

STATUS-BASED PROSECUTION: CONFLICT, CONFUSION AND THE QUEST FOR COHERENCE

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ABSTRACT

In two seminal cases from the 1960s, the U.S. Supreme Court addressed the extent to which the Eighth Amendment permitted the punishment of status versus conduct linked to status. The splintered decisions and analytical imprecision that resulted from those cases have bedeviled lower courts ever since, and the Supreme Court has refused to clarify the confusion. This uncertainty has manifested most recently in the context of homelessness, as courts have disagreed passionately over whether laws criminalizing “life-sustaining” activities in public are unconstitutional as applied to persons who lack private spaces to perform these activities. The status/conduct debate has also engaged scholars who have argued, at times irreconcilably, that a host of criminal statutes impermissibly punish status, including: the cash bond system (poverty); public bathroom laws (gender identity); fetal exposure to illegal drugs (pregnancy); and driving without a license (immigration status). To lend coherence to this area of law, this Article argues that the meaning of status in criminal law should take account of the insights offered by sociologists who have studied this issue in great detail for decades. Incorporating the sociological perspective is not only important in the creation of a workable framework addressing status and conduct; it recognizes, at the same time, the primacy of status in defining who we are and what access status affords to a host of societal benefits.

INTRODUCTION

In two seminal cases from the 1960s, *Robinson v. California* and *Powell v. Texas*, the U.S. Supreme Court held respectively that, while the Eighth Amendment disallowed punishment based solely on an individual’s addiction to the use of narcotics, it did not preclude the imposition of criminal sanctions on conduct linked to one’s addiction—*e.g.*, public drunkenness for chronic alcoholics. Because the justices split 4-1-4 in *Powell*, courts have struggled to discern the precise parameters of its status/conduct distinction, and the Court has done little to clarify this confusion in the decades since these cases were decided. Most recently, the burgeoning homelessness crisis confronting many communities has provided a perfect crucible for this debate as a sharply divided Ninth Circuit sparred over the extent to which governments can

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criminalize life-sustaining conduct engaged in by homeless residents in public in the absence of readily available alternatives.

This Article starts by defining the source of the status/conduct conundrum through careful scrutiny of *Robinson* and *Powell* with particular attention to the so-called *Marks* rule, which is meant to guide lower courts' interpretations of splintered U.S. Supreme Court opinions. Part II turns to lower court caselaw applying the status/conduct distinction with a focus on laws targeting the homeless, where *Robinson* and *Powell* have proved especially relevant. The divergent perspectives that have emerged with respect to the constitutionality of punishing conduct linked to status inform the scholarship in this area, addressed in Part III, which argues that a host of criminal statutes impermissibly punish status, including: the cash bond system (poverty); public bathroom laws (gender identity); fetal exposure to illegal drugs (pregnancy); and driving without a license (immigration status). These wide-ranging, at times irreconcilable, arguments underscore the chaos that presently prevails in differentiating status from conduct. To lend coherence to this area of law, Part IV argues that the meaning of status in criminal law should take account of the insights offered by sociologists who have studied this issue in great detail from *Robinson* and *Powell* forward. Incorporating the sociological perspective is not only important in the creation of a workable framework addressing status and conduct; it recognizes, at the same time, the primacy of status in defining who we are and the extent to which we can access societal benefits that impact quality of life.

I. DEFINING THE PROBLEM

In *Robinson v. California*,¹ a seven-justice majority decided that a California statute that criminalized addiction “to the use of narcotics”² violated the Eighth Amendment prohibition on cruel and unusual punishment.³ The statute’s constitutional infirmity rested primarily on its failure to require that the proscribed conduct take place within the state of California. The judge instructed the jury that it could convict the defendant based simply on proof

¹ 370 U.S. 660 (1962).

² The crime, a misdemeanor, required incarceration of “not less than 90 days nor more than one year in the county jail.” 1963 Cal. Stat. § 11721 (repealed 1972).

³ The Eighth Amendment specifies that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

beyond a reasonable doubt that “while in the City of Los Angeles he was addicted to the use of narcotics.”⁴ As such, as long as he remained addicted, Robinson would be “continuously guilty” anywhere in California “whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.”⁵

As the majority further noted, by failing to require a culpable *actus reus*, the California statute essentially prescribed criminal liability based on the “status” or “chronic condition” of narcotic addiction.⁶ The justices likened this to criminalizing other afflictions such as mental illness, leprosy or venereal disease. Just as the Eighth Amendment would not tolerate punishment for having “a common cold,” nor does it permit incarceration for other illnesses, including addiction.⁷ The Court also recognized that addiction is an illness that “may be contracted innocently or voluntarily.”⁸ This reference to voluntariness, while not a ground of decision in *Robinson*, merits attention nonetheless in light of *Powell*, to which we now turn.

Leroy Powell, a chronic alcoholic, was convicted under a Texas statute that prohibited public drunkenness.⁹ By a vote of 5-4, the Court upheld Powell’s conviction, rejecting his argument that *Robinson* precluded this result. However, Justice White, who provided the critical fifth vote, did not join Justice Marshall’s opinion announcing the Court’s judgment.¹⁰ The resultant

⁴ *Robinson*, 370 U.S. at 663.

⁵ *Id.* at 666.

⁶ *Id.* at 665. Justice Harlan was less convinced than others in the majority that addiction is an “illness” outside the reach of the criminal law. *Id.* at 678 (Harlan, J., concurring). He agreed, however, with the Court’s *actus reus* analysis – that is, that the California statute ran afoul of the Eighth Amendment by prescribing punishment based on “a bare desire to commit a criminal act.” *Id.* at 679 (Harlan, J., concurring).

⁷ *Id.* at 667. The Court notes that California could have lawfully sought to commit Robinson civilly for compulsory treatment of his addiction. *Id.* at 665. Justice Douglas expounds further on this alternative, noting that the “addict is a sick person” who may “be confined for treatment or for the protection of society.” *Id.* at 676 (Douglas, J., concurring). However, to use criminal prosecution as a substitute for available medical intervention to address a person’s illness is, in his opinion, both unconstitutional and “barbarous.” *Id.* at 678.

⁸ *Id.* at 667. For example, a person can become addicted to narcotics that have been lawfully prescribed and infants can be born addicted based on their mothers’ use of drugs or alcohol. *Id.* at 667 n.9.

⁹ The statute in question provided: “Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.” *Powell v. Texas*, 392 U.S. 514, 517 (1968) (citing TEX. PENAL CODE ANN. art. 477 (West 1948)).

¹⁰ *Id.* at 548–54 (White, J., concurring in the result).

4-1-4 split has bedeviled lower courts ever since, as they struggle to distinguish impermissible punishment based on status from the criminalization of conduct linked to that status.

A. The Powell Plurality

Justice Marshall, joined by Justices Black, Harlan and Chief Justice Warren, viewed *Robinson* as a case about the statutory requirement of a culpable *actus reus* to withstand federal constitutional scrutiny.¹¹ Because Powell's conviction was based on the commission of antisocial conduct—not his alcoholic “status”—the prosecution was lawful and did not contravene *Robinson*.¹² The plurality further opined that *Robinson* did not address whether states can criminalize conduct that is “involuntary” or “occasioned by a compulsion” that an individual is “powerless to change.”¹³ This alternative construction, urged by the dissenters, troubled the plurality on multiple levels.

First, if involuntary conduct linked to illness or disease were deemed outside the reach of the criminal law, how could law enforcement justify the prosecution of chronic alcoholics for other offenses such as assault, theft, robbery or drunk driving if they committed them while intoxicated when inhibitions are grossly impaired?¹⁴ The dissent dismisses this concern as not “foreseeable,” reasoning that such conduct is not “due to a compulsion symptomatic of that disease,”¹⁵ but the plurality is not convinced.¹⁶ Nor does the plurality see how the dissent's expansive view of *Robinson* would be limited to chronic alcoholics like Powell. Immunity from prosecution could logically extend, for example, to murderers with a “compulsion to kill” and individuals who commit crimes while legally insane.¹⁷ The foregoing underscores what Justice Black, in his concurrence, labels the “logical

¹¹ *Id.* at 533.

¹² *Id.* at 532. The plurality noted, in this regard, that Powell's “public behavior which may create substantial health and safety hazards.” *Id.*

¹³ *Id.* at 533.

¹⁴ *Id.* at 534.

¹⁵ *Id.* at 559 n.2. (Fortas, J., dissenting).

¹⁶ *Id.* at 534 (characterizing the dissent's position as “limitation by fiat”).

¹⁷ *Id.* at 534 (internal quotation marks omitted) (quoting *Commonwealth v. Phelan*, 234 A.2d 540, 547 (Pa. Super. Ct. 1967), *overruled by* *Commonwealth v. Walzack*, 360 A.2d 914 (Pa. 1976)); *id.* at 536. Justice Black expressed similar concern opining that, under the dissent's reasoning, “irresistible impulse” would constitute a complete defense to all crimes. *Id.* at 544 (Black, J., concurring).

difficulties” that flow from the voluntariness inquiry.¹⁸ In his view, this reality, coupled with the “inherently elusive” nature of the voluntariness inquiry, justifies both a state’s disregard of the concept in prosecutorial decision making and in the Court’s constitutional analysis in the status crimes context.¹⁹

There is a second aspect to the voluntariness inquiry: whether the defendant’s status, defined in *Robinson* and *Powell* by addiction, was acquired involuntarily. The plurality regards this issue as irrelevant, inasmuch as it did not inform the holding in *Robinson*.²⁰ The dissent emphasizes that the state did not argue that Powell acquired alcoholism voluntarily, noting the likelihood that the disease of alcoholism “may be innocently contracted” given how commonplace and socially accepted alcohol consumption is in the United States.²¹

B. Justice White’s “Concurrence in the Result”

Justice White’s opinion, while the briefest of the four issued in *Powell*, is arguably the most consequential. Because he refused to join Justice Marshall’s plurality opinion, White’s concurrence necessarily limits the precedential value of the former. To determine what lower courts should take away from *Powell*, we must first identify areas of agreement shared by all five justices. That is relatively easy: White reasons that prosecuting the defendant did not constitute cruel and unusual punishment because Powell’s alcoholism, while compelling him to drink, did not compel him to do so *in public*.²² The plurality agrees and further contends that states are free to prosecute any conduct linked to status; *Robinson* merely precludes punishment based on status alone.²³

White underscores his disagreement with this broader proposition at the very beginning of his concurrence noting that, if the Eighth Amendment prohibits having “an irresistible compulsion to use narcotics,” it logically must

¹⁸ *Id.* at 542.

¹⁹ *Id.* at 544.

²⁰ *Id.* at 534 (“That this factor was not determinative . . . is shown by the fact that there is no indication of how Robinson himself has become an addict.”).

²¹ *Id.* at 567 n.29 (Fortas, J., dissenting).

²² *Id.* at 549–50 (White, J., concurring in the result) (“The sober chronic alcoholic has no compulsion to be on the public streets; many . . . drink at home and are never seen drunk in public.”).

²³ *Id.* at 532 (noting that, unlike *Robinson*, *Powell* does not criminalize “a mere status” but, rather, prosecutes *behavior* that implicates “substantial health and safety hazards” and “offends the moral and esthetic sensibilities of a large segment of the community”) (emphasis added).

preclude prosecution for yielding to that compulsion.²⁴ “Punishing an addict for using drugs,” he succinctly notes, “convicts for addiction under a different name.”²⁵ The criminal prosecution of a chronic alcoholic who appears drunk in public might also be unconstitutional because he lost either the power to control his movements or to have arranged, when sober, to avoid appearing in public when intoxicated.²⁶ However, the record in *Powell* was devoid of any such evidence.²⁷

In light of the difficulty in meeting this evidentiary burden, White asserts that precluding the prosecution for public drunkenness of chronic alcoholics who cannot remain in private spaces “would hardly have radical consequences.”²⁸ First, this prohibition would have no effect on states’ authority to convict for other crimes, including those “involving much greater risk to society.”²⁹ Second, the application of this principle outside the area of alcoholism would have little impact. For example, with respect to narcotics addiction, the Eighth Amendment would bar prosecution “only for acts which are a necessary part of addiction, such as simple use.”³⁰

This last surmise, offered *in dicta*, has not created any limitation on states’ authority to prosecute addicted persons for acts that are a necessary product of their addiction. Indeed, arrests for the unlawful possession of controlled substances abound on the state and federal level without regard to a defendant’s addiction.³¹ White’s proposed limit on governmental authority over addiction-based conduct would be particularly important in recent years as the opioid epidemic has swept across the country, infecting—and killing—thousands from coast to coast.³² Synthetic opioids such as fentanyl have figured

²⁴ *Id.* at 548 (White, J., concurring in the result).

²⁵ *Id.*

²⁶ *Id.* at 551–52.

²⁷ *Id.* at 552–53.

²⁸ *Id.* at 552 n.4.

²⁹ *Id.*

³⁰ *Id.*

³¹ For example, 2019 saw an estimated 1,558,862 arrests for drug law violations in the United States, 86.7% of which were for possession of a controlled substance. *See Total Annual Drug Arrests in the United States by Offense Type*, DRUG POLY FACTS (2022), <http://drugpolicyfacts.org/node/234> [<https://perma.cc/6X27-ZQRH>].

³² In 2019 alone, nearly 50,000 people died from opioid-involved overdoses in the United States. *See Overdose Death Rates*, NAT’L HEALTH INST. ON DRUG ABUSE (Jan. 20, 2022), <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates> [<https://perma.cc/6VL6-UEFJ>].

prominently in this phenomenon,³³ due to their potency³⁴ and extraordinarily addictive qualities.³⁵

At first blush, lower courts' failure to adopt White's restriction on the authority to prosecute conduct linked to addiction seems curious, inasmuch as the four dissenting justices in *Powell* share this perspective.³⁶ However, as we shall see, the precedential value of a five-justice consensus is dependent on the decisional origins of that apparent majority.

C. *Plurality Opinions and the Marks rule*

Like *Powell*, *Marks v. United States*³⁷ was a fragmented case that produced multiple opinions, none of which enjoyed majority support. At issue was the extent to which the First Amendment precluded obscenity prosecutions. Justice Brennan, joined by Justice Fortas and Chief Justice Warren, applied a multipart test offering First Amendment protection unless, *inter alia*, the expression at issue is "utterly without redeeming social value."³⁸ Justice Stewart would sanction obscenity prosecutions only for "hardcore pornography,"³⁹

³³ See Colleen L. Barry, *Fentanyl and the Evolving Opioid Epidemic: What Strategies Should Policy Makers Consider?*, PSYCHIATRIC SERVICES 69:1, Jan. 2018, at 100; Josh Katz, *The First Count of Fentanyl Deaths in 2016: Up 540% in Three Years*, N.Y. TIMES (Sept. 2, 2017), <https://www.nytimes.com/interactive/2017/09/02/upshot/fentanyl-drug-overdose-deaths.html> [<https://perma.cc/C2VC-UEAH>]; Leo Beletsky & Corey S. Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 INT'L J. DRUG POL'Y 156, 157 (2017).

³⁴ It is estimated that this class of narcotics is up to 10,000 times more powerful than morphine. United Nations Office on Drugs and Crime, *World Drug Report 2017: Pre-Briefing to the Member States*, 25, (June 16, 2017), https://www.unodc.org/wdr2017/field/WDR_2017_presentation_launch_version.pdf [<https://perma.cc/W5CA-W8ZF>].

³⁵ Fentanyl binds to the body's opioid receptors which control pain and emotion. Once the brain adapts to the drug, continued use is necessary to feel pleasure which, in turn, often leads to drug seeking behavior. See *Fentanyl DrugFacts*, NIH: NAT'L INST. ON DRUG ABUSE (June 2021), <https://www.drugabuse.gov/publications/drugfacts/fentanyl> [<https://perma.cc/U6E9-8PV6>].

³⁶ The dissent notes, in this regard, that, like Robinson, defendant Powell suffers from a condition over which he has no control that compels him to drink to the point of intoxication. *Powell v. Texas*, 392 U.S. 514, 568 (1968) (Fortas, J., dissenting). However, unlike White, the dissenting justices consider Powell's appearance in public while inebriated to be an involuntary aspect of his alcoholism; as such, punishing him for this conduct would, in their opinion, violate the Eighth Amendment. *Id.* at 569-70.

³⁷ 430 U.S. 188 (1977).

³⁸ *Id.* at 191 (quoting *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966)).

³⁹ *Id.* at 193 (quoting *Memoirs*, 383 U.S. at 421).

while Justices Black and Douglas reiterated their previously stated position that essentially disallowed obscenity prosecutions in all cases.⁴⁰

In determining the precedential value of this splintered landscape, the Court explained that, in the absence of any single rationale that garners the support of a majority of the justices, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁴¹ Therefore, in the instant case, the First Amendment would presumably permit prosecution only if the allegedly obscene material at issue was found to be “utterly without redeeming social value.”⁴² While three concurring justices would provide even greater prosecutorial protection, they would join the plurality in foreclosing criminal proceedings based on proof of some measure of social value, making this the “narrowest ground” of decision on which a majority of justices agree.

While the foregoing application of *Marks* may seem straightforward at first blush, it has proven to be anything but. Professor Richard Re, a leading *Marks* scholar, has criticized the “logical subset” test as resting on a fallacy that someone who supports one position must necessarily support a “narrower” position.⁴³ For example, imagine that a plurality of three justices opposes capital punishment for all defendants while two others oppose it only for Christian defendants. While this would mean that a majority of the Court opposes the imposition of the death penalty against Christian defendants, it would be fallacious to argue that a rule based on this result would constitute a “logical subset” of the court’s reasoning; on the contrary, it is quite plausible that the three justices joining the plurality opinion would reject the position of the concurring justices as religiously discriminatory.⁴⁴

Some lower courts have expressed similar misgivings about the “logical subset” interpretation of *Marks*. Consider, for example, *Missouri v. Seibert*,⁴⁵

⁴⁰ *Memoirs*, 383 U.S. at 421 (referencing dissenting opinions by Justices Black and Stewart in *Ginzburg v. United States*, 383 U.S. 463 (1966) and *Mishkin v. New York*, 383 U.S. 502 (1966), respectively).

⁴¹ *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

⁴² *Id.* at 194.

⁴³ See Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1983 (2019).

⁴⁴ *Id.* Commentators have also referred to this phenomenon as the fallacy of “division” or “composition.” See, e.g., Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 243-49; Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 551 (2005).

⁴⁵ 542 U.S. 600 (2004).

where the Court split 4-1-4 in determining when an otherwise constitutional confession would be admissible if it was preceded by an unlawful confession obtained in violation of *Miranda v. Arizona*.⁴⁶ A plurality in *Seibert* adopted a five-part, fact-sensitive test for this purpose that relied on the objective circumstances surrounding the two confessions.⁴⁷ Applying these factors, they deemed *Seibert*'s confession inadmissible.⁴⁸ Justice Kennedy concurred in this result but did so only because the interrogator used a “deliberate, two-step strategy,” predicated in the first instance on violating *Miranda*.⁴⁹ No other justice agreed with Kennedy's reliance on an officer's intent in determining admissibility.⁵⁰

Under the logical subset test, Kennedy's concurrence would appear to control since it is the narrowest ground on which a majority of the Court agrees. While a number of federal appellate courts have interpreted *Seibert* in this way under *Marks*,⁵¹ others have been reluctant to do so. For example, the Tenth Circuit deemed *Marks*' logical subset approach “problematic” where, as in *Seibert*, the plurality and concurring opinions are analytically divergent.⁵² In such circumstances, there is no rhetorical “common denominator” on which five justices could agree and, accordingly, the case lacks a “determinate holding.”⁵³ The D.C. and First Circuits have concurred, noting the debate among lower courts about the precedential meaning of

⁴⁶ 384 U.S. 436 (1966).

⁴⁷ The five factors are: “[1] the completeness and detail of the questions and answers in the first round of interrogation, [2] the overlapping content of the two statements, [3] the timing and setting of the first and the second, [4] the continuity of police personnel, and [5] the degree to which the interrogator's questions treated the second round as continuous with the first.” *Seibert*, 542 U.S. at 615.

⁴⁸ *Id.* at 618.

⁴⁹ *Id.* at 621 (Kennedy, J., concurring in the judgment).

⁵⁰ *Id.* at 616 n.6, 624 (O'Connor, J., dissenting) (agreeing with the plurality's rejection of “an intent-based test”).

⁵¹ *See, e.g.*, *United States v. Capers*, 627 F.3d 470, 476 (2d Cir. 2010); *United States v. Torres-Lona*, 491 F.3d 750, 758 (8th Cir. 2007); *United States v. Williams*, 435 F.3d 1148, 1157–58 (9th Cir. 2006); *United States v. Street*, 472 F.3d 1298, 1313–14 (11th Cir. 2006); *United States v. Kiam*, 432 F.3d 524, 532 (3d Cir. 2006); *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States v. Mashburn*, 406 F.3d 303, 308–09 (4th Cir. 2005).

⁵² *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (quoting *King v. Palmer*, 950 F.2d 771, 781–82 (D.C. Cir. 1991) (en banc)).

⁵³ *Id.*

Seibert but choosing not to resolve the issue since, in the cases before them, both tests yielded the same result.⁵⁴

In *United States v. Ray*,⁵⁵ the Sixth Circuit went one step further by affirmatively rejecting Kennedy's concurrence, finding that it could not be regarded as the narrowest ground of decision when seven members of the Court affirmatively rejected its reasoning.⁵⁶ Concluding that *Seibert* produced no "binding rule of law," the *Ray* court adopted the plurality's multi-factor test in determining the admissibility of confessions where *Miranda* warnings were provided midstream, finding that it best reflected "the traditional focus in criminal procedure on the reasonable belief of a defendant in Constitutional jurisprudence."⁵⁷

The utter chaos surrounding *Marks* and *Seibert* is perhaps best illustrated by the Seventh Circuit's seventeen-year odyssey which spawned multiple conflicting opinions before an apparent resolution in 2021. The circuit's first three post-*Seibert* opinions (all involving the same case) treated Kennedy's intent-based standard as controlling, noting that it constituted the "narrowest ground for decision."⁵⁸ Then, in *United States v. Heron*,⁵⁹ a different panel disagreed, holding that the analytical incompatibility between the plurality and concurring opinion made the *Marks* rule inapplicable in *Seibert*. The court declined to decide, however, what rule(s) governed such situations, noting that the statements in question "would be admissible under any test one might extract."⁶⁰ It was not until 2021, twelve years after *Heron's* creation of an intra-circuit split, that the Seventh Circuit resolved the controversy by announcing that Justice Kennedy's concurrence in *Seibert* would prevail going forward.⁶¹

⁵⁴ *United States v. Straker*, 800 F.3d 570, 617 (D.C. Cir. 2015); *United States v. Widi*, 684 F.3d 216, 221 (1st Cir. 2012).

⁵⁵ 803 F.3d 244 (6th Cir. 2015).

⁵⁶ While Justice Breyer joined the plurality opinion but not Kennedy's concurrence in the result, he announced his agreement with the latter "insofar as it . . . makes clear that a good-faith exception applies." *Seibert*, 542 U.S. at 618 (Breyer, J., concurring). Even assuming, *arguendo*, that Breyer agrees with Kennedy's position, there would only two justices who supported the subjective-intent-of-the-interrogator test.

⁵⁷ *Ray*, 803 F.3d at 272.

⁵⁸ *United States v. Stewart*, 191 F. App'x 495, 497 n.2 (7th Cir. 2006) (unpublished). See also *United States v. Stewart*, 536 F.3d 714, 718-20 (7th Cir. 2008); *United States v. Stewart*, 388 F.3d 1079, 1089-90 (7th Cir. 2004).

⁵⁹ 564 F.3d 879, 884 (7th Cir. 2009).

⁶⁰ *Id.* at 885.

⁶¹ *United States v. Guillen*, 995 F.3d 1095, 1114 (7th Cir. 2021).

The Supreme Court is keenly aware of the uncertainty that surrounds *Marks*. In *Hughes v. United States*,⁶² this confusion was on full display as the justices grappled with the precedential value of a 4-1-4 split in *Freeman v. United States*.⁶³ As background, *Freeman* involved the question of whether a certain type of plea agreement permitted defendants to apply for a reduction in sentence if the Sentencing Guidelines lowered the range applicable to the offenses to which he pled guilty.⁶⁴ Siding with the defendant, the plurality reasoned that district courts had authority to provide the requested relief where that the sentencing range was “a relevant part of the analytic framework” that the district judge used in determining the term of imprisonment or approving the agreement.⁶⁵ Justice Sotomayor, who provided the critical fifth vote in favor of the defendant, agreed that *Freeman* was entitled to relief, but *only* because his plea agreement used a sentencing range provided by the Sentencing Guidelines.⁶⁶ In all other circumstances, she agreed with the dissent that allowing a redetermination of sentence would undermine the fundamental purpose of such agreements: “to bind the district court and allow the Government and the defendant to determine what sentence he will receive.”⁶⁷

Both the plurality and the dissent criticized Sotomayor’s position. Writing for the plurality, Justice Kennedy opined that Sotomayor’s compromise unwisely promotes sentencing disparities among defendants by sanctioning relief only where a specific agreement affirmatively contemplates sentence

⁶² 138 S. Ct. 1765 (2018).

⁶³ 564 U.S. 522 (2011).

⁶⁴ *Freeman* addressed a fairly technical issue concerning whether—and, if so, under what circumstances—binding “Type-C” plea agreements governed by the federal rules of criminal procedure are “based on” the Sentencing Guidelines such that a lowering of the sentencing range for the applicable offenses entitles a defendant to apply for a reduction in his agreed-upon term of incarceration. *Id.* at 525. For a thorough discussion of the three opinions issued in *Freeman* and their importance in federal law enforcement, see Julian A. Cook, III, *Plea Bargaining, Sentence Modifications and the Real World*, 48 WAKE FOREST L. REV. 65 (2013).

⁶⁵ *Freeman*, 564 U.S. at 530 (plurality opinion).

⁶⁶ *Id.* at 538–39 (Sotomayor, J., concurring in the judgment) (“If that Guidelines range is subsequently lowered by the Sentencing Commission, the defendant is eligible for sentence reduction.”).

⁶⁷ *Id.* at 536 (Sotomayor, J., concurring in the judgment). The extent to which courts may consider dissenting opinions in identifying a majority rule under *Marks* is itself unclear. Some have expressly rejected the use of dissents for this purpose. *See, e.g., King v. Palmer*, 950 F.3d 771, 777 (D.C. Cir. 1991). Others have not. *See, e.g., United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006).

reduction.⁶⁸ In his dissent, which focused entirely on Sotomayor's proposed rule, Chief Justice Roberts labeled it "arbitrary and unworkable,"⁶⁹ claiming that it eschews certainty in favor of "a free-ranging search . . . through the parties' negotiating history in search of a Guidelines sentencing range that might have been relevant to the agreement."⁷⁰

In *Hughes*, a case substantively similar to *Freeman*, the U.S. Supreme Court acknowledged that lower courts were divided on how to apply *Freeman*.⁷¹ Some, citing *Marks*, adopted Justice Sotomayor's concurrence in the judgment as controlling whereas others favored the plurality opinion.⁷² This distinction was critically important in *Hughes*, where the court of appeals had denied relief, finding that the defendant was ineligible for a reduction in sentence based on Justice Sotomayor's concurrence in the judgment in *Freeman*.⁷³ Petitioner Hughes argued that the concurrence lacked binding effect since its reasoning differed from that of the plurality;⁷⁴ that is, one was not a "logical subset" of the other.⁷⁵ He invited the Court to "take a fresh look" at *Freeman* while clarifying that only majority opinions merit precedential status.⁷⁶

While the Court granted *certiorari* on both the application of the *Marks* rule and the substantive legal question about sentence reductions for plea agreements under the Sentencing Guidelines,⁷⁷ discussion of the former dominated the oral argument. In lively exchanges with both counsel and each other, the justices debated a variety of issues related to *Marks*, including: whether only majority opinions should count as precedent;⁷⁸ whether the "logical subset" test is actually logical;⁷⁹ whether appellate judges would ever

⁶⁸ *Freeman*, 564 U.S. at 532-33 (plurality opinion).

⁶⁹ *Id.* at 544 (Roberts, C.J., dissenting).

⁷⁰ *Id.* at 551.

⁷¹ *Hughes v. United States*, 138 S. Ct. 1765, 1771-72 (2018).

⁷² *Id.*

⁷³ *United States v. Hughes*, 849 F.3d 1008, 1015-16 (11th Cir. 2017).

⁷⁴ Brief for Petitioner at 38, *Hughes v. United States*, 138 S. Ct. 1765 (2018) (No. 17-155), 2018 WL 565327, at *38.

⁷⁵ *Id.*

⁷⁶ *Id.* at 10, 55-59.

⁷⁷ Petition for Writ of Certiorari at i-ii, *Hughes v. United States*, 138 S. Ct. 1765 (2018) (No. 17-155), 2017 WL 3277403, at i-ii.

⁷⁸ Transcript of Oral Argument at 11-12, *Hughes v. United States*, 138 S. Ct. 1765 (2018) (No. 17-155).

⁷⁹ *Id.* at 14.

risk reversal by issuing a ruling with which five justices appear to disagree;⁸⁰ the importance of predictability for lower courts;⁸¹ whether dissents should be counted in getting to five votes;⁸² the extent to which *Marks* has proven problematic for lower courts;⁸³ whether overruling *Marks* would be “disruptive;”⁸⁴ and whether we should simply rely on “common sense” to guide lower courts in applying *Marks*.⁸⁵

Notwithstanding the Court’s engagement on *Marks*, the justices expressly declined to address it in deciding *Hughes*. Instead, the majority resolved the underlying issue in *Freeman*, replacing the splintered reasoning that had bedeviled lower courts facing sentence reduction requests involving Type-C plea agreements.⁸⁶ While Justice Sotomayor joined the majority opinion, she explained that she did so only to provide “clarity and stability in the law,” acknowledging that *Freeman*’s 4-1-4 split “left significant confusion in its wake.”⁸⁷ She continued to believe in the superiority of her resolution of the underlying issue, opining that it embodied the most convincing interpretation of the federal statute at issue.⁸⁸

II. LOWER COURT CONFUSION

Unsurprisingly, the ongoing controversy over the *Marks* rule has produced widespread divergence among lower courts when confronting status versus conduct issues that rely on *Robinson* and *Powell*. This confusion has been especially profound in homelessness cases where analytical fissures have emerged not only among the courts of appeal but within them as well. The Ninth Circuit illustrates this phenomenon most powerfully through its struggle to determine the constitutionality of laws that address the problems associated

⁸⁰ *Id.* at 9–10.

⁸¹ *Id.* at 19.

⁸² *Id.* at 21–23.

⁸³ *Id.* at 46–48.

⁸⁴ *Id.* at 52.

⁸⁵ *Id.* at 34.

⁸⁶ *Hughes*, 138 S. Ct. at 1772.

⁸⁷ *Id.* at 1779–80 (Sotomayor, J., concurring).

⁸⁸ *Id.* Ironically, Sotomayor’s vote was not critical in *Hughes*, as it had been in *Freeman*, due to changes in the composition of the Court. Justice Scalia was among the four dissenters in *Freeman*; however, his replacement, Justice Gorsuch, voted with the majority in *Hughes* creating a five-justice majority without Justice Sotomayor. *Id.* at 1770.

with homelessness by criminalizing certain life-sustaining conduct performed in public.

In a pair of cases in the 1990s, California courts first considered constitutional challenges to ordinances targeting the homeless. In 1994, *Joyce v. City and County of San Francisco*,⁸⁹ addressed the so-called “Matrix Program,” a consolidated assortment of state and city criminal ordinances forbidding numerous activities, including *inter alia*: public inebriation, sleeping in public parks, blocking sidewalks, possession of shopping carts and aggressive panhandling.⁹⁰ The court dismissed the claim that these enactments violated the Eighth Amendment rights of homeless persons on two grounds: first, that the Supreme Court has never invoked the constitutional prohibition on cruel and unusual punishment “to protect acts derivative of a person’s status;”⁹¹ and, “more fundamentally,” because “homelessness is not readily classified as a ‘status.’”⁹² With respect to the latter, the court differentiated an individual’s status, which is largely immutable, from a “condition” over which she or he has greater control and the punishment of which is not prohibited under *Robinson*.⁹³ Equating homelessness with statuses such as age, race and disease would impermissibly deny, the district judge concluded, “the efficacy of acts of social intervention” that could instantaneously provide the shelter a homeless person otherwise lacks.⁹⁴

In 1995, in *Tobe v. City of Santa Ana*,⁹⁵ the California Supreme Court considered the constitutionality of a municipal ordinance that banned camping and the storage of personal property in public areas. In rejecting the plaintiffs’ Eighth Amendment claim, the justices relied on the reasoning of the district judge in *Joyce* labeling homelessness a “condition.”⁹⁶ The court further noted the plaintiffs’ failure to demonstrate a lack of alternatives to being or becoming homeless.⁹⁷

⁸⁹ 846 F. Supp. 843 (N.D. Cal. 1994).

⁹⁰ See generally Nancy Wright, *Not in Anyone’s Backyard: Ending the “Contest of Nonresponsibility” and Implementing Long-Term Solutions to Homelessness*, 2 GEO. J. ON FIGHTING POVERTY 163, 180–81 (1995) (describing activity outlawed by the Matrix program).

⁹¹ *Joyce*, 846 F. Supp. at 857.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 892 P.2d 1145 (Cal. 1995).

⁹⁶ *Id.* at 1166–67.

⁹⁷ *Id.* at 1167.

Eleven years later, the U.S. Court of Appeals for the Ninth Circuit weighed in for the first time on the application of *Robinson* and *Powell* to homeless ordinances. *Jones v. City of Los Angeles*⁹⁸ addressed a citywide ordinance that criminalized sitting, lying and sleeping on public streets and sidewalks at all times. Expressly rejecting the reasoning of the district court in *Joyce*,⁹⁹ a divided panel deemed the ordinance unconstitutional, finding that *Robinson* and *Powell* outlawed punishing individuals for acts they are “powerless to avoid.”¹⁰⁰ Thus, since the number of homeless persons in the city exceeded the number of beds available in shelters at all relevant times, homeless persons could not be prosecuted for sleeping, lying or sitting in public.¹⁰¹ In reaching this decision, the majority derived the holding in *Powell* from the reasoning of “five Justices,” White and the four dissenters, who agree that it is impermissible to punish “an involuntary act or condition if it is the unavoidable consequence of one’s status or being.”¹⁰²

After publication of the decision in *Jones*, the parties settled the case and jointly requested that the circuit vacate its opinion.¹⁰³ It agreed to do so.¹⁰⁴ Two years later, in *Anderson v. City of Portland*,¹⁰⁵ a federal district judge in Oregon embraced *Jones*’ reasoning in part in rejecting the government’s motion to dismiss the homeless plaintiffs’ claim that Portland’s anti-camping and related ordinances violated their Eighth Amendment rights. However, unlike the Ninth Circuit in *Jones*, the judge in *Anderson* was not persuaded that the alleged involuntariness of the conduct in question was sufficient in and of itself to sustain the plaintiffs’ claims.¹⁰⁶ She considered the nature of the prohibited conduct to be an equally important, and necessary, consideration:¹⁰⁷ did these ordinances criminalize activity that society wanted to prevent?¹⁰⁸

⁹⁸ 444 F.3d 1118 (9th Cir. 2006).

⁹⁹ *Id.* at 1132.

¹⁰⁰ *Id.* at 1133. The dissenting judge strongly rejected this reading of *Robinson* and *Powell*, asserting that “[n]either the Supreme Court nor any . . . circuit court has ever held that conduct derivative of a status may not be criminalized.” *Id.* at 1139 (Rymer, J., dissenting).

¹⁰¹ *Id.* at 1132.

¹⁰² *Id.* at 1135.

¹⁰³ *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007).

¹⁰⁴ *Id.*

¹⁰⁵ No. CIV 08-1447-AA, 2009 WL 2386056 (D. Or. July 31, 2009).

¹⁰⁶ *Id.* at *15.

¹⁰⁷ Citing *Powell*, the court noted the relevancy of risks to public health and safety and the proscribed conduct’s offense to “the moral and esthetic sensibilities of a large segment of the community.” *Id.* at *16–17.

¹⁰⁸ *Id.*

Adding to the analytical whiplash within the Ninth Circuit, two years after the court's decision in *Anderson*, a federal judge in California dismissed an Eighth Amendment challenge to an anti-camping ordinance similar to the one addressed in *Jones*.¹⁰⁹ Rejecting the reasoning of the vacated *Jones* opinion, the *Lehr* court assailed the majority's "tenuous" analysis in favor of that of the dissenting judge who differentiated the punishment of status, which *Robinson* forbids, from conduct derivative of status, which *Powell* purportedly permits.¹¹⁰ While sympathetic to the plight of those without shelter, the judge warned that crediting the plaintiffs' position would be "dangerous bordering on irresponsible," since it would inevitably result in an "onslaught" of Eighth Amendment challenges to the prosecution of conduct that individuals allege they are "powerless to change."¹¹¹

Finally, in 2018, eleven years after vacating its decision in *Jones*, the Ninth Circuit revisited the status/conduct debate in the context of an anti-camping ordinance in *Martin v. City of Boise*.¹¹² As the foregoing indicates, the case law from courts within the Ninth Circuit, while inconsistent, had been mostly unfavorable to homeless individuals challenging the constitutionality of these ordinances; the only cases in which plaintiffs prevailed were *Jones*, which had no precedential force, and *Anderson*, an unpublished district court decision.¹¹³ Nonetheless, in light of the apparent and ongoing analytical uncertainty within the circuit, the court took a fresh look at the issue.

Like *Jones*, *Martin* vindicated the homeless plaintiffs' Eighth Amendment claim, finding that the prosecution of individuals for "camping"¹¹⁴ on public

¹⁰⁹ *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009). The ordinance forbids camping facilities and paraphernalia as well as the storage of personal property on public or private property. SACRAMENTO, CAL., CITY CODE, tit. 12, §§ 12.52.030, 12.52.040 (2022). Prohibiting camping facilities and items include tents, vehicles, cots, and sleeping bags as well as "cooking facilities and similar equipment." SACRAMENTO, CAL., CITY CODE, tit. 12, § 12.52.020 (2022).

¹¹⁰ *Lehr*, 624 F. Supp. 2d at 1231.

¹¹¹ *Id.* at 1234.

¹¹² 902 F.3d 1031 (9th Cir. 2018).

¹¹³ In *Anderson*, the plaintiffs prevailed only in the sense that the court rejected defendants' motion to dismiss their Eighth Amendment claim. *Anderson v. City of Portland*, No. 08-1447-AA, 2009 WL 2386056, at *1 (D. Or. July 31, 2009). The judge later denied plaintiffs' motion for summary judgment on the same issue, noting that they had failed to establish as a matter of law that defendants' actions criminalized status, as opposed to conduct. *Anderson v. City of Portland*, No. 08-1447-AA, 2011 WL 6130598, at *4 (D. Or. Dec. 7, 2011).

¹¹⁴ The prohibition on "camping" outlawed "the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at any time between sunset and sunrise, or as a sojourn." BOISE, IDAHO, CODE § 7-3A-2 (2019).

property constituted cruel and unusual punishment.¹¹⁵ In interpreting *Robinson* and *Powell*, the panel relied on the same analysis forwarded in *Jones*. That is, since Justice White and the four dissenters in *Powell* rejected the criminalization of conduct that is “involuntary and inseparable” from an individual’s status, the state could not prosecute homeless persons for “sitting, lying or sleeping on the streets,” since those activities are “an unavoidable consequence of being homeless” where the number of persons in need of shelter exceeds the number of beds available to them.¹¹⁶

When a subsequent petition for rehearing *en banc* failed, six members of the circuit took to the unusual step of filing a written dissent from that decision.¹¹⁷ Penned by Judge Milan Smith, the dissent was forceful, and at times vitriolic, in its disagreement with the panel’s Eighth Amendment reasoning. The *Marks* rule figured prominently in the dispute, as Smith and his colleagues assailed the panel’s use of dissenting opinions in creating a majority rule. In their view, this practice not only contravened judicial precedent, it also “flout[ed] common sense” by “extract[ing] from *Powell* a holding that does not exist.”¹¹⁸ The Supreme Court affirmed *Powell*’s conviction, they opined, for one simple reason: “it involved the commission of an act. Nothing more, nothing less.”¹¹⁹

The *Martin* dissenters also highlighted the potentially troubling consequences of the court’s ruling. It is unquestionably difficult to determine the number of available beds in shelters on any given night in large urban areas within the Ninth Circuit.¹²⁰ Accordingly, if municipalities such as Los Angeles and San Francisco were to enforce anti-camping ordinances, they would risk lawsuits and hefty monetary judgments for failing to provide available beds for all homeless persons who wanted them.¹²¹ Suspension of enforcement, on the

¹¹⁵ *Martin*, 902 F.3d at 1049. The court discusses at length the inadequate supply of beds available to homeless persons in the City of Boise whose three shelters—all run by private, nonprofit organizations—must frequently turn away persons in need of a bed. *Id.* at 1036–37.

¹¹⁶ *Id.* at 1048–49.

¹¹⁷ *Martin v. City of Boise*, 920 F.3d 584, 590 (9th Cir. 2019).

¹¹⁸ *Id.* at 592 (Smith, J., dissenting).

¹¹⁹ *Id.* at 591.

¹²⁰ Even the federal government, which requires a bi-annual “point-in-time” count of homeless persons, acknowledges the difficulties inherent in obtaining accurate figures. See *The Challenges in Counting and Serving Homeless Populations*, U.S. GOV’T ACCOUNTABILITY OFF. (Nov. 23, 2021), <https://www.gao.gov/blog/challenges-counting-and-serving-homeless-populations> [<https://perma.cc/NU7W-LRY7>].

¹²¹ 920 F.3d 595 (9th Cir. 2019) (Smith, J., dissenting).

other hand, would produce health and safety risks by allowing encampments to spread unabated throughout these areas where residents would necessarily engage in involuntary, “life-sustaining activities” like public defecation and urination that would be outside the reach of the criminal law.¹²²

The Ninth Circuit’s reasoning in *Martin* contrasts sharply with that of most other circuits that have considered the extent to which the prohibition on punishing status precludes the prosecution of conduct inextricably linked to it. For example, in *Joel v. City of Orlando*,¹²³ the Eleventh Circuit found that an “anti-camping” ordinance in Orlando, Florida did not violate the Eighth Amendment rights of homeless persons. While the facts differed from those of *Martin* in that Orlando’s shelters had not reached capacity, the court noted, citing *Powell*, that the ordinance “targets conduct, and does not provide punishment based upon a person’s status.”¹²⁴

Federal appellate courts have also rejected *Martin*’s reasoning in contexts other than homelessness. In *United States v. Sirois*,¹²⁵ the First Circuit considered whether it violated the Eighth Amendment to incarcerate individuals for illegal drug possession or use if they are compelled to do so by the disease of addiction. Answering in the negative, the court held that, while its holding is not altogether clear, *Powell* does not extend this far.¹²⁶ If it did, then why had not federal appellate court adopted this interpretation in the more than fifty years since *Powell* was decided?¹²⁷

Likewise, in *United States v. Black*,¹²⁸ the Seventh Circuit found that convicting a pedophile for possessing child pornography did not constitute cruel and unusual punishment because the prosecution was based on the defendant’s conduct, not his illness. It was immaterial, therefore, that the proscribed behavior was a “pathological symptom” of the defendant’s disease.¹²⁹ Similarly, incarcerating an alcoholic parolee for using alcohol and

¹²² *Id.* at 596. To underscore his point, Smith includes a photograph of a homeless encampment on a public street in Los Angeles. *Id.* at 597. Judge Berzon, who wrote the original opinion in this case, took issue with the photograph’s inclusion in the record, finding it evocatively inappropriate and “entirely unrelated to the case.” *Id.* at 589 (Berzon, J., concurring in the denial of rehearing en banc).

¹²³ 232 F.3d 1353 (11th Cir. 2000).

¹²⁴ *Id.* at 1362.

¹²⁵ 898 F.3d 134 (1st Cir. 2018).

¹²⁶ *Id.* at 138.

¹²⁷ *Id.*

¹²⁸ 116 F.3d 198 (7th Cir. 1997).

¹²⁹ *Id.* at 201.

other illicit substances in violation of the terms of his supervised release was found not to violate the Eighth Amendment;¹³⁰ rather than punishing status, the state was lawfully imposing a criminal sanction for public conduct “which may create substantial health and safety hazards.”¹³¹

The Ninth Circuit is not alone, however. In *Pottinger v. City of Miami*,¹³² a federal district judge held that the arrest of homeless persons for violating state and local laws prohibiting certain “life-sustaining” activities in public¹³³ violated their Eighth Amendment rights since they have nowhere else to engage in such activity.¹³⁴ Punishment based on involuntary conduct “inextricably related” to status, the court surmised, is just as pernicious as prosecution based on status itself.¹³⁵

Additionally, in *Manning v. Caldwell*,¹³⁶ the Fourth Circuit, sitting *en banc*, found that a Virginia law constituted cruel and unusual punishment by authorizing the prosecution for alcohol possession and public intoxication of individuals declared “habitual drunkards”.¹³⁷ Characterizing the conduct in question “an involuntary manifestation” of their illness, the court deemed any punishment unacceptable, no matter how slight.¹³⁸ This 8-7 decision drew a fiery dissent from Judge J. Harvie Wilkinson who assailed the “staggering” consequences of the majority’s reading of the *Robinson* and *Powell*.¹³⁹ For the dissenters, those cases provide a simple, workable distinction between status, which cannot be criminalized, and conduct, which can.¹⁴⁰ They do not interpret these cases, or any others decided by the Supreme Court, as precluding prosecution based on an offender’s compulsion to engage in antisocial acts.¹⁴¹ Moreover, and perhaps most troubling to the dissenters, they believe the majority has opened the floodgates to future Eighth Amendment

¹³⁰ United States v. Stenson, 475 F. App’x 630, 631 (7th Cir. 2012).

¹³¹ *Id.*

¹³² 810 F. Supp. 1551 (S.D. Fla. 1992).

¹³³ The arrests were for activities such as standing, sitting, or sleeping on sidewalks and benches as well as in public parks and buildings. *Id.* at 1559-60.

¹³⁴ The homeless plaintiffs, the judge concluded, “have no place else to go and no place else to be.” *Id.* at 1565.

¹³⁵ *Id.* at 1563, 1565.

¹³⁶ 930 F.3d 264 (4th Cir. 2019) (*en banc*).

¹³⁷ *Id.* at 285.

¹³⁸ In the majority’s view, incarceration of alcoholics under these circumstances was tantamount to jailing individuals for having “a common cold,” a practice assailed by the Supreme Court in *Robinson*. *Id.*

¹³⁹ *Id.* at 292 (Wilkinson, J., dissenting).

¹⁴⁰ *Id.* at 290-91.

¹⁴¹ *Id.* at 290.

challenges from countless offenders with volitional impairments that allegedly compromise their ability to control their behavior, including sex offenders, stalkers and domestic abusers.¹⁴²

A. *Summary Reflections*

The foregoing discloses certain truths about the present state of play re the prosecution of status-based offenses. First and foremost, the Supreme Court affirmatively dodged the opportunity to lend clarity to the status/conduct debate by refusing to resolve the confusion surrounding the *Marks* rule, ironically after granting *certiorari* on that very issue. As a result, lower courts continue to decide for themselves whether, and to what extent, to credit Justice White's concurrence in *Powell* in making these determinations.

Collectively, the cases divide into two major camps. The first essentially disregards White's analytical musings altogether, focusing instead on the *Powell* plurality's interpretation of *Robinson* as permitting all conduct-based prosecution, even if the proscribed acts are inextricably linked to a defendant's status.¹⁴³ In addition, with respect to homelessness, some question its inclusion as a status in the first instance, noting that its inherent mutability renders it more akin to a "condition" to which *Robinson* would arguably not apply.¹⁴⁴ The second camp, by contrast, leans heavily on White's concurrence in *Powell*, especially its opening statement that, if it is unlawful to punish someone for having an addiction, it must also be unconstitutional to prosecute individuals for possessing the very substances their illness compels them to use.¹⁴⁵ In light of the agreement of the *Powell* dissenters with this sentiment,¹⁴⁶ the Ninth and Fourth Circuits and a federal district judge in Florida have concluded that, viewed together, *Robinson* and *Powell* preclude punishment

¹⁴² *Id.* at 292-93.

¹⁴³ *See supra* text accompanying notes 91, 124 & 125; *Joyce*, 846 F. Supp. at 857; *Joel*, 232 F.3d at 1362; *Sirois*, 898 F.3d at 138.

¹⁴⁴ *See supra* text accompanying notes 92 & 96; *Joyce*, 846 F. Supp. at 857; *Tobe*, 892 P.2d at 1166-67.

¹⁴⁵ *Powell*, 392 U.S. at 548 (White, J., concurring in the result).

¹⁴⁶ While acknowledging that the Texas statute in *Powell* did not target status expressly, the dissenters found the constitutional defect to be the same as that in *Robinson*: Like Lawrence Robinson, Leroy Powell was being punished for "a condition he had no capacity to change or avoid." *Id.* at 568 (Fortas, J., dissenting).

for any involuntary act that an individual is powerless to avoid by virtue of status.¹⁴⁷

A few final thoughts: first, the analysis of the “second camp” gives precedential value to the position of five justices drawn from the dissenting and concurring opinions in *Powell*. This is itself a controversial proposition that some courts have expressly rejected as an invalid application of the *Marks* rule.¹⁴⁸ Second, the decisions in *Martin* and *Manning* were closely decided and rife with intra-circuit conflict, as the impassioned dissents issued in those *en banc* cases demonstrate. This discord within the second camp resonates far more loudly than any within the first. Finally, the judges who interpret *Robinson* and *Powell* as disallowing any involuntary conduct linked to status uniformly fail to grapple with one fundamental question: why, then, in the more than fifty years since these cases were decided, individuals to been subject to prosecution for conduct linked to their addiction without judicial recourse?

III. SCHOLARLY DISSONANCE

The amorphous state of the status versus conduct dichotomy, and the *Marks* rule on which it relies, have emboldened commentators to advocate for expansive views of *Robinson* and *Powell* that sometimes exceed even the foundational generosity of cases like *Martin* and *Manning*. For example, Professors Stephen Rushin and Jenny Carroll have argued that recent laws requiring individuals to use bathrooms that reflect their biological gender violate the Eighth Amendment rights of transgender persons.¹⁴⁹ While these laws have been challenged on equal protection and Title IX grounds,¹⁵⁰ Rushin and Carroll’s proposal is novel and intriguing—and also problematic. First, these laws generally do not prescribe criminal penalties.¹⁵¹ The authors claim

¹⁴⁷ See *supra* text accompanying note 116, 135 & 138; *Martin*, 902 F.3d at 1048–49; *Manning*, 930 F.3d at 285; *Pottinger*, 810 F. Supp. 1563, 1565.

¹⁴⁸ See *supra* note 67.

¹⁴⁹ Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1 (2017).

¹⁵⁰ See, e.g., Complaint, *A.S. v. Bill Lee*, No. 3:21-cv-00600 (M.D. Tenn. Aug. 2, 2021).

¹⁵¹ For example, North Carolina’s bill contained no penalties or enforcement provisions at all. See Samantha Michaels, *We Asked Cops How They Plan to Enforce North Carolina’s Bathroom Law*, MOTHERJONES (Apr. 7, 2016), <https://www.motherjones.com/politics/2016/04/north-carolina-lgbt-bathrooms-hb2-enforcement/> [https://perma.cc/B6FM-VMFL] (highlighting the lack of enforcement provisions or penalties for violating these laws).

that they “open the door” to arrests for criminal trespass,¹⁵² but this is a speculative proposition. Even if we assume, *arguendo*, that a criminal nexus exists, the laws prohibit certain conduct—gender-associated bathroom use—not transgender status *per se*.¹⁵³ In response, Rushkin and Carroll contend that, while states may constitutionally regulate conduct linked to status, they cannot do so if the conduct “is so entwined with the defendant’s existence as to have the effect of criminalizing her or his status.”¹⁵⁴ They articulate a four-part analytical framework for making this determination, but it is specific to bathroom laws and their effect on transgender persons;¹⁵⁵ it is unclear how it might apply in other contexts.¹⁵⁶

To be sure, Rushkin and Carroll are right to assail so-called bathroom laws that needlessly harass transgender individuals based on dangerous falsehoods about the need to protect women and children from sexual predation.¹⁵⁷ The problem is not the ends, but the means. My reaction is much the same to Professor Annie Lai’s argument that, if undocumented immigrants cannot obtain a driver’s license under state law, arresting them for driving without a license amounts to “proxy criminalization” based on status.¹⁵⁸ Lai correctly notes that undocumented immigrants cannot obtain drivers’ licenses in a vast

¹⁵² Rushin & Carroll, *supra* note 149, at 17.

¹⁵³ See, e.g., S. 2387, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016) (requiring students to use bathrooms and locker facilities consistent with their sex as indicated on their “original birth certificate”); H.R. 2414, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); H.R. 1008, 91st Leg. Assemb., Reg. Sess. (S.D. 2016) (requiring “[e]very restroom, locker room, and shower room located in a public elementary or secondary school that is designated for” multiple occupancy to be used “only by students of the same biological sex” and providing that trans students are entitled to “reasonable accommodation[s]” like the use of a single-occupancy bathroom so long as it does not pose an undue hardship on the district).

¹⁵⁴ Rushin & Carroll, *supra* note 149, at 40.

¹⁵⁵ *Id.* at 41.

¹⁵⁶ Claude Millman has advocated a similar standard using different terminology, namely “elemental acts” conduct that is “fundamentally related” to status and therefore outside the reach of the Eighth Amendment. Claude Millman, *Sodomy Statutes and the Eighth Amendment*, 21 COLUM. J.L. & SOC. PROBS. 267, 288, 289 (1988). He contrasts, in this regard, the “elemental acts” of narcotic possession and use by addicts with those same individuals’ commission of other offenses, like property crimes, which are more tangentially related to their illness. *Id.* at 288 n.129, 289. Because the latter are “minor or fortuitous concomitant[s]” of addiction, punishment for them would not be cruel or unusual. *Id.* at 289.

¹⁵⁷ The laws’ supporters have argued that allowing transgender individuals to use public bathrooms that conform to their gender identity will allow predators, disguised as trans women, to enter those areas to sexually assault and harass women and girls. See German Lopez, *Anti-Transgender Bathroom Hysteria, Explained*, VOX (Feb. 22, 2017), <https://www.vox.com/2016/5/5/11592908/transgender-bathroom-laws-rights> [https://perma.cc/F3D5-BV6J] (discussing anti-transgender bathroom beliefs).

¹⁵⁸ Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U.L. REV. 879, 879 (2015).

majority of states,¹⁵⁹ a practice that necessarily limits the employment that they can seek. Moreover, historical justifications for making licenses unavailable to this group, most notably identity fraud, are tenuous¹⁶⁰ and are likely fueled by nativist and anti-immigrant sentiments that have long existed on the federal, state and local level.¹⁶¹

Nonetheless, the contention that prosecution is impermissible under *Robinson* and *Powell* is highly questionable. As a threshold matter, it is unclear whether being an undocumented immigrant qualifies as a status for Eighth Amendment purposes. In *Robinson*, the Court referred to alcoholism and something “contracted innocently or involuntarily.”¹⁶² While some migrants cross the border to escape persecution in their home countries, many others do so in search of a better life.¹⁶³ Because the presence in the United States of this latter group is voluntary and without legal authorization, the *Robinson/Powell* analysis arguably does not apply to them.

Even assuming it does, criminalizing the conduct at issue, unlicensed driving, reflects sound public policy in the interest of public safety.¹⁶⁴ In addition, public transportation is widely available in most urban and suburban areas to all residents, including those who are undocumented. As such, it is difficult to see how unlicensed driving is necessary, or even “incidental,”¹⁶⁵ to the ability to survive economically.

While all individuals are subject to arrest for the crimes Lai references, Professor Priscilla Ocen claims that pregnancy is being treated as a status offense through the prosecution of offenses that specifically target expectant

¹⁵⁹ See, e.g., Dean W. Davis, Comment, *The Best of Both Worlds: Finding Middle Ground in the Heated Debate Concerning Issuing Driver’s Licenses to Undocumented Immigrants in Illinois*, 38 S. ILL. L. REV. 93, 95 (2013) (finding that only four states extend the right to drive to undocumented immigrants).

¹⁶⁰ See Kevin R. Johnson, *Driver’s Licenses and Undocumented Immigrants: The Future of Civil Rights Law*, 5 NEV. L.J. 213, 218-19 (2004).

¹⁶¹ See generally John Higham, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (3d ed. 1992); Ronald Takaki, STRANGERS FROM A DIFFERENT SHORE (1989).

¹⁶² *Robinson*, 370 U.S. at 667.

¹⁶³ See, e.g., *Transnational Organized Crime: Let’s Put Them Out of Business*, UNITED NATIONS OFF. ON DRUGS & CRIME, <https://www.unodc.org/toc/en/crimes/migrant-smuggling.html> [<https://perma.cc/AL7G-75FX>]; Anthony Fontes, *Migrants’ Stories: Why They Flee*, THE CONVERSATION (Apr. 9, 2019), <https://theconversation.com/migrants-stories-why-they-flee-114725> [<https://perma.cc/GLB6-MLG9>] (highlighting migrants’ sacrifice in search of better lives).

¹⁶⁴ The same is true of prosecution for using false documents to obtain employment, another alleged form of “proxy criminalization” of undocumented immigrants. Lai, *supra* note 158, at 903-04.

¹⁶⁵ *Id.* at 903.

women.¹⁶⁶ She relies principally on data collected by Lynn Paltrow and Jeanne Flavin that discuss the arrests of hundreds of pregnant women for harm to the fetuses they are carrying.¹⁶⁷ In many of these cases, prosecutors used existing criminal statutes, most notably those relating to “feticide,”¹⁶⁸ as the basis for prosecution.¹⁶⁹ While fetal harm is the purported basis for intervention, Paltrow and Flavin report that, in most cases, the record shows no actual evidence of harm.¹⁷⁰ Moreover, prosecutors often reference otherwise legal conduct in support of state intervention, such as smoking, the use of alcohol, or the failure to obtain prenatal care.¹⁷¹

Using the threat of criminal sanctions to promote fetal health is plainly misguided. Appellate courts have been largely unreceptive to these initiatives,¹⁷² as have legions of public health advocates, including the American Medical Association, the American Academy of Pediatrics, and the National Perinatal Association.¹⁷³ Even conservative charities like the March of Dimes

¹⁶⁶ Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1166 (2017).

¹⁶⁷ Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL., POL’Y & L. 299, 320–22 (2013).

¹⁶⁸ Feticide statutes, which exist in 38 states, give independent rights to fetuses at various stages of development and prosecute individuals for harms they cause in utero. *Id.* at 322–23.

¹⁶⁹ Feticide laws have also been used to support charges related to offenses, such as child endangerment and delivery of drugs to minors. *Id.* at 323.

¹⁷⁰ *Id.* at 317–18.

¹⁷¹ *Id.* at 316–17. Ocen includes in this list the “use” of drugs. Ocen, *supra* note 166, at 1167. While the criminalization of illegal drug use is perhaps less pervasive than possession, it is nonetheless criminal in a number of jurisdictions. *See, e.g.*, DEL. CODE ANN. tit. 16, § 4764 (2011) (amended 2015, 2018, 2019, 2021) (effective Jan. 1, 2022); LA. STAT. ANN. § 14:91.13 (1988); MICH. COMP. LAWS ANN. § 333.7404 (West 1994) (amended 1994, 2000, 2002, 2010, 2012, 2015, 2016); NEV. REV. STAT. ANN. § 453.411 (West 1971) (amended 1973, 1979, 1981, 1993, 1995, 1997, 2013, 2019); N.J. STAT. ANN. § 2C:35-10 (West 2021); W. VA. CODE ANN. § 60A-4-416 (West 2017).

¹⁷² Paltrow & Flavin, *supra* note 167, at 320, 320 n.58 (listing cases). *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992), is illustrative of prosecutorial efforts in this regard and courts’ rejection of them. *Johnson* used crack cocaine throughout her pregnancy, including hours before she went into labor. She was subsequently charged under a Florida statute prohibiting adults’ delivery of illegal drugs to minors, focusing on the 60 to 90 second interval after the child was born and before the umbilical cord was severed. The Florida Supreme Court unanimously overturned the conviction, noting that the legislature had never intended the delivery-of-a-drug statute to be applied to addicted mothers in childbirth. *Id.* at 1294.

¹⁷³ Paltrow & Flavin, *supra* note 167, at 320.

oppose these efforts, believing that their effect is to “drive women away from treatment vital both for them and the child.”¹⁷⁴

However, as Ocen herself acknowledges, invalidating these practices under the Eighth Amendment is difficult under prevailing views of *Robinson* and *Powell* which permit prosecution based on conduct, even if that conduct is linked to status.¹⁷⁵ Moreover, challenges brought by pregnant women and third parties to the constitutionality of these statutes have been uniformly unsuccessful.¹⁷⁶ While none has argued that prosecuting pregnant women for fetal harm impermissibly punishes status, other Eighth Amendment claims have been rejected,¹⁷⁷ as have those based on other constitutional provisions.¹⁷⁸

Finally, Lauren Bennett argues that the cash bond system used to secure the pre-trial release of criminal defendants impermissibly punishes the status of poverty.¹⁷⁹ The cash bond system has faced a wave of criticism in recent years, as thousands languish in jail awaiting disposition on their charges simply because they lack the resources to avoid pre-trial detention.¹⁸⁰ Apart from the seemingly unnecessary restraint on liberty, pre-trial incarceration

¹⁷⁴ March of Dimes Fact Sheet, Policies and Programs to Address Drug-Exposed Newborns, MARCH OF DIMES (Dec. 2014), <https://www.marchofdimes.org/materials/NAS-Policy-Fact-Sheet-December-2014.pdf> [<https://perma.cc/84MY-CJVP>].

¹⁷⁵ Ocen, *supra* note 166, at 1190 (noting that the prosecution of pregnant women could be justified based on actions that endanger fetal health).

¹⁷⁶ Lawrence J. Nelson, *A Crisis for Women's Rights? Surveying Feticide Statutes for Content, Coverage, and Constitutionality*, 6 UNIV. DENV. CRIM. L. REV. 63, 72-80 (2016).

¹⁷⁷ For example, these claims have argued that, since the victim is a “nonperson”, the severity of the punishment ascribed to feticide is grossly disproportionate to the gravity of the offense and/or “arbitrary and capricious.” *See* *State v. Alfieri*, 724 N.E.2d 477, 483-84 (Ohio App. 1998); *Smith v. Newsome*, 815 F.2d 1386, 1388 (11th Cir. 1987); *Holmes v. State*, No. 01-06-00975-CR, 2008 WL 963021, at *1, *10 (Tex. App. 1st Cir. Apr. 10, 2008).

¹⁷⁸ *See* Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 PACE L. REV. 43, 62-67 (discussing challenges to feticide statutes based on due process, equal protection and federal abortion cases).

¹⁷⁹ Lauren Bennett, *Punishing Poverty: Robinson & The Criminal Cash Bond System*, 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315 (2018).

¹⁸⁰ *See, e.g.*, Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html> [<https://perma.cc/JPP7-QFLW>]; DETROIT FREE PRESS EDITORIAL BOARD, *Unfair Michigan System Keeps Poor in Jail, Lets Rich Walk Free*, DETROIT FREE PRESS (Mar. 20, 2021, 5:00 PM), <https://www.freep.com/story/opinion/editorials/2021/03/20/cash-bail-michigan-lagrand-jail-prison/4732275001/> [<https://perma.cc/8YTB-BERU>]; Arnav Shah & Shanoor Seervai, *How the Cash Bail System Endangers the Health of Black Americans*, THE COMMONWEALTH FUND (June 17, 2020), <https://www.commonwealthfund.org/blog/2020/how-cash-bail-system-endangers-health-black-americans> [<https://perma.cc/JK2Y-YK2V>].

compromises detainees' ability to challenge the evidence against them or combat prosecutorial pressure to accept a seemingly unfavorable plea bargain.¹⁸¹ In response, some jurisdictions have enacted legislative reforms to facilitate the release of indigent defendants from preventive detention,¹⁸² and early reports suggest that these measures are proving effective.¹⁸³ Much more work needs to be done, however, to meaningfully redress this nationwide problem.¹⁸⁴

Alexa Van Brunt and Locke Bowman have argued that this ongoing and glaring wealth-based inequity in accessing pre-trial release violates due process and equal protection principles.¹⁸⁵ They rely on a trio of Supreme Court cases, all involving indigent defendants whose sentences were impermissibly

¹⁸¹ See Samuel R. Wiseman, *Bail and Mass Incarceration*, 52 GA. L. REV. 235, 242 (2018) (discussing the disadvantageous position of detained versus released defendants); Michelle Jenkins, *Poverty Is the New Crime*, 10 DEPAUL J. FOR SOC. JUST. 1, 6 (2017) (discussing bail bond system's effect of pressuring indigent defendants to plea bargain).

¹⁸² See, e.g., *Bail Reform*, ACLU: Smart Justice, <https://www.aclu.org/issues/smart-justice/bail-reform> [<https://perma.cc/26SH-2RSR>] (last visited Jan. 24, 2022) (discussing reform initiatives in Illinois and New Jersey).

¹⁸³ See, e.g., Michael Rempel & Joanna Weill, *One Year Later: Bail Reform and Judicial Decision-Making in New York City*, CTR. FOR CT. INNOVATION 30-31 (Apr. 2021), https://www.courtinnovation.org/sites/default/files/media/document/2021/One_Year_Bail_Reform_NYS.pdf [<https://perma.cc/XF7N-CTUH>] (discussing reductions in bail and pretrial detention after legislative reforms); Don Stemen & David Olson, *Dollars and Sense in Cook County: Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release and Crime*, CTR. FOR CRIM. JUST. RSCH, POL'Y & PRAC., LOY. UNIV. CHI. 13 (2020), <https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/11/Report-Dollars-and-Sense-in-Cook-County.pdf> [<https://perma.cc/2SUF-ZZ7M>] (reporting success in the creation of a presumption of release without monetary bail for felony defendants in Cook County and consideration of defendants' ability to pay monetary bail).

¹⁸⁴ See THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (Nov. 2007), <http://bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/J99C-X4DC>] (stating that pre-trial incarceration for five out of six defendants is based on inability to afford bail); Ram Subramanian, Ruth Delaney, Stephen Roberts, Nancy Fishman, & Peggy McGarry, VERA INST. JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 5 (Feb. 2015), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf> [<https://perma.cc/6QLQ-PZT7>] (noting that almost 75% of pretrial detainees are jailed for nonviolent traffic, property, drug, or public order offenses); Christopher Ingraham, *Why We Spend Billions to Keep Half a Million Unconvicted People Behind Bars*, WASH. POST (June 11, 2015, 11:25 AM), https://www.washingtonpost.com/news/wonk/wp/2015/06/11/why-we-spend-billions-to-keep-half-a-million-unconvicted-people-behind-bars/?utm_term=.7b0504b1c208 [<https://perma.cc/PAM6-ZXC9>].

¹⁸⁵ Alexa Van Brunt & Locke E. Bowman, *Towards a Just Model of Pretrial Release: A History of Bail Reform and A Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 702 (2019).

extended based on their inability to pay mandatory fees or fines.¹⁸⁶ In one of those cases, the defendant's parole was revoked when, after serving his sentence, he was unable to pay a court-ordered fine and restitution.¹⁸⁷ The majority noted that incarcerating an individual under these circumstances after he has repaid his debt to society "would be little more than punishing a person for his poverty."¹⁸⁸ However, this concern about status did not implicate the Eighth Amendment; rather, it contravened the fundamental fairness mandated by the Fourteenth Amendment.¹⁸⁹

Of course, the cash bail system contravenes Eighth Amendment standards if it imposes costs that are excessive in relation to their purpose.¹⁹⁰ Colin Starger and Michael Bullock have advanced this very argument, contending that it runs afoul of the "excessive bail" clause by imposing amounts that exceed what is necessary to ensure an indigent defendant's presence at trial.¹⁹¹ Their analysis relies in part on *United States v. Salerno*,¹⁹² the Supreme Court's major case addressing the constitutional parameters of pre-trial detention. In *Salerno*, the Court held *inter alia* that, where detention is based on preventing flight rather than danger to the community, bail must be set "at a sum designed to ensure that goal, and no more."¹⁹³

Salerno's Eighth Amendment analysis never mentioned *Robinson* or *Powell*, decided decades earlier. This is hardly surprising, since the cruel and unusual punishments clause on which those cases rely applies only to individuals who have been convicted.¹⁹⁴ Pre-trial detention, by contrast, is a

¹⁸⁶ *Williams v. Illinois*, 399 U.S. 235 (1970) (finding that equal protection was violated by 101-day extension to pay court costs); *Tate v. Short*, 401 U.S. 395 (1971) (holding that equal protection was violated by incarceration to pay fine for traffic offense); *Bearden v. Georgia*, 461 U.S. 660 (1983) (finding that due process was violated by probation revocation based on non-payment of a fine and restitution).

¹⁸⁷ *Bearden*, 461 U.S. at 663.

¹⁸⁸ *Id.* at 671.

¹⁸⁹ *Id.* at 672-73.

¹⁹⁰ The Eighth Amendment provides, in relevant part, that "[e]xcessive bail shall not be required, nor excessive fines imposed." U.S. CONST. amend VIII.

¹⁹¹ Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 602-13 (2018).

¹⁹² 481 U.S. 739 (1987).

¹⁹³ *Id.* at 754.

¹⁹⁴ *See Whitley v. Albers*, 475 U.S. 312, 327 (1986) (stating that the Eighth Amendment "is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions").

civil regulatory process divorced from any punitive purpose or effect.¹⁹⁵ Accordingly, Bennett's claim that the cash bail system impermissibly punishes status runs into strong constitutional headwinds that are impossible to surmount.¹⁹⁶

IV. REIMAGINING STATUS: A NEW WAY FORWARD

As the foregoing underscores, the uncertain parameters of the Eighth Amendment prohibition on the punishment of status-related conduct have facilitated broad interpretations of the type of activity that is immune from prosecution. Supporting the positions taken by commentators requires an understanding of *Powell* where the proscribed conduct is not involuntary,¹⁹⁷ not criminal in nature,¹⁹⁸ or speculative in terms of prosecution.¹⁹⁹ As discussed above, there is little indication that the Supreme Court intended *Powell* to extend that far.²⁰⁰

The meaning of status is also murky at best. *Robinson* and *Powell* addressed addiction to drugs and alcohol, respectively. One could argue, therefore, that their reasoning applies only in the disease context; that is, it is "cruel and unusual" to punish someone for being sick.²⁰¹ This, however, seems an overly cramped view of status. It would suggest, for example, that the issue of whether anti-camping ordinances punish homelessness is inapposite on its face since homelessness, a non-illness, cannot qualify as a status. Many jurists who believe that it is lawful to prosecute homeless persons for engaging in life-

¹⁹⁵ *Salerno*, 481 U.S. at 747; see also Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1144 (2013) (noting that, no matter how harsh pre-trial conditions of confinement might be, they do not constitute punishment absent an intent to punish).

¹⁹⁶ She endeavors to bring the cash bail system within the purview of *Robinson* by arguing that discriminating against someone for "what they do not have" is tantamount to discrimination based on status. Bennett, *supra* note 179, at 346. Accepting this as true, it fails to address the fundamental difference for Eighth Amendment purposes between *Robinson*, who has been convicted of a crime, and pretrial detainees, who have not.

¹⁹⁷ See Lai, *supra* note 158; *supra* text accompanying notes 161-62.

¹⁹⁸ See Bennett, *supra* note 179; *supra* text accompanying notes 194-95.

¹⁹⁹ See Rushin & Carroll, *supra* note 149; *supra* text accompanying notes 150-51.

²⁰⁰ See Ocen, *supra* note 166; *supra* text accompanying note 174 (noting that the weight of authority does not extend *Powell* to status-based conduct).

²⁰¹ See *Powell v. Texas*, 392 U.S. 514, 548 (1968) (White, J., concurring in the result) ("Punishing an addict for using drugs convicts for addiction under a different name."). Professor Elyn Saks has referred to this as the "illness view" of *Robinson* and *Powell*. Elyn R. Saks, *The Status of Status Offenses: Helping Reverse the Criminalization of Mental Illness*, 23 S. CAL. REV. L. & SOC. JUST. 367, 376-77 (2014).

sustaining activities in public acknowledge that homelessness is a status for Eighth Amendment purposes.²⁰²

Those who have challenged this position characterize homelessness as a mere “condition,” based on the alleged voluntariness of its acquisition and individuals’ purported control over it.²⁰³ While we can debate the extent to which either of these propositions is true, the Supreme Court has never clarified the distinction between a “status” and a “condition.” The plurality in *Powell* stated that there is “a substantial definitional distinction” between the two, without offering any further elucidation.²⁰⁴ The concurrences fail to provide any further guidance, referring only to the “multi-faceted use of the concept of condition”²⁰⁵ and the “condition” of destitution that chronic alcoholism may exacerbate.²⁰⁶ The dissent, on the other hand, blurs the distinction between status and condition altogether, characterizing addiction as a “condition” that one is “powerless to change” and hence, like status, beyond the reach of the criminal law.²⁰⁷ While the *Powell* plurality expressly disagreed with this reading of *Robinson*,²⁰⁸ some lower courts have nonetheless seized upon the formulation.²⁰⁹

It is important not to lose sight of the importance of status in this fractured landscape that permeates its judicial understanding. While courts have spilled copious ink debating the distinction, if any, between a status and a condition and the constitutional dividing line between status and conduct, they have failed to consider the significant contributions other disciplines offer in understanding status. Sociologists have been especially prominent in this

²⁰² See, e.g., *Martin v. City of Boise*, 920 F.3d 584, 594 (9th Cir. 2019) (Smith, J., dissenting) (noting that Boise’s anti-camping ordinances do not punish “the status of homelessness”); *Jones v. City of Los Angeles*, 444 F.3d 1118, 1139 (9th Cir. 2006) (Rymer, J., dissenting) (finding it permissible to criminalize conduct “derivative of a status”); *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000) (opining that *Powell* does not address punishment based on statuses like homelessness).

²⁰³ See, e.g., *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1166–67 (Cal. 1995); *Joyce v. City & Cnty. of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994) (“To argue that homelessness is a status and not a condition . . . is to deny the efficacy of acts of social intervention to change the condition of those currently homeless.”).

²⁰⁴ *Powell*, 392 U.S. at 533 (plurality opinion).

²⁰⁵ *Id.* at 542 (Black, J., concurring) (internal quotation marks omitted).

²⁰⁶ *Id.* at 551 (White, J., concurring in the result).

²⁰⁷ *Id.* at 567 (Fortas, J., dissenting).

²⁰⁸ *Id.* at 533 (plurality opinion).

²⁰⁹ See, e.g., *Jones v. City of Los Angeles*, 444 F.3d 1118, 1133 (9th Cir. 2006); *Martin v. City of Boise*, 902 F.3d 1031, 1048–49 (9th Cir. 2018); *Manning v. Caldwell*, 930 F.3d 264, 283 (4th Cir. 2019).

endeavor; however, courts and commentators have largely ignored their decades of research into the meaning and significance of status.

A. Understanding Status

Generally speaking, sociologists define status as an individual's position within a social structure "characterized by certain expectations, rights, and duties."²¹⁰ Within this broad rubric, sociologists distinguish between "ascribed" and "achieved" statuses, a dichotomy first recognized by Ralph Linton in 1936.²¹¹ Linton described an ascribed status as something "assigned to individuals without reference to their innate differences or abilities."²¹² Social positions with which a person is born, such as race, age, or gender, are prototypical examples.²¹³ An achieved status, by contrast, is obtained through merit or effort,²¹⁴ such as education or occupation.²¹⁵ Achieved statuses are not necessarily positive; for example, one can acquire the "status" of prison inmate through criminal offending that results in long-term incarceration.²¹⁶ Sometimes, the line between ascribed and achieved status is somewhat blurred. For example, parenthood that is sought-after and welcome is properly regarded as "achieved." On the other hand, where it is an unplanned outcome, it may be more accurately described as "ascribed." Accordingly, sociologist Ashley Crossman categorizes parenthood as "mixed-status."²¹⁷

With respect to criminal law, it is axiomatic that punishing an individual for having an ascribed status is constitutionally impermissible. As *Robinson* noted, prosecuting someone for having a disease would contravene the Eighth

²¹⁰ DIANA KENDALL, *SOCIOLOGY IN OUR TIMES* 118 (Cengage Learning, 11th ed. 2017).

²¹¹ RALPH LINTON, *THE STUDY OF MAN: AN INTRODUCTION* 115 (Appleton-Century-Crofts, Inc. 1936).

²¹² *Id.*

²¹³ CARL L. BANKSTON III, *SOCIOLOGY BASICS* 503 (Salem Press, Inc. 2000) ("Ascribed status is a status with which one is born. A person, for example, is born either male or female, [and] is born into a particular ethnic group . . .").

²¹⁴ See Manfred Rehbinder, *Status, Contract and the Welfare State*, 23 *STAN. L. REV.* 941, 954 (1971) ("Achieved status is status obtainable by one's own initiative.").

²¹⁵ See, e.g., Michael L. Radelet, *Response: Race as a Semi-Measurable Component of Social Status*, 55 *HARV. CIV. RTS. CIV. LIBERTIES L. REV.* 675, 676 (2020); Noorjahan Rahman, *Earning the Drinker's Bonus: How Lawyers Can Use Alcohol and Other Alternatives to Build Social Capital*, 28 *GEO. J. LEGAL ETHICS* 875, 883 (2015).

²¹⁶ See, e.g., KENDALL, *supra* note 210, at 119.

²¹⁷ Ashley Crossman, *Sociology: Achieved Status Versus Ascribed Status*, *THOUGHTCO* (Aug. 12, 2019), <https://www.thoughtco.com/achieved-status-vs-ascribed-status-3966719> [<https://perma.cc/N9FP-Z948>].

Amendment.²¹⁸ The Supreme Court has also invalidated statutes allowing the imposition of the death penalty²¹⁹ and mandatory life sentences without the possibility of parole²²⁰ based on a defendant's status as a juvenile. The foregoing implies *a fortiori* that any prosecution based expressly on race or gender would be plainly unlawful.²²¹

The bigger, and more critical, question is the extent to which achieved statuses have similar constitutional currency. In the criminal context, the Court has recognized "habitual offender status" in addressing laws pertaining to the sentencing of recidivist offenders.²²² Elsewhere, in striking down laws outlawing same-sex marriage, the justices have discussed the importance that "marital status" plays in affording individual rights and privileges.²²³ These cases clearly signal the constitutional significance of achieved statuses. The case law does not provide a framework, however, for differentiating among the many achieved statuses for Eighth Amendment purposes. Thus, while punishing marriage seems far more constitutionally suspect than prosecution based on one's status as an undocumented immigrant, there is no test that has emerged to distinguish the two.

Additionally, as with parenthood, some statuses do not always fit neatly within the ascribed versus achieved dichotomy. Homelessness, which has figured prominently in the status/conduct case law, is one such example. One might think of homelessness as achieved, inasmuch as it does not reflect "innate differences or abilities,"²²⁴ however, sociologist Todd Schoepflin has challenged this assumption for the many individuals who lacked stable,

²¹⁸ *Robinson v. California*, 370 U.S. 660, 666 (1962).

²¹⁹ *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (disallowing the execution of a person who was under sixteen years of age at the time of his or her offense).

²²⁰ *Graham v. Florida*, 560 U.S. 48, 68–69 (2010) (detailing neurological and other developmental characteristics linked to a defendant's juvenile "status").

²²¹ In striking down a Texas statute criminalizing private, consensual sexual conduct between same-sex individuals, the Court also implicitly referenced status. *See Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment) (noting the illegitimacy of laws based on "moral disapproval" of a targeted group).

²²² *See Solem v. Helm*, 463 U.S. 277, 298 (1983) (applying Eighth Amendment disproportionality analysis to defendant with "habitual offender status"); *Rummel v. Estelle*, 445 U.S. 263, 281 (1980) (explaining that a life sentence based on defendant's recidivist status is not "cruel and unusual" punishment).

²²³ *See Obergefell v. Hodges*, 576 U.S. 644, 670 (2015) (discussing legal ramifications of one's marital status).

²²⁴ *See Linton*, *supra* text accompanying note 212.

consistent housing throughout their formative years.²²⁵ These children were not responsible for their homelessness; it was thrust upon them due to a host of factors, including familial instability, mental illness and poverty.²²⁶ Likewise, a maelstrom of controversy surrounds addiction’s characterization as an ascribed or achieved status. While scientists traditionally adopted a “disease model” of addiction,²²⁷ there has been strong pushback from some in the field who consider addiction a voluntary, self-destructive choice.²²⁸

At the end of the day, these uncertainties regarding status classifications as ascribed or achieved are largely irrelevant. Other considerations, to which we now turn, underscore why statuses—whether achieved, ascribed, or mixed—merit protection from prosecutorial overreach.

B. The Primacy of Status

The foregoing debate about the classification of status subtypes, while important, does not address something that is more fundamental: the effect an individual’s status designation has on his or her daily existence. The concept of “master status,” first introduced in 1945,²²⁹ figures prominently in this regard. Sociologists have described it as “the most important status that a person occupies,”²³⁰ one that carries “exceptional significance for individual

²²⁵ Todd Schoepflin, *Ascribed Status vs. Achieved Status: The Case of Homelessness*, EVERYDAY SOCIOLOGY BLOG (May 27, 2010), <https://www.everydaysociologyblog.com/2010/05/ascribed-status-vs-achieved-status-the-case-of-homelessness.html> [<https://perma.cc/5VBC-KTGV>].

²²⁶ By way of example, Schoepflin recounts the story of one of his students who moved between friend’s houses and shelters throughout her childhood due to her mother’s personal problems and inability to provide for the family on a consistent basis. *Id.*

²²⁷ See, e.g., Markus Heilig et al., *Addiction as a Brain Disease Revised: Why it Still Matters, and the Need for Consilience*, 46 NEUROPSYCHOPHARMACOLOGY 1715 (2021), <https://doi.org/10.1038/s41386-020-00950-y> [<https://perma.cc/2S87-IJX9>]; Nora D. Volkow, George F. Koob & A. Thomas McLellan, *Neurobiologic Advances from the Brain Disease Model of Addiction*, 374 NEW ENG. J. MED. 363 (Jan. 28, 2016), <https://www.nejm.org/doi/full/10.1056/nejmra1511480> [<https://perma.cc/M732-C5Q7>].

²²⁸ See, e.g., GENE M. HEYMAN, ADDICTION: A DISORDER OF CHOICE, at vii (2009); JEFFREY A. SCHALER, ADDICTION IS A CHOICE, at xiii (2000).

²²⁹ See Everett Cherrington Hughes, *Dilemmas and Contradictions of Status*, 50 AM. J. SOCIO. 353 (1945).

²³⁰ KENDALL, *supra* note 210, at 119.

identity, frequently shaping a person's entire social experience.²³¹ Master statuses may be either achieved or ascribed,²³² positive or negative.²³³

Researchers have labeled both homelessness and addiction master statuses noting, respectively, their profoundly negative effects on accessing basic necessities²³⁴ and fostering positive interactions with those around them.²³⁵ Stigmatization is at the core of this process in its tendency to overwhelm other more positive statuses that may also apply to individuals battling homelessness or addiction, such as educational achievement.²³⁶ Concluding, for example, that addiction “is a status that obscures all others,” Charlie Lloyd notes the “disgust, anger, judgment, and censure” that it frequently incites in others.²³⁷ Homeless individuals face similar contempt, many regarding them as “the lowest of the low” and more like objects than people.²³⁸ These stigmatic effects likely exceed those associated with poverty alone.²³⁹

²³¹ Stephen Hunt, *Master Status*, THE BLACKWELL ENCYCLOPEDIA OF SOCIO. 2832 (George Ritzer, ed.) (Blackwell Publishing 2007).

²³² For example, race, the prototypical ascribed status, is a commonly cited master status, as is one's achieved occupational status. See Lisa-Jo K. van den Scott & Deborah K. van den Hoonard, *The Origins and Evolution of Everett Hughes's Concept: "Master Status,"* THE ANTHEM COMPANION TO EVERETT HUGHES 178, 182 (2021).

²³³ See HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 33 (1963) (relating master status to deviance); KATHY S. STOLLEY, *THE BASICS OF SOCIOLOGY* 44-45 (2005) (being a medical doctor as a master status).

²³⁴ See Mark LaGory, Kevin Fitzpatrick & Ferris Ritchey, *Life Changes and Choices: Assessing Quality of Life Among the Homeless*, 42 SOCIO. Q. 633 (2001) (noting homeless persons' lack of privacy and spaces over which they have control and can feel safe).

²³⁵ See Charlie Lloyd, *Sinning and the Sinned Against: The Stigmatisation of Problem Drug Users*, U.K. DRUG POL'Y COMM'N 65 (Aug. 2010), rb.gy/g8i2an [<https://perma.cc/BX6F-K525>] (noting addiction's negative effects on interactions with “members of the public, nurses, doctors, pharmacists and police officers alike.”).

²³⁶ See generally Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. OF SOCIO. 363 (2001) (describing how stigma promotes the devaluation of one group by another through processes such as labeling, stereotyping, and cognitive separation into “us” and “them” groups); ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (1963) (arguing that stigma is a “deeply discrediting” attribute that precludes full social acceptance).

²³⁷ See Lloyd, *supra* note 235.

²³⁸ See Melissa Johnstone, Jolanda Jetten, Genevieve A. Dingle, Cameron Parsell, & Zoe C. Walter, *Discrimination and Well-Being Amongst the Homeless: The Role of Multiple Group Membership*, 6 FRONTIERS PSYCH. 1, 2 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4450171/> [<https://perma.cc/VM7X-THDF>] (“[T]he discrimination that homeless individuals face is perceived as legitimate, not only by the general public, but also by individuals who experience homelessness themselves.”).

²³⁹ Jo Phelan, Bruce G. Link, Robert E. Moore & Ann Sueve, *The Stigma of Homelessness: The Impact of the Label "Homeless" on Attitudes Towards Poor Persons*, 60 SOC. PSYCH. Q. 323, 332 (1997).

The impact of master statuses like addiction and homelessness cannot be overstated. As sociologist Cecilia Ridgeway has explained, they function as an independent force that not only creates structural inequality but stabilizes it.²⁴⁰ Cultural beliefs about the relative status of different groups shapes expectations and social perceptions of difference, ascribing perceived competence to certain groups.²⁴¹ By contrast, those with disfavored status are shunned, perpetuating their lack of access to power and resources.²⁴² These insights underscore the need for vigilance in ensuring that the most vulnerable among us are not subject to prosecutorial overreach.

Decades of research can help inform whether a criminal statute implicates a master status. Many of the status designations identified by scholars in the previous section²⁴³ appear to qualify. For example, Professor Laura Enriquez has demonstrated how immigration status functions as a master status with especially negative effects for undocumented minors.²⁴⁴ Pregnancy provides another powerful example of master status by combining gender with a second visible trait that immediately engages and recalibrates the perception of others.²⁴⁵

Refocusing Eighth Amendment analysis on master statuses captures the concerns raised by the justices in *Robinson* and *Powell* while avoiding, at the same time, some of the challenges those cases, and the uncertainties surrounding the *Marks* doctrine, have created for lower courts. Any alleged constitutional difference between a status and a condition would become irrelevant. Debate would also recede about the importance, if any, of involuntariness in both the acquisition of a given status and/or the conduct linked to it.

However, recognizing the primacy of master status is not sufficient in and of itself to guide courts' resolution of the core issues presented in this article.

²⁴⁰ Cecilia L. Ridgeway, *Why Status Matters for Inequality*, 79 AM. SOCIO. REV. 1, 4 (2014).

²⁴¹ Whites, men and the middle and upper class have benefitted historically from this phenomenon. *Id.* at 3-4.

²⁴² *Id.* at 3-4, 6-7.

²⁴³ See *supra* Part III.

²⁴⁴ Laura E. Enriquez, *A "Master Status" or the "Final Straw"?: Assessing the Role of Immigration Status in Latino Undocumented Youths' Pathways Out of School*, 43 J. ETHNIC & MIGRATION STUD. 1526 (2017).

²⁴⁵ While a master status may be self-referential and invisible, visible traits or identities were first identified by researchers as master statuses "conferred by the other." See van den Scott & van den Hoonard, *supra* note 232, at 178.

For example, while homelessness and addiction are clearly master statuses, anti-camping and alcohol-related laws are carefully crafted to avoid punishing those statuses, at least expressly. Further scrutiny of statutory enactments is necessary, therefore, to ferret out subterfuge that promotes the *de facto* punishment of vulnerable groups in violation Eighth Amendment principles, along with a mechanism to vindicate constitutional rights.

C. Master Status, Pretext and the Eighth Amendment

To protect vulnerable populations under the Eighth Amendment, a robust understanding of status must be paired with an enforcement mechanism that invalidates laws that criminalize such statuses by disguising them as conduct-based prohibitions. To date, commentators and various courts have endeavored to do this by interpreting *Robinson* and *Powell* as conflating status and conduct associated with it. As argued above, I believe that this strained reading of those cases is problematic and flawed. There is a better approach.

Simply put, *Robinson* teaches that it is cruel and unusual to punish people for who they are,²⁴⁶ as opposed to what they do.²⁴⁷ In permitting the prosecution of a chronic alcoholic for public drunkenness, *Powell* affirms this distinction.²⁴⁸ The prohibition, moreover, applied equally to all persons who appeared intoxicated in public; alcoholics were not singled out for prosecution, nor did the defendant contend that they were. Rather, as the plurality noted, the statute targeted conduct that carried “substantial health and safety hazards” and which violated the larger community’s “moral and esthetic sensibilities.”²⁴⁹ In sum, in the absence of evidence that the prosecution of public drunkenness was a proxy for punishing the disease of alcoholism, the Texas law at issue did not offend the Eighth Amendment.

The same is true of other laws challenged by commentators on Eighth Amendment grounds. For example, the unlicensed driving offenses identified by Annie Lai²⁵⁰ are not novel legislative enactments targeting undocumented

²⁴⁶ *Robinson*, 370 U.S. at 660, 667 (disallowing prosecution for being a person addicted to the use of narcotics).

²⁴⁷ *Id.* at 664 (noting the validity of criminal sanctions for, *inter alia*, the unauthorized sale or possession of narcotics).

²⁴⁸ *Powell*, 392 U.S. at 514, 532 (plurality opinion) (noting that *Robinson* disallows conviction for chronic alcoholism but not public drunkenness by a chronic alcoholic).

²⁴⁹ *Id.*

²⁵⁰ See Lai, *supra* note 158 and accompanying text.

immigrants; they apply equally to all motorists to promote public safety by ensuring that those who take to the roads can safely operate the vehicle.²⁵¹ Likewise, Priscilla Ocen's reliance on feticide in the criminalization of pregnancy is problematic since pregnant women are expressly exempt from prosecution in most states with a separate statutory enactment.²⁵² These offenses focus instead on third parties who unlawfully cause the death of a fetus.²⁵³

The landscape is quite different, however, vis-à-vis the homeless and anti-camping ordinances. These laws address otherwise innocent conduct like sitting on public streets and storage of personal property in public places,²⁵⁴ activities that clearly target those who lack private spaces in which to perform them.²⁵⁵ The fact that homeless individuals are grossly overrepresented in arrests for these crimes²⁵⁶ underscores their fundamentally pretextual nature: they exist to punish homelessness, a master status. Such laws strike at the core of what *Robinson*, and the Eighth Amendment more generally, seek to prevent.

Connecting status and pretext to vindicate individual rights is not a novel proposition. Federal antidiscrimination law has long done so in the employment context where plaintiffs allege disparate treatment based on race, color, religion, sex or national or origin.²⁵⁷ Parallel state laws do much the same. For example, in *Hegwine v. Longview Fibre Co.*,²⁵⁸ the plaintiff alleged that the defendant refused to hire her based on her pregnancy status in

²⁵¹ The same is true of prosecution for using false documents to obtain employment, another alleged form of "proxy criminalization" of undocumented immigrants. *Id.* at 903-04.

²⁵² Nelson, *supra* note 176, at 67, 69 (noting that pregnant women are exempt from feticide liability for their own pregnancies in twenty-five of thirty-six states).

²⁵³ See, e.g., *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990) (upholding a feticide conviction where defendant shot and killed twenty-eight-day-old embryo); *People v. Davis*, 872 P.2d 591 (Cal. 1994) (in bank) (discussing a murder conviction for the killing of a twenty-three to twenty-five-week-old fetus by gunshot during robbery).

²⁵⁴ See *supra* text accompanying notes 88-115.

²⁵⁵ For example, in *Pottinger v. City of Miami*, the court referenced governmental memoranda detailing the intentional use of anti-camping and related laws to arrest and otherwise harass homeless persons. 810 F. Supp. 1551, 1561, 1566 (S.D. Fla. 1992).

²⁵⁶ See e.g. Ryan E. Little et al., *Cities Try to Arrest Their Way Out of Homeless Problems*, AP NEWS (June 29, 2020), <https://apnews.com/article/us-news-arrests-race-and-ethnicity-virus-outbreak-fort-walton-beach-571a8646896ed0d12f3fe7ca3b1d064d> [https://perma.cc/V3JE-AW2R].

²⁵⁷ See 42 U.S.C. § 2000e-2(a); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (explaining that employees can prevail by proving that an employer's justification for adverse employment action was pretextual).

²⁵⁸ 172 P.3d 688 (Wash. 2007).

violation of the Washington Law Against Discrimination's prohibition on sex discrimination in employment. The plaintiff prevailed, establishing that the defendant's claim of business necessity was pretextual.²⁵⁹

In *Veenstra v. Washtenaw Country Club*,²⁶⁰ applying Michigan's Civil Rights Act, the plaintiff alleged "marital status" discrimination after his employer declined to renew his contract as the club's golf professional following plaintiff's separation from his wife and cohabitation with another woman. In evaluating the claim, the court explained that, while the statute protects status and not conduct, conduct may be relevant in demonstrating "pretext for action based on consideration of a protected status category."²⁶¹ Accordingly, the majority found that the trial court erred in refusing to consider evidence relating to defendant's conduct that may establish animus based on marital status.²⁶²

The foregoing does not suggest that all master statuses merit constitutional protection, even if conduct-based legislation targets them. For example, criminal laws that target gangs and gang-related activity are commonplace²⁶³ and have generally withstood constitutional scrutiny.²⁶⁴ While being part of a gang might be integral to a member's identity, the fact that these groups routinely engage in criminal activity²⁶⁵ would appear to preclude any status-based protection based on their conduct. An Illinois appellate court did find that a Chicago ordinance impermissibly punished status by criminalizing loitering by gang members.²⁶⁶ However, in reviewing the same ordinance, the state and federal supreme courts did not address the Eighth Amendment claim.²⁶⁷ Moreover, the city subsequently redrafted the ordinance to clarify that it

²⁵⁹ *Id.* at 697.

²⁶⁰ 645 N.W.2d 643 (Mich. 2002).

²⁶¹ *Id.* at 649; see also *Hazle v. Ford Motor Co.*, 628 N.W.2d 515, 522 (Mich. 2001) (requiring proof that employer's justification was a "pretext for [unlawful] discrimination").

²⁶² *Veenstra*, 645 N.W.2d at 648-49.

²⁶³ By 2002, such laws existed in most states, covering a range of activities including recruitment, loitering, and racketeering. See generally Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 107-08 (2002).

²⁶⁴ See *id.*

²⁶⁵ See generally C. Ronald Huff, *Criminal Behavior of Gang Members and At-Risk Youth*, NAT'L. INST. OF JUST. RSCH. PREVIEW, (Mar. 1998), <https://www.ojp.gov/pdffiles/fs000190.pdf> [<https://perma.cc/2KEH-F8NU>].

²⁶⁶ *City of Chicago v. Youkhana*, 660 N.E.2d 34, 42-43 (Ill. App. 1995).

²⁶⁷ *City of Chicago v. Morales*, 687 N.E.2d 53, 59-65 (Ill. 1997); *City of Chicago v. Morales*, 527 U.S. 41, 51-64 (1999).

applied to loitering with an illicit purpose for which punishment would clearly be appropriate, regardless of status affiliation.²⁶⁸

The distinction between illegal and “otherwise innocent” conduct—*e.g.*, sitting on the sidewalk if you are homeless—also justifies the prosecution of possessory drug offenses by those suffering from addiction. The proliferation of narcotics and other dangerous drugs has caused widespread tragedy throughout the country, a reality that remains stubbornly persistent.²⁶⁹ This ongoing crisis underscores the need for aggressive action to preserve life and criminalizing the unlawful possession of controlled substances is a legitimate part of this effort, as it has been for decades.²⁷⁰

CONCLUSION

Social scientific research discloses that status affiliations pervade our existence and matter profoundly in shaping the future that awaits us, both good and bad. Those whose statuses predict hardship are especially vulnerable since their disadvantage separates them from the people and the resources that are necessary for upward mobility. Homeless people are of particular concern in this regard, and we must be vigilant in protecting them from unlawful punishment that only serves to compound the challenges they inevitably face.

Through *Robinson* and *Powell*, the Supreme Court embraced concerns about status-based prosecution but failed to specify a framework to safeguard Eighth Amendment rights in this context. The fractured judicial landscape that resulted has persisted for decades, and the Court has shown little inclination to resolve ambiguities about status and conduct either directly or through a clarification of the *Marks* doctrine. This Article has proposed a new

²⁶⁸ The original ordinance applied to gang members who loitered “with no apparent purpose.” CHI., ILL., MUN. CODE § 8-4-015(c)(1) (1992). The revised version, by contrast, criminalized loitering by gang members “to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.” CHI., ILL., MUN. CODE § 8-4-015(d)(1) (2015).

²⁶⁹ In the twelve-month period ending in April 2021, drug overdose deaths increased by 28.5% over the previous twelve-month period. CTRS. FOR DISEASE CONTROL AND PREVENTION, NAT’L CTR. FOR HEALTH STATS., *Drug Overdose Deaths in the U.S. Top 100,000 Annually* (Nov. 17, 2021), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm [https://perma.cc/64JL-WEPJ].

²⁷⁰ I do not mean to suggest in any way that we can prosecute our way out of the present pandemic. As I have argued elsewhere, health-based strategies and interventions are of paramount importance in this struggle. See John Kip Cornwell, *The Search for Answers: Overcoming Chaos and Inconsistency in Addressing the Opioid Crisis*, 47 MITCHELL HAMLINE L. REV. 419, 424–25 (2021) (discussing the critical role of medication-assisted treatment in addressing opioid addiction).

approach that, recognizing the centrality of master statuses, disallows the prosecution of otherwise innocent conduct that targets these statuses pretextually. Refocusing the Eighth Amendment inquiry in this way provides a path out of the present analytical confusion while remaining true to the spirit and humanity of the Supreme Court's reflections so many years ago.