

# TESTING THE SCOPE OF STATUS

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## I. INTRODUCTION

Defining the constitutional limits of states' autonomy in substantive criminal law is playing out against a backdrop of cases on homelessness.<sup>1</sup> Lower courts are floundering as they address the extent to which local laws violate the Eighth Amendment when they criminalize basic human conduct out in public. Tension in that legislative reach arises because the behaviors or conduct at issue are inextricably tied to involuntary characteristics, or statuses, of those punished.

The battleground of these cases is a pocket of Eighth Amendment jurisprudence, which this article will refer to as the "Status Crimes Doctrine."<sup>2</sup> But, as Supreme Court jurisprudence is scant on the subject, local legislatures are left to question the parameters of their authority to permissibly enforce these criminal statutes.<sup>3</sup>

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1. See, e.g., *Manning v. City of Roanoke*, 930 F.3d 264 (4th Cir. 2019); *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019); *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000); *Phillips v. City of Cincinnati*, No. 1:18-cv-541, 2020 WL 4698800, at \*1 (S.D. Ohio Aug. 13, 2020); *Frank v. City of Saint Louis*, No. 4:20-CV-00597 SEP, 2020 WL 2116392, at \*1 (E.D. Mo. May 2, 2020); *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218 (E.D. Cal. 2009); *Joyce v. City and County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994); *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd on other grounds*; *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992); *State v. Adams*, 91 So. 3d 724 (Ala. Crim. App. 2018); *People v. Kellogg*, 14 Cal. Rptr. 3d 507 (Ct. App. 2004).

2. Status crimes were first addressed by the Supreme Court in *Robinson v. California*, 370 U.S. 660 (1962) (expanding the reach of the Eighth Amendment by finding punishment for an individual's status to be "cruel and unusual").

3. The Supreme Court has only addressed the Eighth Amendment Status Crime Doctrine twice, and both instances were in the sixties. See *Powell v. Texas*, 392 U.S. 514, 531-37 (1968); *Robinson*, 370 U.S. at 660-68.

Media attention paints a disturbing picture—cities on a crusade to punish poverty and criminalize homelessness through the treatment of their unhoused population via criminal laws.<sup>4</sup> Stories are told of homeless individuals living in fear of arrest as they struggle to find a place upon which to lay their heads.<sup>5</sup> It is a picture of a police state, misusing its criminal laws to drive homeless populations out of its limits rather than enact adequate social policies to address a rising problem.

And while there is certainly truth in the hardship experienced by homeless individuals in these stories, there is another concerning reality. Without the ability to control public conduct through these generally applicable laws, cities must stand idly by as homeless populations grow and encampments become increasingly permanent.<sup>6</sup> The effect? The hampering of sound and constructive solutions as well as local efforts to provide these populations with necessary social services and adequate housing.<sup>7</sup>

Two decisions stand as bookends in the collection of status crimes cases—*Robinson v. California*<sup>8</sup> and *Powell v. Texas*.<sup>9</sup> Yet, when it comes to criminal law, the Supreme Court generally limits its involvement to

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4. See, e.g., Kristin Lam, *Cities Are Criminalizing Homelessness by Banning People from Camping in Public. That's the Wrong Approach, Report Says*, USA TODAY (Dec. 10, 2019, 8:00 AM), <https://www.usatoday.com/story/news/nation/2019/12/10/homeless-camping-bans-criminalization-report/4378565002/>; Trevor Bach, *Will Fines and Jail Time Fix the Homelessness Crisis?*, U.S. NEWS (Oct. 7, 2019, 1:25 PM), <https://www.usnews.com/news/cities/articles/2019-10-07/us-cities-are-increasingly-cracking-down-on-homelessness>; Mihir Zaveri, *Laws Punishing Homeless People for Sleeping in Public Are Cruel and Unusual, Court Rules*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/us/-homeless-sleeping-on-street-ruling.html>; Bidish Sarma & Jessica Brand, *The Criminalization of Homelessness: Explained*, THE APPEAL (June 29, 2018), <https://theappeal.org/the-criminalization-of-homelessness-an-explainer-aa074d25688d/>.

5. See, e.g., Sarma & Brand, *supra* note 4 (“Most evenings, Aguirre Dick rides his bike about three miles from the streets of Waikiki in Honolulu to the slopes of a volcano, where he sleeps. If he doesn’t make that trek, he could be arrested. A 2014 law made it illegal to sit or lie down on the public sidewalks in Waikiki. As a result of this law, those without homes, like Aguirre, live in constant fear of being pushed into the criminal justice system simply because they are too poor to own or rent lodging.”).

6. For an in-depth understanding of the growth of homeless encampments in the United States, see JULIA HUNTER ET AL., NAT’L L. CTR. ON HOMELESSNESS & POVERTY & ALLARD K. LOWENSTEIN INT’L HUM. RIGHTS CLINIC, YALE L. SCH., *WELCOME HOME: THE RISE OF TENT CITIES IN THE UNITED STATES* (2014), [https://nlchp.org/wp-content/uploads/2018/10/WelcomeHome\\_TentCities.pdf](https://nlchp.org/wp-content/uploads/2018/10/WelcomeHome_TentCities.pdf); see also Brief of the People Concern and Weingart Center Ass’n as Amici Curiae Supporting Petitioner at 19-20, *City of Boise v. Martin*, 140 S. Ct. 674 (2019) (No. 19-247), 2019 WL 4747974 at \*19-20 [hereinafter *People Concern and Weingart Center Ass’n Brief*].

7. See Brief for Petitioner at 4, *City of Boise v. Martin*, 140 S. Ct. 674 (2019) (No. 19-247), 2019 WL 4034750 at \*4; *People Concern and Weingart Center Ass’n Brief*, *supra* note 6, at 3-5.

8. 370 U.S. 660 (1962).

9. 392 U.S. 514 (1968) (plurality opinion).

constitutional questions of criminal procedure or punishment.<sup>10</sup> In its two hundred and twenty years, the Court has only entered the arena of substantive criminal law in three instances,<sup>11</sup> with *Robinson* and *Powell* marking the end of the Court's "flirtation with the possibility of a constitutional criminal law doctrine."<sup>12</sup> Rather, local legislatures generally retain significant power over the creation of their criminal codes and ample discretion to enforce them. However, state and local legislative bodies across the country have come under scrutiny as they attempt to control and even punish public behaviors they perceive as disruptive to the welfare of their citizens.

To be sure, the criminalization of an individual's status in the absence of any volitional act violates the Eighth Amendment.<sup>13</sup> But this principle, although reaffirmed in both *Robinson*<sup>14</sup> and *Powell*,<sup>15</sup> raises a host of serious questions regarding the nature and parameter of "status." The Court's interpretation of the Status Crimes Doctrine has admittedly produced "confused and divergent" opinions.<sup>16</sup> Fifty years later, much is still left unresolved. There is widespread disagreement and, as a result, seemingly inconsistent interpretations of this doctrine.<sup>17</sup>

Cities are calling out for the Supreme Court to provide clarity on the scope of their legislative authority.<sup>18</sup> Recently, twenty Amicus Briefs were filed in response to a petition for certiorari in a recent case on the subject.<sup>19</sup>

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10. See Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 57 (2008). The first case in which the Supreme Court actually interfered with a state's discretion to create criminal laws and struck down a state law as a violation of Due Process was in 1957 in *Lambert v. California*, 355 U.S. 225 (1957).

11. See *Lambert*, 355 U.S. 225; *Robinson*, 370 U.S. 660; *Powell*, 392 U.S. 514.

12. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 966 (1999).

13. *Robinson*, 370 U.S. at 667.

14. See *id.*

15. See 392 U.S. at 532-33.

16. *United States v. Sirois*, 898 F.3d 134, 138 (1st Cir. 2018) (quoting *United States v. Moore*, 486 F.2d 1139, 1142 (D.C. Cir. 1973)).

17. Compare *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), and *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992), with *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), and *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218 (E.D. Cal. 2009).

18. See, e.g., Brief of Amicus Curiae the City of Los Angeles in Support of Grant of Petition for Certiorari, *City of Boise v. Martin*, 140 S. Ct. 674 (2019) (No. 19-247), 2019 WL 4795658 [hereinafter Brief of Amicus Curiae the City of Los Angeles]; Brief of Amicus Curiae the Downtown Denver P'ship in Support of Petitioner, *City of Boise v. Martin*, 140 S. Ct. 674 (2019) (No. 19-247), 2019 WL 4673418; Brief of Amicus Curiae League of Oregon Cities in Support of Petitioner, *City of Boise v. Martin*, 140 S. Ct. 674 (2019) (No. 19-247), 2019 WL 4795659.

19. Amy Howe, *Justices Turn Aside Major Case on Homelessness Law*, SCOTUSBLOG (Dec. 16, 2019, 10:50 AM), <https://www.scotusblog.com/2019/12/justices-turn-aside-major-case-on-homelessness-law/> ("The city's appeal was supported by 20 'friend of the court' briefs, some from cities and states with large homeless populations."). Of the twenty "friend of the court" briefs

One Amicus Brief declares that “the Ambiguous Language and Circuit Split is Wreaking Havoc.”<sup>20</sup> Yet, calls to address this constitutional ambiguity have gone unanswered to date.<sup>21</sup>

A balance must be struck between these compelling, but competing, interests. The search for clarity can be solved by a workable test that addresses when criminal laws permissibly regulate public conduct and when they amount to the unconstitutional punishment of one’s status. This Note surveys the status/conduct debate and, ultimately, proposes a two-part burden-shifting test to define the bounds of status and determine when conduct falls within its scope. **Part II** provides a primer on the Eighth Amendment and the two leading Supreme Court cases on status crimes. **Part III** illustrates recurring themes in the status/conduct debate and proposes a constitutional test that could aid courts in addressing concerns raised by both sides of the issue. **Part IV** applies the proposed test to an existing California statute, and **Part V** concludes.

## II. PRIMER ON EIGHTH AMENDMENT AND STATUS CRIMES

Any discussion of status crimes must start with a review of the Eighth Amendment’s categorical ban on “cruel and unusual punishments.”<sup>22</sup> Although the Bill of Rights incited disagreement, the Eighth Amendment was adopted without much debate.<sup>23</sup> Support arose from the express concern that the government could conceivably “invent[] the most cruel and unheard-of punishments, and annex[] them to crimes.”<sup>24</sup>

From the time of its adoption, the Eighth Amendment has acted as a necessary check on the discretion generally granted to states to assign punishment.<sup>25</sup> However, it was originally interpreted to operate solely on the government’s power to punish, *not on the government’s power to define*

submitted, almost half are representing states, cities, and counties. See *City of Boise, Idaho v. Martin*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/city-of-boise-idaho-v-martin/> (last visited Nov. 5, 2020).

20. Brief of Amici Curiae Int’l Downtown Ass’n et al. in Support of Petitioner at 19, *City of Boise v. Martin*, 140 S. Ct. 674 (2019) (No. 19-247), 2019 WL 4879641 at \*19.

21. Most recently, the Supreme Court denied certiorari to the Ninth Circuit’s decision in *Martin v. City of Boise*, a case that limited legislative authority to criminalize aspects of homelessness. 920 F.3d 584 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 674 (2019).

22. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

23. 1 ANNALS OF CONG. 782-83 (1789) (Joseph Gales ed., 1834).

24. 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1836), <https://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-vol-2>.

25. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (applying the Eighth Amendment to the states through the Fourteenth Amendment); see also ELLIOT, *supra* note 24.

crime.<sup>26</sup> The underlying scope of the amendment has since expanded beyond “proscrib[ing] tortures and other barbarous methods of punishment” condemned at common law.<sup>27</sup>

Beginning over a century ago, the Supreme Court placed new emphasis on the Amendment’s import.<sup>28</sup> First, the Court interpreted the Eighth Amendment to protect human dignity in light of the “evolving standards of decency that mark the progress of a maturing society.”<sup>29</sup> Second, the Court bestowed an overarching right to be free from “excessive sanctions,” or punishment disproportionate to the crime.<sup>30</sup> Unlike the evolving standard, which embodies “idealistic,” “civilized,” and developing notions of human decency,<sup>31</sup> the second principle of proportionality stems from a historical progression of the last hundred years of Eighth Amendment jurisprudence.<sup>32</sup>

#### A. *The Eighth Amendment Status Crimes Doctrine*

The Eighth Amendment’s central themes of proportionality and dignity, and their relationship to one another, sparked the prohibition of status crimes.<sup>33</sup> This area of Eighth Amendment jurisprudence not only circumscribes the government’s power to punish, it bears directly on governmental power to define what constitutes a crime.<sup>34</sup> Status crimes arise out of both a progressive view of the human condition and a historic understanding of the Eighth Amendment. Simply, if the government may *never* impose disproportionate punishments, and punishment for an

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26. See *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*,” 57 CALIF. L. REV. 839, 842 (1969)); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878); see also *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 635 (1966) [hereinafter *Cruel and Unusual Punishment and Criminal Law*].

27. *Estelle*, 429 U.S. at 102 (internal citations omitted) (citing Granucci, *supra* note 26, at 842).

28. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (setting forth the “evolving standards of decency”); *Weems v. United States*, 217 U.S. 349, 382 (1910) (expanding the Eighth Amendment to prevent punishment that is disproportionate to the crime).

29. *Trop*, 356 U.S. at 101; see also *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring) (quoting *O’Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting) (“[T]he ‘cry of horror’ against man’s inhumanity to his fellow man.”)).

30. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012).

31. *Estelle*, 429 U.S. at 102.

32. *Miller*, 132 S. Ct. at 2463.

33. See *Powell v. Texas*, 392 U.S. 514, 542 (1968) (Black, J., concurring); *Cruel and Unusual Punishment and Criminal Law*, *supra* note 26, at 647.

34. See *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

individual's status will *always* be deemed disproportionate, then the government cannot create crime based on status.<sup>35</sup>

In the seminal case on status crimes, *Robinson v. California*, the status at issue was narcotics addiction.<sup>36</sup> The California statute not only criminalized the acts of drug possession and consumption, it also criminalized the status of addiction.<sup>37</sup> Conviction could therefore be based upon proof that Robinson either consumed drugs *or was addicted to drugs*.<sup>38</sup>

*Robinson* is particularly instructive on whether an individual's condition meets the requirements of a "status" for purposes of presenting a cognizable claim under the Eighth Amendment. The Court likened narcotics addiction to other "human afflictions," such as insanity, mental disease, and illness.<sup>39</sup> Interestingly, how Robinson himself became addicted to narcotics was irrelevant to the inquiry.<sup>40</sup> Instead, the Court analyzed whether addiction constituted a "status" in the abstract. Irrespective of how the specific individual became addicted, a cognizable status was defined as a condition that an individual *could* or *likely* "innocently or involuntarily" inherit<sup>41</sup> and is generally "powerless to change" without help.<sup>42</sup>

Borrowing from the overbreadth doctrine of the First Amendment,<sup>43</sup> the Court concluded the California statute at issue could not stand where a person could innocently be swept up in its prohibitory reach.<sup>44</sup> One extreme example the *Robinson* Court referenced was a baby born addicted to drugs.<sup>45</sup> In California, prior to *Robinson*, this very baby would inherently be deemed a "criminal."

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35. See *Robinson*, 370 U.S. at 667; *Cruel and Unusual Punishment and Criminal Law*, *supra* note 26.

36. 370 U.S. at 667.

37. See *id.* at 665.

38. The Court stated that:

Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's 'status' or 'chronic condition' was that of being 'addicted to the use of narcotics.' And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding.

*Id.*

39. *Id.* at 666.

40. See *id.* at 666-67.

41. See *id.* at 667.

42. *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting) (plurality opinion).

43. The substantial overbreadth of a statute is judged in relation to the statute's legitimate sweep, posing a risk that protected conduct could be swept into the statute's prohibitory reach. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

44. *Robinson*, 370 U.S. at 667.

45. See *id.* at 670 (Douglas, J., concurring).

Finally, *Robinson*, rather remarkably, implicated a constitutional doctrine of criminal law. In *Robinson*, the Eighth Amendment violation turned on the government's designation of criminality in the absence of any voluntary "antisocial or disorderly" conduct.<sup>46</sup> By rejecting this designation, the Court impliedly constitutionalized the doctrine of actus reus.<sup>47</sup> Specifically, the Eighth Amendment could now be read as mandating a voluntary act as an element of a crime.

Even where the regulation of narcotics falls within the legitimate exercise of a state's police power to promote the health, safety, and welfare of the public,<sup>48</sup> the *Robinson* Court tested the reach of the Eighth Amendment and used it to limit state discretion in the creation of criminal laws.<sup>49</sup>

### B. *The Status-Act Distinction*

*Robinson*, however, did not settle the discussion of the constitutional prerequisite for a finding of criminality. At the time, criminal law commentators contemplated how such a decision could create a constitutional mandate, not just on the doctrine of actus reus, but also on the doctrine of *mens rea*.<sup>50</sup> As one scholar noted, "[Beyond *Robinson*], there are no clearly marked principles of criminal responsibility in the federal constitution."<sup>51</sup> That void caused considerable concern: if the Status Crimes Doctrine were broadened, it could usurp states' ability to criminalize conduct that was historically within its purview.<sup>52</sup> Justice Clark signaled this concern in his dissent in *Robinson* when he asked,

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46. See *id.* at 666-67 (finding that criminality constitutionally requires more than the simple act of being).

47. "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed . . . some *actus reus*." *Powell*, 392 U.S. at 533.

48. *Robinson*, 370 U.S. at 664-65 (reasoning that a state could employ a myriad of constitutionally permissible tactics to serve its legitimate interests, including mandatory treatment, without having to criminalize the status itself).

49. See *id.* at 667; *Cruel and Unusual Punishment and Criminal Law*, *supra* note 26, at 646.

50. See, e.g., Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 385-86 (1966); *Cruel and Unusual Punishment and Criminal Law*, *supra* note 26, at 653-54; James S. Campbell, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1010-11 (1964); John E. Bagalay, Jr., Note, *Constitutional Law-Criminal Law-Penal Sanctions Applied to Narcotics Addiction are Unconstitutional as Cruel and Unusual Punishment*. *Robinson v. California*, 370 U.S. 660 (1962), 41 TEX. L. REV. 444, 446-47 (1963).

51. Dubin, *supra* note 50, at 374.

52. See *Powell*, 392 U.S. at 533 (1968); see also Brenner M. Fissell, *Federalism and Constitutional Criminal Law*, 46 HOFSTRA L. REV. 489, 505-07 (2017); Martin R. Gardner, *Rethinking Robinson v. California in the Wake of Jones v. Los Angeles: Avoiding the "Demise of*

Can this Court deny the legislative and judicial judgment of California that incipient, volitional narcotic addiction poses a threat of serious crime similar to the threat inherent in the purchase or possession of narcotics? And if such a threat is inherent in addiction, can this Court say that California is powerless to deter it by punishment?<sup>53</sup>

Fueled by a need to limit the reach of the Eighth Amendment and curb any potential of a constitutional doctrine of criminal responsibility, the Supreme Court unsuccessfully addressed the Status Crimes Doctrine one last time. In *Powell v. Texas*, the Court declined to find that a Texas statute penalizing public intoxication criminalized the status of alcoholism.<sup>54</sup> The thrust of Petitioner's argument was that "his appearance in public while drunk was . . . not of his own volition" but a consequence of his alcoholism.<sup>55</sup>

The *Powell* Court affirmed the fundamental principles held in *Robinson*: (1) punishment can only be constitutionally imposed after the finding of an actus reus, and (2) alcoholism, like narcotics addiction, constitutes a status for purposes of the Eighth Amendment.<sup>56</sup> Nonetheless, it declined to expand the Status Crimes Doctrine and rejected Petitioner's argument.<sup>57</sup>

Fearing *Robinson*'s unchecked reach, the *Powell* plurality clung to a status-act distinction—criminalizing the status of alcoholism is different than criminalizing the act of appearing in public drunk.<sup>58</sup> Note the reasoning behind the plurality's decision:

[U]nless *Robinson* is [narrowed] it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.<sup>59</sup>

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*the Criminal Law*" By Attending to "Punishment", 98 J. CRIM. L. AND CRIMINOLOGY 429, 429, 476-78 (2008).

53. 370 U.S. at 684.

54. 392 U.S. at 535. The statute at issue finds that "[w]hoever 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." *Id.* at 517 (citing TEX. PENAL CODE ANN. art. 477 (1952) (current version at TEX. PENAL CODE ANN. § 49.02 (West 2011))).

55. *Id.* at 517.

56. *See id.* at 533.

57. *See id.* at 535.

58. Courts and scholars have praised this status-act distinction because it narrows *Robinson*. *See, e.g.*, *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000); *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009); *Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 854 (N.D. Cal. 1994); *see also Eighth Amendment Criminalization of Homelessness—Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public* *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), 133 HARV. L. REV. 699, 701 n.24 (2019) [hereinafter *Eighth Amendment Criminalization of Homelessness*].

59. *Powell*, 392 U.S. at 533.

“Traditional common-law concepts of personal accountability and essential considerations of federalism” ultimately persuaded the Court to adopt the status-act distinction as this “limiting principle.”<sup>60</sup>

Remember, *Robinson* was only the second time in its history that the Supreme Court erected “constitutional barrier[s]” on substantive criminal law.<sup>61</sup> This kind of intrusion on states’ autonomy to protect their citizens from a host of harmful and undesirable conduct was seen as revolutionizing the Court’s involvement in criminal law.<sup>62</sup> As a result, when the Court reentered the discussion in *Powell*, the plurality attempted to restrict *Robinson*’s holding to pure status crimes, excluding acts, even those closely associated with a person’s status.<sup>63</sup>

But the status-act distinction should not be binding. *Powell*’s lead opinion is a plurality, not a plenary opinion.<sup>64</sup> With that in mind, Justice White’s concurring opinion in *Powell* perhaps more accurately informs the conversation.

Justice White concurred in the result, but not in the reasoning.<sup>65</sup> For Justice White, the facts of *Powell* did not support a *Robinson*-based conclusion. His understanding of the scope of the *Robinson* decision, however, was far more reflective of the dissenting justices’ opinion: it is cruel and unusual to punish an individual for acts that directly and involuntarily stem from her status just as it is unconstitutional to punish for the status itself.<sup>66</sup>

The issue for Justice White was not that public intoxication implicated an act. Instead, Justice White could not find enough facts in the record to support the conclusion that Powell had “a compulsion . . . to drink to excess

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60. *Id.* at 533, 535.

61. *Id.* at 537 (Black, J., concurring). The first time was in *Lambert v. California*, 355 U.S. 255 (1957).

62. *See Powell*, 392 U.S. at 535 (plurality opinion); *id.* at 535-37 (Black, J., concurring).

63. *See id.* at 533, 535 (plurality opinion). *But see id.* at 548-49, 567-68 (White, J., concurring) (Fortas, J., dissenting) (acknowledging that the *Robinson* decision *could have* extended to create a constitutional prerequisite of a culpable state of mind for a finding of criminality).

64. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (providing guidelines as to the precedential effect of plurality decisions in subsequent cases). Per the Court’s holding in *Marks*, when five justices cannot unite around a “single rationale [to explain] the result” of the case at hand, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

65. *Powell*, 392 U.S. at 548 (White, J., concurring); *see also* Wayne W. Armstrong & Perry S. Silver, Note, *Alcoholism and the Eighth Amendment: Powell v. Texas*, 2 LOY. U. L.A. L. REV. 159, 164 (1969) (calling Justice White’s opinion the “most significant opinion in *Powell*”).

66. *Compare Powell*, 392 U.S. at 548 (White, J., concurring), *with id.* at 567-68 (Fortas, J., dissenting).

[and] to frequent public places when intoxicated.”<sup>67</sup> Without the compulsion to commit the act of appearing drunk in public, the act could not be characterized as “involuntary.”<sup>68</sup> Most instructive, Justice White described an instance in which a homeless chronic alcoholic could not be held criminally accountable, even under an otherwise constitutionally permissible statute, for appearing drunk in public.<sup>69</sup>

Unlike the *Robinson* statute, which could be struck down facially for criminalizing pure status, Justice White’s concurring opinion seems to open the door to as applied challenges. Under these challenges, individuals could present sufficient facts to support that the punished conduct was an involuntary result of status such that the criminalization of the conduct constitutes a status crime.<sup>70</sup>

Under *Marks v. United States*, Justice White’s concurring opinion is the least narrow grounds by which to decide *Powell*, and thus would be binding as opposed to the plurality’s opinion.<sup>71</sup> However, criticism has sprung up around the idea that a “single-justice” concurring opinion could carry such precedential effect.<sup>72</sup> Even though Justice White’s *Powell* concurrence had gained minimal traction until recently,<sup>73</sup> the themes described within his opinion appear throughout court decisions. For example, in *United States v. Black*, the Seventh Circuit rejected further discussion of the opinion because

67. *Id.* at 549 (White, J., concurring) (emphasis added); see *Armstrong & Silver, supra* note 65 (“There was no showing at the trial to support the contention that Powell had a compulsion to be drunk in public. The record showed that the defendant had a home and a job, indicating that he had some control over his movements and could have chosen to be drunk in private.”).

68. *Powell*, 392 U.S. at 549 (White, J., concurring).

69. *Id.* at 551-52. As Justice White reasoned:

The fact remains that some chronic alcoholics must drink and hence must drink somewhere. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.

*Id.* at 551 (emphasis omitted).

70. See *id.*

71. 430 U.S. at 193; see *supra* text accompanying note 64.

72. Brief for Petitioner, *supra* note 7, at 2; see also *United States v. Sirois*, 898 F.3d 134, 138 (1st Cir. 2018) (“[The opinion] is one that has yet to gain any apparent relevant traction.”); *United States v. Black*, 116 F.3d 198, 201 n.2 (7th Cir. 1997) (“Defendant’s principal reliance is on the concurring opinion of Justice White in *Powell v. Texas*. However, since no other Justice joined in that opinion, it need not be discussed further.”).

73. The Ninth Circuit opinion in *Martin v. Boise* tracks Justice White’s concurring opinion. *Martin v. City of Boise*, 920 F.3d 584, 616-17 (9th Cir. 2019).

“no other justice joined it,” but still analyzed whether petitioner’s conduct was involuntary or uncontrollable in light of his status.<sup>74</sup>

Ultimately, these themes raised throughout *Robinson* and *Powell* will serve to provide a structure to the Status Crimes Doctrine and the proposed Status-Act Test.

### III. PROVIDING A WORKABLE FRAMEWORK FOR THE STATUS CRIMES DOCTRINE

Within the last few decades, a series of cases centering on homelessness have provided lower courts the opportunity to test the bounds of status crimes.<sup>75</sup> Specifically, courts are grappling with whether, and to what extent, the punishment of acts closely related to status constitutes a status crime in violation of the Eighth Amendment.

The status-act distinction is a flawed dichotomy. Consider this example. In establishing the Status Crimes Doctrine, Justice Stewart wrote, “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”<sup>76</sup> How could the Eighth Amendment, though, prohibit penalties for the common cold but nonetheless find it constitutionally permissible to criminalize sneezing or blowing one’s nose?<sup>77</sup> Deeming the criminalization of the status, the common cold, unconstitutional, but the criminalization of the act, blowing one’s nose, tolerable “reveal[s] the arbitrary consequences of drawing a purely linguistic distinction between status and conduct.”<sup>78</sup> Individuals suffering from disfavored statuses, such as alcoholism and addiction, are subjected to hardship and stigma when their status *and* the involuntary acts that follow amount to a crime.

With *Robinson* and *Powell* framing the inquiry, a review of the status/conduct debate among lower courts and scholars reveals a series of recurring themes. Foundational to the debate is the question of what constitutes a status for purposes of a cognizable Eighth Amendment challenge. A second theme centers on when the criminalization of conduct amounts to the criminalization of status. Finally, and at the heart of this Note,

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74. 116 F.3d at 201 & n.2.

75. See cases cited *supra* note 1.

76. *Robinson v. California*, 370 U.S. 660, 667 (1962).

77. See Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 316 (1996); see also *Powell v. Texas*, 392 U.S. 514, 548 (1968) (White, J., concurring) (plurality opinion).

78. Benno Weisberg, Comment, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual “Crimes”*, 96 J. CRIM. L. & CRIMINOLOGY 329, 341 (2005).

is pinpointing an appropriate “limiting principle” that balances the court’s dual responsibilities to protect individual liberties, while affirming states’ autonomy.<sup>79</sup>

Although lower courts have moved away from a test that revolves around a status-act distinction, none necessarily establish a clear substitute test to frame the analysis. The result is seemingly inconsistent judgments.<sup>80</sup> Thus, there is a strong need to create a status crime framework that provides necessary protections and clarifies governmental “authority with respect to the conduct of individuals” suffering from disfavored statuses.<sup>81</sup> This Section examines the threshold matter as to what generally constitutes a status. However, the thrust of this Section is to outline a novel two-part “Status-Act Test” that establishes when the criminalization of conduct falls within the prohibitory scope of the Status Crimes Doctrine.

#### A. *Threshold Issue: Whether a Statute Facially Criminalizes Status or Conduct*

Before we can even reach the Status-Act Test proposed later in Part B of this Section, we must, as a threshold matter, identify whether the statute directly or indirectly implicates status for purposes of a cognizable Eighth Amendment claim. The answer to this question determines, first, the kind of constitutional challenge that can be brought, and second, the effect a successful challenge will have on the existing statute.

In keeping with *Robinson*, a law that facially seeks to criminalize a cognizable status must be struck as a violation of the Eighth Amendment’s ban on cruel and unusual punishment,<sup>82</sup> where the law “punish[es] a person for who he is, independent of anything he has done.”<sup>83</sup> But where the law appears on its face to criminalize conduct and not status, it would seem, per Justice White’s *Powell* instruction, that an individual or class of persons may bring an as applied challenge arguing that the “statute is unconstitutional on the facts of a particular case or in its application to a particular party.”<sup>84</sup> Put

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79. Aside from the *Powell* plurality, no case necessarily references a “limiting principle.” 392 U.S. at 533. Instead, there is an inherent tension that arises when constitutional law tiptoes into general realms of states’ autonomy. The only realistic way to ensure the Status Crime Doctrine maintains substance is to (1) extend the Doctrine to protect conduct closely associated with status, and (2) implement a constitutional test that reasonably accounts for when a state may have a superseding interest in regulating the conduct.

80. See cases cited *supra* note 17.

81. Brief of Amicus Curiae the City of Los Angeles, *supra* note 18, at 1.

82. *Robinson v. California*, 370 U.S. 660, 667 (1962).

83. *State v. Adams*, 91 So. 3d 724, 747, 754 (Ala. Crim. App. 2010) (quoting *Jones v. City of Los Angeles*, 444 F. 3d 1118, 1133 (9th Cir. 2006)).

84. *Id.* at 754 (quoting *As Applied Challenge*, BLACK’S LAW DICTIONARY (8th ed. 2004)).

simply, to achieve threshold standing, the statute must facially criminalize conduct that implicates a recognized status under the Eighth Amendment.

While it may be easy to spot when a statute facially criminalizes conduct, it seems far more difficult to determine whether a statute facially criminalizes status. Indeed, defining “status” has proven to be an “elusive” task.<sup>85</sup> The Supreme Court has established that status includes addiction, alcoholism, and other diseases.<sup>86</sup> It is unclear, however, whether this is the floor or ceiling. This lack of clarity is exemplified in the cases surrounding homelessness.<sup>87</sup>

While courts agree that a distinguishing feature of status is the individual’s inability to largely avoid or change the condition,<sup>88</sup> tension arises over whether status can derive from social and environmental triggers.<sup>89</sup> Narrowly interpreting status to include only a biological or anatomical condition, akin to mental disease or alcoholism, would exclude homelessness as a protected status. Yet, it seems contrary to basic notions of civility and human decency described under the Eighth Amendment to permit a city or state to enact a statute that facially criminalizes poverty or homelessness.

The issue does not stop there. Even if we assume that the definition of status extends beyond biology, additional confusion stems from whether status should be analyzed in the abstract or done on a case-by-case basis.<sup>90</sup> Buried in a footnote, Justice White proposed that courts should look to whether the status was proximately caused by voluntary actions.<sup>91</sup> Take the example of the baby born addicted to drugs.<sup>92</sup> Under Justice White’s test, a

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85. *Johnson v. City of Dallas*, 860 F. Supp. 344, 349 (N.D. Tex. 1994), *aff’d in part and vacated in part on other grounds*, 61 F.3d 442 (5th Cir. 1995). Even though the law is well-established that the government cannot criminalize an individual’s status, there is still debate as to what constitutes status. *Compare Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563-64 (S.D. Fla. 1992) (recognizing homelessness as a status for purposes of an Eighth Amendment status crime), *with Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994) (narrowing the definition of status to exclude homelessness).

86. *See Powell v. Texas*, 392 U.S. 514, 532 (1968) (plurality opinion); *see also Robinson*, 370 U.S. at 666-67.

87. *Compare Joyce*, 846 F. Supp. at 857 (homelessness is not a status), *with Pottinger*, 810 F. Supp. at 1563 (homelessness is a cognizable status).

88. *Johnson*, 860 F. Supp. at 348-49 (surveying other district courts’ definitions of status in an attempt to determine whether homelessness constitutes a cognizable status under the Eighth Amendment); *see also Powell*, 392 U.S. at 567 (Fortas, J., dissenting); *Robinson*, 370 U.S. at 667.

89. The tension is illustrated by the conflicting outcomes of *Pottinger*, 810 F. Supp. at 1563, and *Joyce*, 846 F. Supp. at 856.

90. *See, e.g., Gardner*, *supra* note 52, at 447-50; *Smith*, *supra* note 77, at 312-13; *Cruel and Unusual Punishment and Criminal Law*, *supra* note 26, at 645.

91. *Powell*, 392 U.S. at 550 n.2 (White, J., concurring) (“The proper subject of inquiry is whether volitional acts brought about the ‘condition’ and whether those acts are sufficiently proximate to the ‘condition’ for it to be permissible to impose penal sanctions on the ‘condition.’”).

92. *See supra* note 44-45 and accompanying text.

statute criminalizing addiction could not be enforced against this child where the child has not engaged in any voluntary acts to bring about her addiction. However, an individual who develops an addiction through the voluntary actions of possession and consumption could legitimately be swept into the statute's reach.

But the *Robinson* decision is clear on this issue. The *Robinson* Court never considered whether Robinson himself voluntarily or involuntarily acquired his addiction when striking down California's statute as unconstitutional.<sup>93</sup> Rather, it looked to whether addiction was a kind of condition that *could* involuntarily, innocently, or unwantedly be acquired.<sup>94</sup>

Consider again the overbreadth doctrine of the First Amendment.<sup>95</sup> If a statute restricting speech is too broad such that protected speech may fall within its prohibitory reach, then the statute must be struck as unconstitutional.<sup>96</sup> Similarly, when a statute criminalizes status, it must be struck as unconstitutional regardless of the facts of the case because there is a potential that someone *could* be punished for a crime that truly lacked an actus reus.<sup>97</sup> It is upon this premise that the *Robinson* Court landed.

It follows that a condition must be viewed in the abstract—whether the individual could “innocently” or “involuntarily” acquire the condition.<sup>98</sup> And if a statute criminalizes a condition one likely “innocently” or “involuntarily” inherits,<sup>99</sup> but is generally “powerless to change” without outside help,<sup>100</sup> the statute unconstitutionally criminalizes status for purposes of the Status Crimes Doctrine and must be facially struck.<sup>101</sup>

Homelessness should be considered a status. First, lower courts have adopted a broader definition of status such that homelessness would fall within it.<sup>102</sup> Second, although it is “not an innate or immutable characteristic,

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93. *Robinson*, 370 U.S. at 667.

94. *See id.*

95. *See supra* note 43 and accompanying text.

96. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

97. *See Powell*, 392 U.S. at 534 (citing *Robinson*, 370 U.S. at 667 n.9) (“[The Court] was able to suggest that the statute would cover even a situation in which addiction had been acquired involuntarily.”).

98. *Robinson*, 370 U.S. at 667.

99. *Id.*

100. *Powell*, 392 U.S. at 567 (Fortas, J., dissenting).

101. *See Robinson*, 370 U.S. at 667.

102. *See, e.g., Martin v. City of Boise*, 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019); *Phillips v. City of Cincinnati*, No. 1:18-cv-541, 2020 WL 4698800, at \*1 (S.D. Ohio Aug. 13, 2020); *Frank v. City of St. Louis*, No. 4:20-CV-00597 SEP, 2020 WL 2116392, at \*1 (E.D. Mo. May 2, 2020); *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992); *State v. Adams*, 91 So. 3d 724, 747 (Ala. Crim. App. 2010).

nor . . . a disease,”<sup>103</sup> homelessness, when viewed in the abstract, is a condition one may involuntarily inherit and is largely powerless to avoid or even change.<sup>104</sup> The fallacy that homelessness is a choice has gained a regrettable foothold. The narrative, however false it may be, that homelessness is a choice or a consequence of an individual’s own actions has no bearing on the inquiry.<sup>105</sup> “[A]n individual may become homeless based on factors both within and beyond his immediate control” as evidenced by the fact that “the composition of the homeless as a group” include “the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable.”<sup>106</sup>

Just as is the case with addicts, it is easy to contemplate an instance in which a person innocently and involuntarily acquires the condition of homelessness.<sup>107</sup> The fact that voluntary acts may lead to an individual’s unhoused condition does not change the need for protection, in the same way that chronically taking prescription pills or consuming alcohol constitutes voluntary acts that trigger addiction and alcoholism.<sup>108</sup> Therefore, the trend amongst lower courts to extend the definition of status to homelessness seems appropriate.

#### *B. The Status-Act Test: When the Criminalization of Conduct Constitutes a Status Crime*

Once it has been determined that the statute facially criminalizes conduct rather than status, courts should apply the Status-Act Test proposed in this Note. The Status-Act Test is a burden shifting two-part test. The first part seeks to analyze the relationship between the status and conduct as well as the voluntary nature of the conduct. The second part of the test weighs it against the government interest in the statute’s enforcement. Under this

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103. *Adams*, 91 So. 3d at 752.

104. Twenty-nine percent of the Nation’s population has been homeless at one point or another. Andrew Hening, *Is Homelessness a Choice?*, MEDIUM (Sept. 6, 2019), <https://medium.com/@andrewhening/is-homelessness-a-choice-bc6fcb57bd03>. Homelessness can be brought about by a host of factors and for many results in a temporary or episodic status. *See id.* However, for those that are chronically homeless, it is extremely difficult to change their status without the help of significant social services. *See id.*

105. Statistics overwhelmingly support that homelessness, whether temporary, episodic, or chronic, is not a choice. *See, e.g., id.* (arguing that homelessness is not a choice made by those who become homeless, but a societal choice made by voters when they elect to defund public assistance programs or reject affordable housing); Ruth Gourevitch & Mary K. Cunningham, *Dismantling the Harmful, False Narrative that Homelessness is a Choice*, URB. INST. (Mar. 27, 2019), <https://www.urban.org/urban-wire/dismantling-harmful-false-narrative-homelessness-choice>.

106. *Adams*, 91 So. 3d at 752.

107. *See Pottinger*, 810 F. Supp. at 1564.

108. *Adams*, 91 So. 3d at 752.

Status-Act Test, a plaintiff bringing an as-applied challenge must first establish prong one before the burden would shift to the defendant-government under prong two to prove a superseding governmental interest is at stake.

This second prong acts as the necessary and *appropriate* “limiting principle”<sup>109</sup> in any extension of the Status Crimes Doctrine. Ultimately, the proposed framework set out below would not only track the recurring themes highlighted in lower court cases, it would also parallel the framework of other constitutional inquiries, such as a due process violation or a governmental retaliation claim.<sup>110</sup>

### 1. Challenger’s Burden: Involuntariness

Involuntariness is central to the Status Crimes Doctrine. The presence or absence of volitional conduct was central to both the *Robinson* and *Powell* decisions.<sup>111</sup> In fact, lower courts that extend the scope of this doctrine to conduct do so only when the conduct can be reasonably described as “involuntary.”<sup>112</sup>

Conduct that directly flows from status and arises even when the actor lacks the power to choose or not choose the given conduct can be plainly characterized as involuntary. Therefore, the scope of the Status Crimes Doctrine can be limited to conduct that is (1) inseparable from or inextricably intertwined with the status and (2) performed in the absence of alternative legal avenues. These two considerations constitute the first part of the Status-Act analysis, allowing courts to limit the potential reach of the Status Crimes Doctrine without making arbitrary bright-line distinctions between status and conduct.

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109. *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion).

110. The constitutional inquiry for a due process violation requires the challenger to establish (1) a fundamental right and (2) that the right has been infringed, and then the burden shifts to the government to provide a sufficient justification for the infringement. See *Obergefell v. Hodges*, 576 U.S. 644, 663-64 (2015); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 952-54 (6th ed. 2020). For an individual to establish that the government unconstitutionally retaliated against her for the exercise of a protected right, courts apply the *Mt. Healthy* framework where the challenger establishes (1) that her conduct was constitutionally protected, (2) an improper motive substantially contributed to her harm, and then the burden shifts to the government to prove that the governmental action would have been taken even in the absence of any improper motive. See *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

111. See *Robinson v. California*, 370 U.S. 660 (1962); *Powell*, 392 U.S. 514.

112. For an example of this, look to the Ninth Circuit’s extension of the Status Crimes Doctrine in *Martin v. City of Boise*, 920 F.3d 584 (2019). It is worth noting that conduct may qualify as a voluntary act, or *actus reus*, for purposes of criminal law, see MODEL PENAL CODE § 2.01 (AM. L. INST., Official Draft and Explanatory Notes 1962), yet not necessarily stem from one’s “power” of “choice or determination,” see *Volition*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/volition> (last visited Nov. 6, 2020).

*Inextricably Intertwined.* Conduct that is merely related or associated with status is not enough. To determine when conduct is inseparable from status, the court can look to whether the status compels the conduct, the conduct is an unavoidable consequence of the status, and/or the conduct is a physiological or biological response.

A status compels conduct if one cannot be of the status without engaging in the behavior. For example, homelessness necessarily compels engaging in “life-sustaining activities,” such as sleeping, out in public.<sup>113</sup> As the Ninth Circuit reasoned in *Martin v. Boise*, the status of homelessness requires the penalized behavior of sleeping, sitting, and lying out in public.<sup>114</sup> This conduct is an identifying feature of the status of homelessness. Similarly, recall the arbitrary distinction between the common cold and blowing one’s nose.<sup>115</sup> The former compels the latter and as such must be viewed as inseparable.

Another way conduct is inextricably intertwined to status is when the conduct is an unavoidable consequence of the status.<sup>116</sup> As was the case in *State v. Adams*, the status of homelessness carries the unavoidable consequence of leaving individuals without an address.<sup>117</sup> Therefore, punishing homeless sex offenders for failing to provide the state with a permanent address impermissibly punishes them for conduct that is inextricably intertwined with their homeless status.

A final factor that weighs in favor of finding a direct and involuntary tie between status and conduct is when the conduct is a physiological response.<sup>118</sup> This type of conduct is also referred to in many of the cases as “life-sustaining activities,” or acts that derive from a biological necessity.<sup>119</sup> These include sleeping, eating, sitting, and other basic human behaviors. And these behaviors are the subject of statutory schemes across the country.<sup>120</sup>

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113. *Martin*, 920 F.3d at 617 (citing *Pottinger v. Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992)).

114. *Id.*

115. *See supra* notes 76-78 and accompanying text.

116. *See Martin*, 920 F.3d at 617; *State v. Adams*, 91 So. 3d 724, 752 (Ala. Crim. App. 2010).

117. 91 So. 3d at 752.

118. *See Martin*, 920 F.3d at 617.

119. *Id.* (citing *Pottinger v. Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992)).

120. *See* NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES, NAT’L L. CTR. ON HOMELESSNESS & POVERTY 47 (2014), [https://nlchp.org/wp-content/uploads/2019/02/No\\_Safe\\_Place.pdf](https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf) (Prohibited Conduct Chart); *see also* Emily Badger, *It’s Unconstitutional to Ban the Homeless From Sleeping Outside, the Federal Government Says*, WASH. POST (Aug. 13, 2015, 4:45 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/08/13/its-unconstitutional-to-ban-the-homeless-from-sleeping-outside-the-federal-government-says/> (referencing the NLCHP study).

Take the comprehensive statutory scheme at issue in *Pottinger v. City of Miami* that was used “as part of a custom and practice of driving the homeless from public places.”<sup>121</sup> The scheme made no facial reference to status, but instead, consisted of three criminal laws aimed solely at regulating the acts of sleeping and lingering in public spaces.<sup>122</sup> Yet, sleep is an involuntary and physiological response, and therefore inextricably intertwined to the status. “We all need sleep.”<sup>123</sup> One homeless individual describes his experience saying, “Do you walk in a circle 24 hours a day? You have to sleep and if you slow down to sleep you go to jail for it, which I’ve done, that’s pretty much where you get to sleep.”<sup>124</sup>

*Absence of Legally Feasible Alternatives.* Where the Eighth Amendment would likely prohibit a city from outright criminalizing homelessness within its borders, how can it permit a city to adopt a comprehensive statutory scheme that makes it practically “impossible” to be legally homeless?<sup>125</sup>

What makes conduct a legal impossibility, though, is not solely its close relationship with status, but the fact that it must be performed in the absence of legally feasible alternatives. Where the first inquiry looks to the direct relationship between the status and conduct, an inquiry into the feasibility of legal alternatives actually reinforces the involuntary nature of the conduct.

Without legal alternatives, the actor is powerless to avoid the criminal penalty.<sup>126</sup> Because the actor under the particular circumstances of her case has no choice but to engage in the conduct and thus face the criminal penalty, the statute cannot rightfully be enforced against her.<sup>127</sup> Alternatively, the presence of legally available alternatives indicates that the conduct is no

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121. 810 F. Supp. at 1554. As a preliminary matter, the Southern District of Florida accepted the position that homelessness was a status and the City could not constitutionally criminalize homelessness without running afoul of the Eighth Amendment. *See id.* Although the Supreme Court has not decided the issue, many courts have accepted homelessness as a status akin to alcoholism and addiction, rather than a volitional condition. *See, e.g.,* Manning v. City of Roanoke, 930 F.3d 264 (4th Cir. 2019); *Martin*, 920 F.3d 584; *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994); *State v. Adams*, 91 So. 3d at 747 (Ala. Crim. App. 2010).

122. *Pottinger*, 810 F. Supp. at 1559-60 (preventing homeless individuals from sleeping in any public space, entering a public park at night, or lingering along sidewalks).

123. Badger, *supra* note 120.

124. Sarma & Brand, *supra* note 5, at 5.

125. *See Pottinger*, 810 F. Supp. at 1559-60.

126. The absence of feasible alternatives evidences that the conduct performed is not a product of the actor’s will, determination, or choice. *See* Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 663 (1992).

127. As described in Part II(B), the decision in *Powell* left the door open for courts to consider as-applied challenges regarding the criminalization of conduct directly tied to status. *See Powell v. Texas*, 392 U.S. 514, 553-54 (1968) (plurality opinion).

longer involuntary, where the actor's power of choice is restored. The ordinance in this case survives Eighth Amendment scrutiny, and, under the Status-Act Test, the court need not look any further.

The unavailability of feasible alternatives drove the Ninth Circuit's recent decision on the Eighth Amendment Status Crimes Doctrine.<sup>128</sup> In *Martin v. Boise*, the court barred the City of Boise, Idaho, from enforcing a statute against a class of homeless individuals that made it a crime to sleep in public places due to the unavailability of shelter beds.<sup>129</sup> Even where the court recognized that sleeping outside in public places was inseparable from the status of homelessness, its analysis did not end there.<sup>130</sup> Instead, much of the court's opinion centered on the unavailability of feasible alternatives for engaging in the prohibited conduct.<sup>131</sup>

Determining whether there are adequate legal alternatives should not be difficult. As one scholar noted, determining when a city has provided adequate legal alternatives, such as sufficient shelter beds, is a "relatively straightforward factual inquiry."<sup>132</sup> The city either "possesses sufficient safe, sanitary shelter to house its homeless population or it does not. If a city does not . . . , it cannot legitimately argue that the homeless [make a choice to] sleep in public of their own free will."<sup>133</sup> In the absence of a volitional choice, conduct falls within the protective realm of the Status Crimes Doctrine.

Courts may also conclude that it is possible for a statute to be narrowed or interpreted in a way that provides the municipality with a feasible legal alternative such that the conduct can be permissibly punished.<sup>134</sup> An example of this is "arrest-free zones," or public areas where cities are enjoined from enforcing these laws against homeless individuals.<sup>135</sup>

Lower court cases guide the construction of a two-part inquiry to determine when conduct is a direct and involuntary result of status such that it falls within the Status Crime Doctrine. Finding that acts directly flow from

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128. See *Martin v. City of Boise*, 920 F.3d 584, 617 (2019).

129. See *id.* at 617-618.

130. See *id.* at 616-17.

131. Without shelter beds, the homeless population was faced with a choice between two criminal evils: sleep out in public places or engage in criminal trespass and sleep on private land. Where the choice is between two criminal penalties, there is an absence of feasible alternatives.

132. *Simon*, *supra* note 126.

133. *Id.*

134. See *Pottinger v. Miami*, 810 F. Supp. 1551, 1584 (S.D. Fla. 1992).

135. See *id.* To be clear, this Note does not advocate for the adoption of "arrest-free zones" nor does it suggest that these zones reflect efficient city policies that adequately address the needs of homeless individuals. Instead, this Note is limited purely to the constitutional effect such zones may have on the success of challenges brought under the Eighth Amendment Status Crimes Doctrine.

status alone is insufficient. The conduct must also be described as “involuntary” in light of the absence of feasible legal alternatives for the performance of the conduct. When both prongs are satisfied, the Eighth Amendment’s Status Crimes Doctrine is triggered, and the challenger has met her burden under the Status-Act Test.

## 2. Burden-Shifting Prong: Governmental Interest

Involuntariness is not the final consideration, and the analysis under the Status-Act Test does not end simply because the Status Crimes Doctrine is triggered. The first prong of the Status-Act Test provides an expansive rationale. If that was the end of the test, such as it seems to be when the Ninth Circuit adopted its decision in *Martin v. Boise*, the test would risk “a whole host of other laws regulating public health and safety, including laws prohibiting public defecation and urination.”<sup>136</sup> Therefore, even if a challenger establishes that a statute implicates conduct inextricably intertwined with status and involuntarily performed,<sup>137</sup> this Note argues that the challenge may be defeated when analyzed in light of the governmental interest in the enforcement of the law.

This final theme and second prong derive from a need to balance constitutional notions of federalism with individual liberties. States’ autonomy is a hallmark of criminal law.<sup>138</sup> Criticism is premised on the notion that states are “[s]tripped . . . of [these] traditional police powers” when courts enter the pool of public policymaking and bar enforcement of a law through the extension of the Status Crimes Doctrine beyond pure status to conduct.<sup>139</sup>

Although courts must take care not to unremittingly impede states’ discretion in criminal laws, judicial intervention is necessary because that discretion cannot go unchecked.<sup>140</sup> It is possible to fathom instances in which a local government abuses its law-making authority to enact criminal statutes with some malintent to punish those of a particular status.<sup>141</sup> However, that is not a universal prerogative across all state and local governments.

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136. Brief for Petitioner, *supra* note 7, at 4.

137. Smith, *supra* note 77, at 313.

138. “The States’ core police powers have always included authority to define criminal law and protect the health, safety, and welfare of their citizens.” See *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

139. Brief for Petitioner, *supra* note 7; see *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion); *Eighth Amendment – Criminalization of Homelessness*, *supra* note 58.

140. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

141. See, e.g., *Pottinger v. Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992). In one California city, a local mayor attempted to use of its criminal laws to “clamp down” on activities such as food sharing. See Benjamin Oreskes, *Effort Targets Public Feeding*, L.A. TIMES, Dec. 14, 2019, at B1,

State and local governments are trying to address the serious public health risks that come along with a growing unhoused population and public encampments.<sup>142</sup> These risks permeate not only the housed populations, but more importantly the vulnerable unhoused populations. Whether good policy or not, localities use these criminal laws “to connect those living anonymously and transiently in sprawling encampments with resources available to them.”<sup>143</sup> Blanket extension of the Status Crimes Doctrine to conduct without anything more, “leaves cities with a Hobson’s choice: They must either undertake an overwhelming financial responsibility to provide housing for . . . homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety.”<sup>144</sup>

Thus, courts must have an opportunity to balance the intrusion on one’s status against the government’s stated interest in creating and enforcing the laws. This judicial intervention is necessary in order to weed out cities with important social aims versus those that are engaging in purely animus-driven measures. Different considerations must be taken into account when determining whether the governmental interest in the enforcement of the conduct outweighs the implication of status.

*The Harm/Innocent Principle.* One necessary consideration is whether the conduct is otherwise innocent or poses a threat of harm to self or others—a “harm/innocent principle.”<sup>145</sup> This component of a court’s analysis acts as the “limiting principle” that maintains the State’s power to police undesirable or antisocial conduct without imposing a trivial and unworkable test, like the status-act distinction.<sup>146</sup> Further, this principle is foundational to criminal law and falls cleanly within evolving status crimes jurisprudence.

Distinguishing between harmful and innocent conduct provides clarity as to when the criminalization of relational acts cannot provide a basis for an Eighth Amendment status crime.<sup>147</sup> For example, no one questions whether a state, even in light of *Robinson*, can criminalize the possession or

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B4. However, that same mayor has spoken out about the homeless population in his city and has even suggested “residents should arm themselves against” these individuals. *Id.*

142. These include “crime and violence, incubated disease, and . . . environmental hazards.” See Brief for Petitioner, *supra* note 7; see also Anh Do, *Camp’s Haul ‘Eye-Popping’*, L.A. TIMES, Mar. 11, 2018, at B4; Christina Goldbaum, *‘It was Horrible’: Man Killed in Gruesome Brawl at Homeless Shelter*, N.Y. TIMES, Nov. 11, 2019, at A19.

143. Brief for Petitioner, *supra* note 7.

144. *Martin v. City of Boise*, 920 F.3d 584, 594 (9th Cir. 2019) (Smith, J., dissenting).

145. See Weisberg, *supra* note 78 at 364-65.

146. *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion).

147. See Smith, *supra* note 77, at 313.

consumption of drugs.<sup>148</sup> Even where possession and consumption may be inextricably intertwined with the status of addiction, the conduct is antisocial and poses a risk to the addict, as well as others the addict may encounter. Thus, cities and states have an interest in regulating and deterring such conduct through the imposition of punishment.

The criminalization of conduct that is deemed innocent or lawful lacks the same justifying force as conduct that is disorderly or antisocial.<sup>149</sup> Lawful conduct inextricably tied to status, even if it poses potential or tangential risks to self and others, will likely weigh against the government's interest. One example that comes to mind is recent city efforts to criminalize food sharing in an effort to prevent religious or charitable organizations as well as Good Samaritans from feeding homeless individuals out in public.<sup>150</sup>

Another example is Virginia's recent attempt to prevent individuals of a certain status, "habitual drunkards," from engaging in the otherwise lawful and legal act of purchasing and consuming alcohol.<sup>151</sup> The conduct is unquestionably linked, both directly and involuntarily, to a status recognized by the Supreme Court.<sup>152</sup> However, unlike illegal drugs, the Fourth Circuit emphasized that the conduct at issue—consuming alcohol—was otherwise lawful by individuals over the age of twenty-one, but deemed criminal when committed by individuals of a particular status.<sup>153</sup> Even where alcohol can pose health and safety issues, especially to those suffering from alcoholism, the general lawfulness of the conduct weighed against finding that the government had a superseding interest in the enforcement of conduct.

*Discriminatory Purpose.* Paralleling an analysis under the Fourteenth Amendment's Equal Protection Clause,<sup>154</sup> a showing that the legislature acted with a discriminatory intent to indirectly criminalize status through the punishment of conduct will necessarily weigh heavily, if not definitively, against a superseding governmental interest.

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148. *Robinson v. California*, 370 U.S. 660, 667 (1962) (emphasizing that the "crime" lacked any antisocial conduct).

149. See *Manning v. City of Roanoke*, 930 F.3d 264, 278 (4th Cir. 2019); *Martin*, 920 F.3d at 616-17; see also *Smith*, *supra* note 77, at 313.

150. See, e.g., *Oreskes*, *supra* note 141.

151. *Manning*, 930 F.3d at 268, 285. Plaintiffs were alcoholics of legal age, who had previously been deemed by the courts to be "habitual drunkards." *Id.* at 269. It is worth noting, however, that the Fourth Circuit's decision, although persuasive, merely used the Status Crimes Doctrine as an *alternative* grounds for barring the statute's enforcement. *Id.* at 299 (Wilkinson, J., dissenting).

152. "Habitual drunkard" is clearly related to the status of alcoholism, and alcoholism was recognized as a protected status by the *Powell* Court. *Powell v. Texas*, 392 U.S. 514 (1968) (plurality opinion).

153. See *Manning*, 930 F.3d at 285.

154. *CHEMERINSKY*, *supra* note 110, at 683-90.

This can be shown in one of two ways. First, the statute only criminalizes conduct when performed by those of a particular status. Such was the statute at issue in *Manning v. City of Roanoke*, which intended to target conduct derived from the status of alcoholism by prohibiting the purchase and consumption of alcohol by “habitual drunkards.”<sup>155</sup> A second way is when the stated purpose of the law, as evidenced by the legislative intent or through the law’s construction, clearly signals an intent to target individuals for their status.<sup>156</sup> Recall the statutory scheme in *Pottinger v. City of Miami* enacted as part of a widespread effort to rid the City of its homeless population.<sup>157</sup>

On the contrary, generally applicable laws would seem to weigh against a finding of discriminatory purpose. Take a public intoxication statute like the one referenced in *Powell*,<sup>158</sup> which operates on the public at large without any discrimination.<sup>159</sup> However, when a stated discriminatory purpose is evidenced through the legislative intent or otherwise, the mere characterization of the law as “generally-applicable” should not necessarily save it from the court’s scrutiny.

*Degree of the Interest and Tailoring.* The final consideration should look to the degree of the governmental interest and how closely tailored the statute is in serving a governmental or penological interest, such as rehabilitation or deterrence.<sup>160</sup> Although the inquiry is reflective of classical constitutional tests, this is merely suggested as a factor.<sup>161</sup> One that should

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155. See *Manning*, 930 F.3d at 284-85.

156. See *Romer v. Evans*, 517 U.S. 618, 631 (1996) (striking down a law after finding that its sole purpose was to create a special disability a class of homosexual persons).

157. See *Pottinger v. Miami*, 810 F. Supp. 1554, 1581 (S.D. Fla. 1992).

158. *Powell v. Texas*, 392 U.S. 514, 517 (1968) (plurality opinion).

159. While there may be some evidence to suggest that public intoxication statutes are more often enforced against individuals suffering from the status of alcoholism, disparate impact is not necessarily enough to undermine a strong governmental interest in the health and safety of the public. See Suzanne V. Jarvis et al., *Public Intoxication: Sobering Centers as an Alternative to Incarceration, Houston, 2010-2017*, 109 *AJPH* 597, 598 tbl.1 (2019), <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2018.304907> (suggesting that repeat offenders were arrested for public intoxication at a rate of almost 400 times more than individuals with less than three arrests).

160. See *Manning*, 930 F.3d at 269, 270. Eighth Amendment jurisprudence repeatedly affirms the principal that the absence of any penological interest is indicative of a disproportionate punishment. See *Graham v. Florida*, 560 U.S. 48, 72 (2010).

161. Generally, any intrusion on a fundamental right requires the justification of strict scrutiny. *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997). While the criminalization of conduct associated with status should not raise the same constitutional concerns as the pure status crime described in *Robinson v. California*, 370 U.S. 660, 667 (1962), the criminalization of conduct that involuntarily and directly flows from status still traces upon a fundamental right—the right to be free from punishment for status—such that it is deserving of something more than true rational basis test. See *Glucksburg*, 521 U.S. at 722 (reiterating the “threshold requirement[] that a challenged

be viewed as a sliding scale: the greater the interest and the closer the tailoring, the more this factor militates towards finding the governmental interest superseding.

If the statute is narrowly tailored toward the purported governmental interest, this would weigh in favor of finding the statute's enforcement permissible. A city faced with a viral epidemic, such as the recent coronavirus outbreak, may need to respond by enacting laws that limit the ability for homeless individuals to engage in "life-sustaining activities" out in public to prevent the spread of the disease. Even where the city ordinance implicates the Status Crimes Doctrine, the city could certainly justify the enforcement of the statute under the given circumstances where it is especially tailored toward a compelling interest.

Conversely, a statute that lacks any tailoring to the purported governmental interest, however significant, should weigh in favor of striking the statute's enforcement. The challenged scheme in *Manning* originated with a rehabilitative aim.<sup>162</sup> However, as the Fourth Circuit noted, any rehabilitative justification turned purely punitive because individuals labeled as "habitual drunkards" by the state were ultimately stigmatized and detrimentally "affected in their ability to maintain employment and secure long-term housing."<sup>163</sup>

These three considerations must then be weighed in order to determine whether the governmental interest warrants the intrusion on status. Neither should necessarily be dispositive, although an analysis of one may certainly affect the outcome of another. For example, if the court finds that a law was created for the discriminatory purpose of criminalizing the status of homelessness through the criminalization of conduct under the second factor, then that conclusion will establish an absence of even a legitimate government interest under the third.

Where the status-act distinction is flawed, the second prong of the Status-Act Test is the appropriate limiting principle needed to further the substantive merits of the Status Crimes Doctrine. And yes, balancing tests are messy. But as it is with practically the entirety of our constitutional jurisprudence, lower courts will work it out, and the Supreme Court will have the opportunity to weigh in when necessary in order to establish *appropriate* bright-line limitations.

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state action implicate a fundamental right[] before requiring more than a reasonable relation to a legitimate state interest to justify the action.").

162. *Manning*, 930 F.3d at 269, 270 n.3.

163. *See id.* at 269-270.

## IV. CASE STUDY: THE STATUS-ACT TEST IN ACTION

Let's put this novel approach to work.

The purpose of this section will be to apply the proposed framework from Part III to an existing California Statute, section 647(f) of the California Penal Code. This section of the California Penal Code sets out to punish individuals "[w]ho [are] found in any public place under the influence of intoxicating liquor . . . in a condition that they are unable to exercise care for their own safety or the safety of others."<sup>164</sup> Suppose the challenger is a homeless alcoholic arrested on one occasion and cited for violating section 647(f).<sup>165</sup> Now suppose the challenger brings an action against the City, claiming California's law criminalizes him for conduct that involuntarily and directly flows from his status as a homeless alcoholic.

The Status-Act Test that this Note proposes applies in this case because section 647(f) is a generally applicable public intoxication statute, which facially criminalizes conduct and makes no reference to a particular status.<sup>166</sup>

The Status-Act Test is a burden-shifting, two-part test that determines when the criminalization of conduct amounts to a status crime. Under the first prong, challenger bears the burden of establishing that the conduct is an involuntary product of her status such that criminalization of the conduct, as applied to her, amounts to a status crime. Two elements must be met under this first prong. First, challenger must prove that the conduct is inextricably intertwined with status and, second, that the conduct was performed in the absence of legally feasible alternatives. Once challenger has succeeded in establishing the first prong, then the criminalization of the conduct falls within the status crimes doctrine. The burden then shifts to the defendant government under the second prong to prove sufficient interest.

Under the second prong, courts should analyze three factors in order to determine the extent to which the government's interest supersedes the intrusion on status. The first two factors include whether the conduct is harmful or otherwise innocent and whether the statute was enacted or enforced with a discriminatory purpose. The final factor analyzes the degree of the government's interest in the enforcement of the conduct and how closely tailored the statute is toward serving that interest. Thus, a challenger can only succeed on the merits of her claim if she proves the first prong of the Status-Act Test and the government fails to meet its burden under the second prong.

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164. CAL. PENAL CODE § 647(f) (West 2020).

165. Facts are taken from *People v. Kellogg*, 14 Cal. Rptr. 3d 507 (Ct. App. 2004).

166. PENAL § 647(f).

The constitutional challenge would be premised on the argument that the punishable conduct at issue implicates the challenger's status as a homeless alcoholic.<sup>167</sup> In order to present a cognizable claim and trigger the Eighth Amendment Status Crimes Doctrine, challenger will need to establish the first prong of the Status-Act Test: (1) the conduct is inextricably intertwined with the status; and (2) there is an absence of legally feasible alternatives.<sup>168</sup>

First, the conduct at issue, appearing under the influence of alcohol in public spaces, is inextricably intertwined with the status of a homeless alcoholic. The status of alcoholism compels an individual to consume alcohol. Further, the need to drink out in public spaces when challenger has nowhere else to go is an unavoidable consequence of being a homeless alcoholic. Thus, the conduct of presenting intoxicated in public is inextricably intertwined with the status of a homeless alcoholic.

Next, a simple factual inquiry would reveal the absence of available alternatives, so as to describe the conduct as involuntary. There is no "shelter bar" nor "arrest-free zone" for challenger to turn to, to engage in the otherwise permissible act of drinking while of legal age.<sup>169</sup> Therefore, challenger has met his burden of establishing that the conduct is involuntary and inseparable from status, so as to trigger the Status Crime Doctrine.

Under the second prong, the burden now shifts to the state to provide a sufficient justification for the enforcement of such conduct. Generally, the consumption of alcohol is a lawful act. However, the statute at hand clearly emphasizes a harm principle where an individual only violates section 647(f) when his condition renders him "unable to exercise care for [his] own safety or the safety of others."<sup>170</sup> In this instance, the challenger's conduct, although inseparable from his status, poses a risk to himself and others. This heavily leans towards finding the governmental interest in regulating the conduct significant and justifiable. Further, section 647(f) is a generally applicable law. Absent any evidence to show a discriminatory intent to target a protected status, such as homelessness or alcoholism, factor one and two together weigh in favor of justified intrusion on status.

Last, the government's interest in ensuring the safety of others out in public is at the very least legitimate. The statute both penologically and pragmatically serves this interest. First, enforcement of the statute deters individuals through punishment from becoming of a condition that poses

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167. As a threshold matter, alcoholism and homelessness are statuses under the Eighth Amendment. *See supra* notes 86, 102-107 and accompanying text. Intoxication is conduct related to alcoholism, and the need to engage in public activity derives from a homeless status.

168. *See supra* Part III(B)(1).

169. *See supra* notes 132-138 and accompanying text.

170. PENAL § 647(f).

harm to the individual or others. Second, the statute allows law enforcement to remove these individuals from the street whenever they are in a condition that poses a risk to themselves and others.

Under the Status-Act Test, California's statute implicates conduct within the scope of status under the test's first prong. However, when applying the second prong, California has presented a sufficient justification to allow for the enforcement of the statute.

Without the Status-Act Test, courts could come to conflicting decisions. One court could end the inquiry at the mere fact that the statute criminalizes conduct and makes no reference to status. Another court, in light of the Ninth Circuit's recent decision, could conclude that the conduct is involuntary such that it cannot be punished under the circumstances of this case. The Status-Act Test provides courts with the necessary guidelines to address the Status Crimes Doctrine. Through the Status-Act Test, courts can utilize their power to intervene when necessary as well as maintain states' autonomy without having to create arbitrary and unworkable bright-line rules, such as the status-act distinction.

## V. CONCLUSION

Fifty years following *Robinson* and *Powell*, little progress has emerged as lower courts are still testing and retesting the bounds of *Robinson*'s Status Crimes Doctrines.<sup>171</sup> The Supreme Court may very well have intended its *Powell* decision to “end [its] flirtation with . . . a constitutional criminal law doctrine,” but such a doctrine exists nonetheless.<sup>172</sup> And while the Court may fear the day it has to reenter the substantive arena of criminal law, it is in the interest of legislative and judicial efficiency that a test arises to outline the scope of status and when conduct falls within that scope.

Another concerning reality that could not have been predicted at the time this Note was first conceived: homelessness, as a result of the COVID-19 pandemic, is likely to significantly increase in major cities across the country.<sup>173</sup> As the COVID-19 pandemic began to take hold of the United

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171. It seems that much will remain unresolved in this area of Eighth Amendment jurisprudence, considering the Supreme Court just passed on the opportunity to resolve the constitutional ambiguity when denying certiorari to the Ninth Circuit's decision in *Martin v. City of Boise*. See 920 F.3d 584 (9th Cir. 2019), cert. denied, 140 S. Ct. 674 (2019).

172. Kadish, *supra* note 12.

173. See, e.g., Alleza Durana & Anne Kat Alexander, *The Eviction Crisis Has Begun. It Will Get So Much Worse.*, WASH. POST (Sept. 23, 2020, 3:00 AM), <https://www.washingtonpost.com/outlook/2020/09/23/evictions-cdc-moratoriums-housing-homelessness/>; Yelena Dzhanova, *Experts Fear the End of Eviction Moratoriums Could Plunge Thousands of People into Homelessness*, CNBC (July 3, 2020, 7:39 AM); Benjamin Oreskes, *Mass Unemployment Over Coronavirus Could Lead to a 45% Jump in Homelessness, Study Finds*, L.A.

States in April 2020, unemployment peaked at an unprecedented rate.<sup>174</sup> Accordingly, local state governments across this country, and recently the federal government, enacted eviction moratoriums for those facing hardship.<sup>175</sup> These temporary bans have served to relieve some financial difficulties and, at the same time, mitigate the rise of homelessness, which perpetuates the spread of the virus.<sup>176</sup> However, these moratoriums have an expiration date, and rent will soon be due.<sup>177</sup> With so much unsettled in this area of law, some cities will likely resort to the “solution” of tangentially criminalizing homelessness through laws described above. Others, such as those within the Ninth Circuit, will be faced with the difficult choice of either allowing encampments to grow and become increasingly permanentized or expending ample resources, in an already financially strained time, to provide shelter.

There is a pressing need for a workable solution. Bright line rules, like the status-act distinction, provide false security to courts where they fail to adequately secure the individual rights at stake. The Status-Act Test can serve as a necessary framework in defining the reach of the Eighth Amendment, while adequately safeguarding both government and individual interests.<sup>178</sup>

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TIMES (May 14, 2020, 2:55 PM); *see also* Order Under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 CFR 70.2, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19, 85 Fed. Reg. 55,292, 55,293 (Sept. 1, 2020) (ordering a national halt on evictions in order to mitigate a rise in homelessness, which would aggravate the recent surge in coronavirus cases).

174. GENE FALK ET AL., CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC: IN BRIEF 1, 2 (2020).

175. For a comprehensive state-by-state review of protective measures during the COVID-19 pandemic, whether that be holds on evictions or utility shutoffs, *see* Ann O’Connell, *Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus*, NOLO, <https://www.nolo.com/legal-encyclopedia/emergency-bans-on-evictions-and-other-tenant-protections-related-to-coronavirus.html> (last updated Nov. 17, 2020); *see also* Order Under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 CFR 70.2, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19, 85 Fed. Reg. at 55,293.

176. “In the context of the pandemic, eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of communicable disease.” Order Under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 CFR 70.2, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19, 85 Fed. Reg. at 55,292. “Housing stability helps protect public health because homelessness . . . puts individuals at higher risks to COVID–19.” *Id.*

177. Most eviction moratoriums currently in effect, including the one issued by the CDC, are set to expire on December 31, 2020. *See* sources cited *supra* note 175.

178. Although this Note mainly addresses status within the context of alcoholism, addiction, and homelessness, the proposed test could be applied to other laws that potentially constitute status crimes. For example, the test could be applied to determine the constitutionality of bathroom bills and their impact on the status of being transgender. *See* Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1, 40-42 (2017).