medical attention, including assistance for alcohol withdrawal.[211] At trial, a physician testifying for the prosecution testified that Kellogg's condition improved in jail.[212]

While the compassionate police treatment of Kellogg is heartening, it suggests a gap between the state of the law of public intoxication as applied to homeless alcoholics and public policy considerations.[213] In short, the law allows the homeless to be arrested, and then obliges the police to care for them.[214] However, as Kellogg contended, because he was a "chronic" or "serial" alcoholic, he was apparently ineligible for "the option of civil detoxification."[215] The facts of Kellogg's case are not only suggestive of the cruel reality that people like Thomas Kellogg are perpetually exposed to criminal liability; they also attest to the futility of applying camping ordinances compassionately.[216]

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[207] *See* N.C.H. REPORT, *supra* note 166, at 6. ("The legal challenges resulting from criminalizing homelessness have proven costly for both homeless people and for those who prosecute them.").

[208] *Kellogg*, 14 Cal. Rptr. 3d at 515 ("We are sympathetic to Kellogg's plight. . . ."). Indeed, Justice Haller's sympathy is indicative of the dilemma that criminalizing homelessness has caused for the criminal justice system, including law enforcement officers. As one homeless advocate has noted, "The police are not bad guys. They're being put in the middle of a very serious social problem." N.C.H. REPORT, *supra* note 166, at 68.

[209] *Kellogg*, 14 Cal. Rptr. 3d at 508-11.

[210] *Id.* at 508-09, 508 n.2.

[211] *Id.* at 510.

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.* at 516 n.9.

[216] According to a report prepared by one homeless advocacy group:

Meanwhile, as one scholar has suggested, abandoning a regime of camping ordinances not only will oblige cities to "[d]eliver[] comprehensive services to homeless people," but will lead to "more effective and cheaper" means for cities to address the homeless problem.[217] At any rate, courts should not remain complicit in legislative efforts to keep homeless people out of sight of the voting public. Simply put, courts should not hide behind slavish status/act readings of the *Robinson* doctrine to enable legislators to appease their constituents. Not only is such an application of the *Robinson* doctrine a distortion of the principle underlying *Robinson v. California*, it leads to cosmetic and ineffectual methods of dealing with a widespread and substantial social problem and allows cities to "pass the buck" to cities making good-faith efforts to solve the homeless problem.[218]

VI. THE BEHAVIORAL/CONTEXTUAL READING: A NEW, FAIRER PRINCIPLE FOR APPLYING THE *ROBINSON* DOCTRINE

How, then, can courts strike down camping ordinances and other laws that for all practical purposes punish status, without neutering municipalities' police power? The answer may well lie in the *Robinson* doctrine.

Even many of those who reject a volitional reading of the *Robinson* doctrine still recognize intuitively that there is something wrong with branding someone a criminal for doing something that it is beyond their power to avoid doing.[219] On the other hand, courts have found it difficult to assert a limiting principle that would prevent lawmakers from targeting innocent conduct like sleeping in public, while allowing them to punish truly culpable—or at least harmful—conduct, such as buying or using drugs.[220]

It is more expensive to detain a person in jail than to house and offer services. According to the National Law Center on Homelessness and Poverty 2003 report, Punishing Poverty: The Criminalization of Homelessness, Litigation, and Recommendations for Solutions, the cost of providing jail, excluding the cost of the police resources used in the arrest, exceeds $40 per day. Some say the daily cost is as much as $140. In comparison, the average cost of providing counseling, housing, food, and transportation for one day is approximately $30.

N.C.H. REPORT, *supra* note 166, at 6-7.

[217] Nordberg, *supra* note 158, at 299; *see also* N.C.H. REPORT, *supra* note 166, at 6-7.

[218] *See id.* at 6-8.

[219] For instance, Justice Clark, dissenting in Robinson, recognizes that the state should (and, in the case of California, did) provide for civil commitment for "addicts who have lost the power of self-control." Robinson v. California, 370 U.S. 660, 681 (1962) (Clark, J., dissenting).

[220] *See* Powell v. Texas, 392 U.S. 514, 534 (1968).

To date, proponents of the volitional reading have adopted or attempted to formulate tests that rely on overly subjective or factually burdensome standards of analysis. One scholar, for instance, has suggested a test for applying the *Robinson* doctrine to "symptomatic acts":

> If the case involves symptomatic acts [derived from status], then a test should be applied based on the homelessness paradigm. The following would have to be established for the Robinson doctrine to apply to symptomatic acts: (a) the "act" would have to be involuntary, (b) the status would have to be one that "cannot be changed" through individual volition except with significant outside assistance and (c) the "act" would have to be inextricably related to the status such that, as with the homelessness case, criminalization of the act obviously criminalized the status.[221]

Unfortunately, this test—while it will result in a finding that camping ordinances are unconstitutional—leaves open to manipulation the definition of such terms as "involuntary,"[222] "cannot be changed," "inextricably," and "obviously," and remains vulnerable to Justice Marshall's slippery slope argument in *Powell*.[223]

The court in *Pottinger* devised a more objective test, but one that would require defendants employing *Robinson* defenses to obtain factual information that may be difficult to obtain, and at any rate may not convince an unsympathetic court that their conduct was unavoidable.[224] The *Pottinger* test essentially requires a homeless litigant to prove that the number of homeless persons living in the city on the night when he or she was arrested exceeded the number of available shelter beds.[225] That proof would be difficult for a homeless litigant to establish, not least because calculating homeless populations usually involves a degree of estimation that courts may simply reject on evidentiary grounds.[226]

The tests described above are derived from volitional readings of the *Robinson* doctrine, and thus are likely to be rejected by any court attracted to the seemingly bright-line status/act reading.[227] However, these strict status/act readings—which claim legitimacy based on the purportedly self-evident difference between a status and an act—are equally susceptible to

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[221] Smith, *supra* note 4, at 334.

[222] *See* Daniels, *supra* note 7, at 715 ("Advocates should consider abandoning the argument that the behavior of homeless people is 'involuntary'. . . .").

[223] *See Powell*, 392 U.S. at 534 ("[I]t is difficult to see how a State can convict an individual for murder, if that individual . . . suffers from a 'compulsion' to kill . . . .").

[224] For a discussion of the three-part *Pottinger* test, see *supra* Part III.A. For a discussion of one court's effective dismantling of the test, see *supra* Part III.B.

[225] *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992).

[226] *See* Smith, *supra* note 4, at 297 n.24.

[227] *See, e.g.*, People v. Kellogg, 14 Cal. Rptr. 3d 507, 513 (Cal. Ct. App. 2004).

uncertainty.[228] Furthermore, these readings strip the *Robinson* doctrine of its fundamental substance, that the criminal law should strive, to the extent possible, to punish only the culpable.[229]

The *Robinson* and *Powell* Courts clearly did not contemplate the homeless epidemic that would arise in the 1980s, and that may be severely exacerbated by Hurricane Katrina. However, given the "evolving standards of decency" rationale of the Court's Eighth Amendment jurisprudence—and invoked by Justices Stewart and Douglas in *Robinson*[230]—one can argue that the *Robinson* majority would not have tolerated a law making it a crime simply to be without a home. Similarly, it is likely that the *Robinson* Court would have frowned upon criminalization of the innocent *acts* of homeless persons. Thus, to reduce the *Robinson* doctrine to a strict status/act reading—in addition to creating a false and easily malleable dichotomy between status and act[231]—is also a clear undermining of *Robinson*'s holding, which, although difficult to articulate, remains good law.

Courts could solve the dilemma of how to articulate the *Robinson* doctrine—while not edging down the slippery slope as Justice Marshall[232] and others[233] have feared—simply enough by distinguishing between innocent and culpable conduct. The test for determining whether conduct is innocent or culpable would be this: is the targeted conduct only unlawful in a particular context? If so, then the conduct is innocent, and if the defendant is unable either to escape the context, or avoid performing the conduct,[234] it would violate the Eighth Amendment to hold him criminally liable.[235]

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[228] *See supra* Part IV.B.

[229] *See* Robinson v. California, 370 U.S. 660, 668 (1962) (Douglas, J., concurring); *see also* State v. Searcy, 798 P.2d 914, 933 (Idaho 1990) (McDevitt, J., dissenting) (internal quotations omitted) ("The conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good; there can be no criminality in the sense of moral shortcoming if there is no freedom of choice or normality of will capable of exercising a free choice." (quoting Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1004)).

[230] *See Robinson*, 370 U.S. at 666-68.

[231] *See supra* Parts III.A-B.

[232] *See* Powell v. Texas, 392 U.S. 514, 534 (1968).

[233] *See, e.g.*, Robinson, *supra* note 81, at 434-35.

[234] This test is referred to as a "contextual reading" of the *Robinson* doctrine.

[235] As a procedural matter, this two-part test could serve as the elements of a constitutional affirmative defense, under which the defendant would have the burden of proving that the conduct he is being punished for is innocent and that, because of who he is, he cannot escape the context in which the conduct becomes unlawful. The factual framework established by the *Pottinger* court may provide some guidance as to how a defendant could mount such a defense. *See supra* Parts IV.A.1-3.

To understand this contextual reading, one must draw a distinction between laws that criminalize specific conduct in all spacial and temporal contexts—such as theft, homicide, rape, assault, and buying or possessing drugs—and laws that criminalize conduct only when performed in certain contexts, that is, in certain times and places, or under certain circumstances. The latter category includes the various forms of disturbing the peace and public indecency. Because very few people, if any, are unable to refrain from disturbing the peace, a defendant invoking a contextual reading of the *Robinson* doctrine as a defense to one of these charges would be unsuccessful.

On the other hand, a homeless litigant charged with sleeping in public—a contextual crime—can argue that he does not have a home and had nowhere else to sleep. Under a status/act reading of the *Robinson* doctrine, the argument would fail, because sleeping is an act. Under a volitional reading, his argument is correct, but, as Justice Marshall argued, so would be the argument of a person charged with homicide who "suffers from a compulsion to kill."[236] No homicide defendant could employ the contextual reading as a defense, since his conduct is culpable regardless of the context in which he has committed it.

There are several acts, of course, whose culpability is a function of the context in which they are performed—and a contextual reading of the *Robinson* doctrine accommodates criminalization of these acts. For instance, a person who has a valid driver's license, but whose blood alcohol level is above the legal limit, is prohibited from driving. His conduct (driving) is unlawful only in a certain context (when he is intoxicated). Unless he is an alcoholic, a driver can avoid becoming drunk, and therefore he is liable for driving drunk. Even if the drunk driver is an alcoholic, he is not compelled to drive.[237]

The contextual reading of the *Robinson* doctrine has three benefits. First, it would quell the fears of adherents of the status/act reading, who warn that if the volitional reading is adopted, the State would lose the

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[236] *Powell*, 392 U.S. at 534.

[237] Of course, a class of laws—sometimes known as "quasi-criminal" laws—has come to be accepted as a legitimate exercise of state power to regulate morally neutral aspects of public welfare. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 708 (2005). This class—which includes strict liability or "malum prohibitum" offenses lacking a mens rea element and carrying light penalties—should perhaps be excepted from the contextual reading of the Robinson doctrine advocated by this comment, because they often involve innocent conduct that can't be avoided by the offender. However, this exception is acceptable given the minimal stigma attached to these offenses. *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 319 (2003).

ability to punish even the compulsive killer for his act of homicide.[238] In all jurisdictions in the United States, homicide is a crime whenever and wherever (within the jurisdiction) it is committed.[239] Thus, under a contextual reading, punishing homicide would not violate the Eighth Amendment.

The second benefit of the contextual reading is that it would avoid arbitrary distinctions between status and act,[240] because status is not the focal point of the analysis. As we have seen, judicial discussions of whether homelessness is a status under the meaning of *Robinson* lead to contrary conclusions.[241] Such analyses, whatever their conclusions, neglect to mention that under the "evolving standards of decency" principle invoked by *Robinson*,[242] the question of whether or not homelessness is a status is irrelevant: no state in 2006 would pass a law making it illegal simply to be without a home.[243]

Similarly, such an analysis would allow judges to avoid making ad hoc determinations of what defines conduct.[244] Some courts put life-sustaining activity on the status side of the status/act divide,[245] while others adhere to the principle that any action that can be described by a verb (unless, apparently, that verb is "to be") is conduct.[246] A person's culpability should not come down to such linguistic niceties. Under the contextual reading the determination of culpability is made objectively, by reference to the state's penal code: if the conduct is criminalized by the state in all contexts, it is culpable.

The third benefit of the contextual reading is that it would continue to allow legislatures to ameliorate social ills through the criminal law, for example by creating "safe zones" for the homeless.[247] Under such a scheme, the legislature could target socially undesirable conduct because the homeless would be able to avoid liability by moving to a designated safe zone. Under a contextual reading of the *Robinson* doctrine, a homeless

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[238] *See Powell*, 392 U.S. at 534.

[239] *See id.* at 559 (Fortas, J., dissenting).

[240] *See supra* Parts III.A-B, IV.B.

[241] *See supra* Part IV.

[242] Robinson v. California, 370 U.S. 660, 666-67, 668 (1962).

[243] Not least because *Papachristou v. City of Jacksonville* struck down vagrancy laws on vagueness grounds over thirty years ago. *See supra* note 107.

[244] *See supra* Parts III.A-B.

[245] *See supra* Part IV.A.

[246] *See supra* Part IV.B.

[247] *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1584 (S.D. Fla. 1992) (enjoining the city "from arresting homeless individuals for sleeping or eating in" the two designated safe zones).

person arrested for sleeping outside of the safe zone would not be able to mount a successful *Robinson* defense.

Although such a solution may seem distasteful—it effectively "quarantines" the homeless in designated areas—it is at least preferable to "quarantining" the homeless in jails and subjecting them to criminal liability. The scheme would also be fiscally beneficial to municipalities that lack adequate funding for social services. Moreover, delivering social services to the homeless may prove far simpler in a safe-zone city than in a city whose homeless population is widely dispersed. Finally, as sociologist Jane Jacobs described, whether by design or not, cities by their very nature tend to breed areas in which "unwelcome users" congregate, but which are not officially arrest-free zones.[248]

However difficult it has been to encapsulate in a rule, *Robinson*'s holding was designed to prevent branding people as criminals because of who they are (as opposed to what they do), and distinguishing between status and conduct has not furthered this goal. Because the *Robinson* doctrine has been controversial and subject to differing interpretations, those who favor the doctrine's continuing utility would be well-served by an expression of the doctrine that is maximally neutral, rigid, and objective.

VII. CONCLUSION

This Comment has attempted to show that there is an alternative to the volitional reading and the status/act reading of the *Robinson* doctrine. These two readings of the doctrine create the opposite dangers of allowing the state to punish non-culpable conduct in a manner inconsistent with the spirit of the doctrine, and limiting the state's police power by eroding its ability to punish culpable conduct.

As the forty years of post-*Robinson* jurisprudence have demonstrated, however, a status/act reading of the *Robinson* doctrine can yield egregious results, including the conviction of homeless persons for the "crimes" of sleeping and eating,[249] and the conviction of alcoholics for the "crime" of purchasing liquor.[250] The *Robinson* Court seemingly intended to craft a

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[248] JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 98 (1961). As Jacobs notes (using slightly dated terminology), the socially marginal tend to favor the parts of cities that have already been abandoned by the upper strata: "The perverts who completely took over Philadelphia's Washington Square for several decades were a manifestation of this city behavior, in microcosm. They did not kill off a vital and appreciated park. They did not drive out respectable users. They moved into an abandoned place and entrenched themselves." *Id.*

[249] *See* Joyce v. City of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994).

[250] *See* Jackson v. Commonwealth, 604 S.E.2d 122 (Va. Ct. App. 2004).

constitutional principle that would prevent such results. If judges can look to an objective standard for applying the *Robinson* doctrine there will be no danger that the doctrine will de-criminalize conduct that is truly culpable. By focusing on the question of whether targeted conduct is innocent or culpable, judges and lawmakers can look to objective standards of determining whether a law punishes innocent people because of their status.