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RETHINKING *ROBINSON V. CALIFORNIA* IN THE WAKE OF *JONES V. LOS ANGELES*: AVOIDING THE "DEMISE OF THE CRIMINAL LAW" BY ATTENDING TO "PUNISHMENT"

MARTIN R. GARDNER*

For nearly forty years, the United States Supreme Court's decision in Robinson v. California *has been understood to hold merely that the Cruel and Unusual Punishments Clause of the Eighth Amendment forbids punishing status conditions and thus requires a criminal act as a precondition for imposition of the criminal sanction. However, a recent Ninth Circuit Court of Appeals case,* Jones v. Los Angeles, *would expand the reach of* Robinson *from simply embodying the actus reus requirement to also forbid as a mens rea matter the punishment of acts deemed inherent in status conditions. Professor Gardner evaluates* Jones *and argues that extending* Robinson *to mens rea issues is unwise and poses a radical threat to traditional criminal law doctrine that perhaps even threatens the continued existence of the criminal law itself. Professor Gardner argues that the* Jones *expansion of* Robinson *is a consequence of the Supreme Court's misapplication of the Eighth Amendment in* Robinson. *Because the sanction at issue in* Robinson *was not in fact "punishment" but was instead an inherently unconstitutional sanction characterized by Professor Gardner as "malishment," he argues that* Robinson *should never have been decided as a cruel punishment case but instead as one manifesting arbitrary state power unconstitutional under the Due Process Clause. To reverse the movement towards constitutionalization of mens rea, Professor Gardner urges the Supreme Court to rethink* Robinson *as a due process case thus cabining the decision to reflect only that a criminal act is a constitutional prerequisite for governmental imposition of punishment.*

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I. INTRODUCTION

In its 1962 opinion *Robinson v. California*,[1] the United States Supreme Court held that a jail sentence of ninety days to one year for the status of being "addicted to the use of narcotics" constituted cruel and unusual punishment. *Robinson* broke new constitutional ground by its unprecedented employment of the Eighth Amendment to strike down a sanction as cruel on grounds other than its mode or its proportion.[2]

Robinson precipitated immediate controversy.[3] For Herbert Packer, perhaps the leading criminal law commentator of the day, *Robinson* raised more questions than it answered and planted the seeds for a radical remaking of the criminal law, possibly even sounding its death knell. In Packer's words, "[I]f [*Robinson*'s] premise, that the legislature may not make it a 'crime' to be 'sick' is to be taken literally, the demise of the criminal law may be at hand."[4]

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[1] 370 U.S. 660 (1962).

[2] One commentator described *Robinson* as follows:

> Thus for the first time the Court held that the constitutional ban on cruel and unusual punishments not only has to do with the type and severity of punishment for what is concededly a crime but also prohibits *any* punishment for what is not a crime but is instead the status of having an illness.

George F. Bason, Jr., *Chronic Alcoholism and Public Drunkenness—Quo Vadis Post* Powell, 19 AM. U. L. REV. 48, 50 (1970). Another commentator described the case this way:

> *Robinson v. California* may have established in the eighth amendment a basis for invalidating legislation that is thought inappropriately to invoke the criminal sanction, despite an entire lack of precedent for the idea that a punishment may be deemed cruel not because of its mode or even its proportion but because the conduct for which it is imposed should not be subjected to the criminal sanction.

Herbert L. Packer, Comment, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964). But see James S. Campbell, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1010 (1964), for the view that *Robinson* "involves the clearest and easiest application of the [proportionality] principle: the offense which is charged is such that *any* punishment of fine or imprisonment would be excessive in relation to it." *See also infra* notes 10-11 and accompanying text.

[3] *See, e.g.*, Dale W. Broeder & Robert Wade Merson, Robinson v. California: *An Abbreviated Study*, 3 AM. CRIM. L.Q. 203, 204 (1965) (arguing that the Court decided *Robinson* on Eighth Amendment grounds because it "wanted almost completely to overhaul State substantive criminal law"); Hugh R. Manes, Robinson v. California, *A Farewell to Rationalism?*, 22 LAW IN TRANSITION 238, 244 (1963) (suggesting that *Robinson* would "admonish the states to re-examine their criminal laws and procedures"); John B. Neibel, *Implications of* Robinson v. California, 1 HOUS. L. REV. 1, 11 (1963) (arguing that *Robinson* would change the way society treats drug addiction and alcoholism, steering the trend from imprisonment to proper diagnosis and medical treatment).

[4] Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 147-48, n.144 (1962); *see also* Broeder & Merson, *supra* note 3, at 207 (outlining the momentous implications of *Robinson*).

Such perceptions of the impact of *Robinson* were only strengthened by the Court's subsequent decision in *Powell v. Texas*[5] rendered several years after *Robinson*. *Powell* addressed the question of whether it constituted cruel and unusual punishment to punish an alcoholic for public drunkenness. The defendant argued that alcoholism is a disease and appearances by alcoholics in public are but symptoms of the disease, so to punish acts inherent in the disease is to punish the disease itself. While the *Powell* Court did not find a constitutional violation under the facts of the case, the inconclusive nature of the opinion[6] nevertheless left open the possibility that acts deemed uncontrollable as manifestations of diseases or other status conditions may in future cases fall within *Robinson*'s ban.

After *Powell*, the Supreme Court offered no more guidance on the meaning of *Robinson*. In the ensuing years, the lower courts generally sustained punishments attacked under *Robinson* so long as an act rather than a mere status was being punished.[7] *Robinson* thus had little impact and certainly did not result in radical doctrinal change. A recent lower court development suggests, however, that *Robinson*'s period of dormancy may be ending. In its 2006 opinion *Jones v. Los Angeles*,[8] the Ninth Circuit Court of Appeals relied on *Robinson* and *Powell* in finding that it was cruel and unusual punishment to impose criminal sanctions upon homeless persons who violated a city ordinance prohibiting, among other things, sitting, lying, or sleeping on public sidewalks. The *Jones* court found that the acts of sitting or sleeping on the sidewalk were inherent in the status of homelessness, and therefore to punish such acts was to punish the status contrary to *Robinson*.

The *Jones* approach represents a dramatic change of direction in Eighth Amendment jurisprudence. At a minimum, the case introduces the constitutionalization of the traditional mens rea principle. If followed to its logical conclusion, *Jones* portends radical doctrinal change, potentially signaling the very "demise of the criminal law" foretold by Packer.

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[5] 392 U.S. 514 (1968).

[6] *See infra* text accompanying notes 35-46, 51-54.

[7] *See infra* text accompanying notes 64-71.

[8] 444 F.3d 1118 (9th Cir. 2006), *vacated*, No. 04-55324, 2007 WL 3010591, at *1 (9th Cir. Oct. 15, 2007). As this article was in the process of publication, the *Jones* opinion was vacated as the result of an agreed-upon settlement between the parties. The merits of the court's approach to the issues presented remain available for other courts to consult in subsequent cases raising similar issues. For favorable comment on *Jones*, see Joseph William Singer, *After the Flood: Equality and Humanity in Property Regimes*, 52 LOY. L. REV. 243, 323 (2006). For the basis of the settlement agreement, see Steve Hymon & David Zahniser, *Deal on Sidewalk Camping Reached*, L.A. TIMES, Oct. 11, 2007, at B1; and *Skid Row Sanity*, L.A. TIMES, Oct. 12, 2007, at A22.

This Article explores the ramifications of the *Jones* case and argues that, while the decision may in part be consistent with *Robinson* and *Powell*, it should nevertheless be rejected. I argue that the mischief created by *Jones* is the consequence of a fundamental mistake made by the *Robinson* Court in grounding that case in the Cruel and Unusual Punishments Clause rather than in more appropriate substantive due process doctrine. Specifically, I argue that the problem with the sanction applied to drug addiction in *Robinson* was not that it was cruel punishment under the Eighth Amendment but that its application was blatantly irrational as a due process matter. The due process analysis of *Robinson* I recommend would resolve the problem posed by criminalizing status conditions by articulating a sound but narrow constitutional principle, thus avoiding the radical implications of *Jones*.

In Part II, I discuss *Robinson* and *Powell* and their progeny up to *Jones*. In Part III, I critique *Jones* and argue that a failure to attend to the concept of punishment led the court erroneously to grant standing to unconvicted homeless litigants to raise Eighth Amendment claims. I then explore the unwelcome implications of the *Jones* case and trace its existence as a product of *Robinson*'s Eighth Amendment underpinnings. In Part IV, I examine the concept of punishment in light of Supreme Court definitions as well as relevant philosophical literature. This discussion illustrates that the sanction at issue in *Robinson* was not in fact "punishment." To make this point, I appeal to John Rawls's heuristic distinction between "telishment" (his term) and "punishment" in coining my own term, "malishment," to describe the sanction in *Robinson*. Because "punishment" was not at stake in *Robinson*, the Court inappropriately utilized the Cruel and Unusual Punishments Clause in reaching its decision, resulting in a much broader decision in *Robinson* than was necessary to decide the issue raised in the case. I then analyze *Robinson* in Part V under what I believe to be the proper constitutional theory, the Due Process Clause, and demonstrate the unconstitutionality of employing the malishment sanction.

All of this is to urge the Supreme Court, at its earliest opportunity, to revisit *Robinson* and rethink it under a substantive due process footing. Such a rethinking will preserve the results in *Robinson* and *Powell* but avoid the *Jones* approach with its deleterious implications. Proper analysis of the issue raised by *Robinson* will, in the end, result in the modest, but essential, constitutional conclusion that without a criminal act there can be no punishment.

II. *ROBINSON* AND ITS OFFSPRING

Prior to *Robinson*, the Cruel and Unusual Punishments Clause of the Eighth Amendment[9] had played a relatively unimportant role in American constitutional jurisprudence. In the nineteenth century, the clause was seldom invoked in the courts, and then only as a vehicle to address the constitutionality of questionable methods of punishment, but not as a means of measuring the proportionality of punishment to crime.[10] The clause was so insignificant that some nineteenth-century courts and commentators actually believed it to be obsolete.[11]

Early in the twentieth century the Supreme Court expanded the scope of the clause to invalidate acceptable modes of punishment deemed excessive in relation to the offense being punished.[12] Yet even then, the clause was seldom used to invalidate harsh sentences.[13] Given this background, the *Robinson* Court's sudden application of the clause in a case questioning neither the method nor the proportionality of punishment[14] was deemed a "sweeping"[15] and "novel" development.[16]

A. *ROBINSON V. CALIFORNIA*

The *Robinson* Court considered the constitutionality of a California statute making it a misdemeanor, *inter alia*, to "be addicted to the use of narcotics."[17] Persons violating the statute were subjected to a confinement of ninety days to one year in the county jail.[18]

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[9] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[10] *See generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839 (1969); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636-39 (1966).

[11] Granucci, *supra* note 10, at 842; Note, *supra* note 10, at 647.

[12] Weems v. United States, 217 U.S. 349 (1910); *see* Granucci, *supra* note 10, at 843; Note, *supra* note 10, at 633-40.

[13] Note, *supra* note 10, at 635.

[14] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 81 (2d ed. 1995); *see supra* note 2. *Robinson* was "the first case in which the Eighth [Amendment's] ban against cruel and unusual punishment has been invoked to overturn the substantive provisions of a statute, as distinguished from the penalties inflicted by it." Manes, *supra* note 3, at 238.

[15] Michael R. Asimow, *Constitutional Law: Punishment for Narcotic Addiction Held Cruel and Unusual*—Robinson v. California *(U.S. 1962)*, 51 CAL. L. REV. 219-20 n.7 (1963) (noting that *Robinson* "sweepingly redefined the clause").

[16] Note, *supra* note 10, at 645.

[17] The statute provided in full:

> No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes

Although the Cruel and Unusual Punishments Clause previously had never been applied to the states,[19] a five-member majority of the Court utilized the clause to invalidate the statute's application to drug addicts. The Court noted that the statute made the mere "status" of narcotic addiction a criminal offense whether or not the offender had ever used or possessed narcotics within the State or had engaged in any antisocial behavior there. Citing but one Eighth Amendment case as authority[20] and offering no further analysis or explanation, the Court said:

> A State might determine that the general health and welfare require that the victims . . . of human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. . . .
>
> [N]arcotic addiction is an illness . . . which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal . . . inflicts a cruel and unusual punishment . . . . To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.[21]

In dicta, the Court further allowed that the States retained broad power to impose criminal sanctions against the "unauthorized manufacture, prescription, sale, purchase, or possession of narcotics" within its borders.[22]

While the *Robinson* majority merely concluded without analysis that the Eighth Amendment invalidated the California statute,[23] Justice Douglas,

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> within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail.

CAL. HEALTH & SAFETY CODE § 11721 (Deering 1952 & Supp. 1959), as quoted in *Robinson v. California*, 370 U.S. 660 (1962).

[18] *Id.*

[19] Manes, *supra* note 3, at 238; Note, *supra* note 10, at 645.

[20] The case was *Louisiana ex rel. Resweber*, 329 U.S. 459 (1947), which held that carrying out the execution of a convicted murderer, after a first execution attempt had failed because of mechanical failure in the electric chair, did not constitute cruel and unusual punishment. The *Robinson* Court merely cited *Resweber* without any discussion. *See* 370 U.S. at 666.

[21] 370 U.S. at 666-67.

[22] *Id.* at 664. The Court also cited *Whipple v. Martinson*, 256 U.S. 41, 45 (1921), which opined that the "*use* of dangerous and habit-forming drugs" could also be regulated by the States. 370 U.S. at 664 (emphasis added).

[23] The only "analysis" the Court offered was its observation that "in light of contemporary human knowledge, a law which made a criminal offense of . . . a disease

in a concurring opinion, appealed to the Court's proportionality cases as grounds for the *Robinson* Court's decision. For Douglas, "the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick."[24] Douglas further elaborated:

> Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime. The purpose of [the statute] is not to cure, but to penalize. Were the purpose to cure, there would be no need for a mandatory jail term of not less than 90 days. . . . [The statute] is, in reality, a direct attempt to punish those the State cannot commit civilly. . . . We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.[25]

Justice Harlan also concurred in the result in *Robinson* but not on Eighth Amendment grounds. Citing no authority, Harlan appeared to have seen the problem in substantive due process terms, finding it an "arbitrary imposition" of State power to apply the California statute under the circumstances of *Robinson*. Assuming that the State could properly punish narcotics use by addicts, who by definition possess a compelling propensity to use narcotics, Harlan saw the statute's application to addicts per se as an unconstitutional authorization of criminal punishment "for a bare desire to commit a criminal act."[26]

In a dissenting opinion, Justice White expressed concern about the implications of the majority opinion in *Robinson*. White found insufficient evidence in the record to find that the appellant in the case had in fact been convicted solely on the basis of his status as an addict rather than for the regular use of narcotics.[27] Had such evidence existed he "would have [had] other thoughts about the case,"[28] presumably, however, not as an Eighth Amendment matter. In warning of the ill-advised use of the Eighth Amendment to decide the issue in *Robinson*, White said:

> If it is "cruel and unusual punishment" to convict appellant for addiction, it is difficult to understand why it would be any less offensive . . . to convict him for use on the same evidence of use which proved he was an addict. It is significant that in purporting to reaffirm the power of the States to deal with the narcotics traffic, the

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would doubtless be universally thought to be an infliction of cruel and unusual punishment" in violation of the Eighth Amendment. 370 U.S. at 666.

[24] *Id.* at 676-77 (Douglas, J., concurring).

[25] *Id.* at 676-78.

[26] *Id.* at 678-79 (Harlan, J., concurring).

[27] *Id.* at 686 (White, J., dissenting).

[28] *Id.* at 685.

> Court does not include among the obvious powers of the State the power to punish for the use of narcotics. I cannot think that the omission was inadvertent.[29]

For White, the majority opinion cast doubt on the continued ability of states to punish use of narcotics by addicts.[30]

Finally, Justice White chided the majority for substituting its judgment for that of policymakers. White suggested that the majority's "novel" application of the Eighth Amendment was a consequence of the Court's "allergy" to substantive due process.[31]

Clearly, *Robinson* left important questions unanswered. Did the case stand for the narrow proposition that commission of an offense is an essential prerequisite for punishment, thus simply constitutionalizing traditional actus reus principles? If so, whether or not a person possesses power to control his actions, a mens rea issue, would be irrelevant.[32] Or, on the other hand, did the *Robinson* Court's focus on drug addiction as a disease entail a broader rationale, as feared by Justice White,[33] extending also to mens rea issues addressing criminal responsibility for acts inherent in the disease?[34] As shown by the discussion of the *Powell* case in the next section, the broader actus reus plus mens rea interpretation appears to have captured the meaning of *Robinson*.

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[29] *Id.* at 688-89; *see also supra* note 22 and accompanying text.

[30] 370 U.S. at 688-89 (White, J., dissenting).

[31] White said:

> I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures of Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

Id. at 689.

[32] *See* Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 COLUM. L. REV. 927, 929 n.14 (1969). One leading commentator suggests that *Robinson* carries no mens rea connotations and should be read simply as a case barring punishment for status only insofar as "status excludes any act at all." Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 418 (1975). In his view, in light of a "vast literature" treating drug addiction, the argument that drug addiction and acts associated with it be regarded as legally involuntary must be abandoned. *Id.* at 443.

[33] *See supra* text accompanying notes 27-30.

[34] Greenawalt, *supra* note 32, at 929.

B. *POWELL V. TEXAS*

In its 1968 decision *Powell v. Texas*,[35] the Supreme Court offered its next and final word on the scope of *Robinson*. Leroy Powell, an alleged alcoholic, was convicted of "be[ing] found in a state of intoxication in a public place" and fined $20. On appeal Powell argued that he was afflicted with the disease of chronic alcoholism, that his appearance in public while drunk was not volitional, and that to punish him for that conduct would essentially be punishing him for his disease contrary to *Robinson*.

The Court affirmed Powell's conviction in a 5-4 decision but divided three ways. In a four-Justice plurality opinion, Justice Marshall rejected Powell's constitutional claim on a variety of grounds. Marshall found the record in the case did not clearly reveal the circumstances of Powell's drinking bout on the day of his arrest nor his drinking problem in general and thus provided an inadequate basis for announcing "an important and wide-ranging new constitutional principle."[36] While recognizing that alcoholism is a disease, Marshall found little agreement within the medical profession regarding its causes and manifestations.[37] Moreover, the record did not provide a basis for determining what, for Marshall, was a crucial issue in the case: the ability to distinguish between "loss of control" by Powell once he commenced to drink and his "inability to abstain" from drinking in the first place.[38] "Presumably a person would have to display both characteristics in order to make out a constitutional defense, should one be recognized."[39]

Future recognition of such a defense was not necessarily foreclosed, however, by other aspects of Marshall's opinion. In noting that effective treatment of alcoholism was not at the time available, Marshall saw some virtue in treating public aspects of alcoholism through the criminal justice system with its fixed, relatively brief periods of confinement for offenses such as Powell's rather than through therapeutic civil commitments that might entail confinement for a longer period of time.[40] By implication,

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[35] 392 U.S. 514 (1968).

[36] *Id.* at 521-22 (plurality opinion).

[37] *Id.* at 523.

[38] *Id.* at 524-25.

[39] *Id.* at 525.

[40] *Id.* at 529. Marshall elaborated:

> Faced with this unpleasant reality, we are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational. The picture of the penniless drunk propelled aimlessly and endlessly through the law's "revolving door" of arrest, incarceration, release and re-arrest is not a pretty one. But before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately, no such promise has yet been forthcoming. If, in addition to the absence of a coherent approach to the problem of

improved treatment might give more credibility to claims like those of Powell's in the future.

Notwithstanding his view of the faulty record, Marshall addressed the applicability of *Robinson* to Powell's situation by pointing out a simple distinction: unlike the defendant in *Robinson*, Powell was not convicted for his status, here a chronic alcoholic, but for his "act" of "being [appearing] in public while drunk on a particular occasion."[41] This narrow interpretation was attractive to Marshall:

> *Robinson* so viewed brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.[42]

Marshall specifically attempted to limit *Robinson*'s thrust to actus reus concerns rather than to the more expansive mens rea issues entailed in Powell's claim that he was not criminally responsible because he could not control his actions due to his alcoholism. Noting that the Supreme Court "ha[d] never articulated a general constitutional doctrine of mens rea,"[43] Marshall was reluctant to do so in *Powell*, at least

> on the state of this record or on the current state of medical knowledge that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts.[44]

> treatment, we consider the almost complete absence of facilities and manpower for the implementation of a rehabilitation program, it is difficult to say in the present context that the criminal process is utterly lacking in social value.

Id. at 530.

[41] *Id.* at 532. In addressing the question of whether Powell "acted" even though he could not help engaging in his conduct due to his alcoholism, Justice Black, in a concurring opinion in *Powell*, said:

> When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force that is nevertheless "his" except in some special sense [such as, for example, being carried into the street by someone else]. The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible. Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was "compelled" by some elusive "irresponsible" aspect of his personality. . . . Punishment of such a defendant can clearly be justified in terms of deterrence, isolation, and treatment.

Id. at 540-41 (Black, J., concurring).

[42] *Id.* at 533 (plurality opinion).

[43] *Id.* at 535.

[44] *Id.*

Noting the value of leaving to the States the power to determine the broad range of mens rea doctrines[45] in light of shifting "religious, moral, philosophical, and medical views of the nature of man,"[46] Marshall found that "[i]t is simply not yet the time to write the Constitutional formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers."[47]

While Marshall's plurality denied, at least for the time being, a mens rea component to *Robinson*, Justice Fortas, writing for three other dissenting Justices, would recognize Powell's defense. Fortas saw the issue in the case as "a narrow one": "[W]hether a criminal penalty may be imposed upon a person suffering the disease of 'chronic alcoholism' for a condition—being 'in a state of intoxication' in public—which is a characteristic part of the pattern of his disease."[48] Fortas found adequate evidence in the record to establish that Powell was an alcoholic who was unable to resist the constant excessive consumption of alcohol which, in turn, "leads him to 'appear in public [not] by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.'"[49] Thus, punishment of Powell was precluded by the principle of *Robinson*:

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[45] Marshall specifically noted the doctrines of insanity, mistake, justification, and duress. *Id.* at 536.

[46] *Id.* Marshall saw particular problems in the area of the insanity defense if Powell's defense were to be successful.

> Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect," would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, e.g., the right-wrong test of *M'Naghten's Case*. The experimentation of one jurisdiction in that field alone indicates the magnitude of the problem. But formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold.

Id. at 536-37 (citations omitted).

[47] *Id.* at 537. Justice Black added other practical concerns:

> [The impact of the holding urged upon us] would make it necessary to determine, not only what constitutes a "disease," but also what is the "pattern" of the disease, what "conditions" are "part" of the pattern, what parts of this pattern result from a "compulsion," and finally which of these compulsions are "symptomatic" of the disease.

Id. at 546 (Black, J., concurring).

[48] *Id.* at 558 (Fortas, J., concurring). Fortas specified that the *Powell* case did not challenge "the validity of public intoxication statutes in general," nor did it deal with intoxicated non-alcoholic drinkers appearing in public, nor with "any offense other than the crime of public intoxication." *Id.*

[49] *Id.* at 559.

"Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[50]

With the *Powell* Court equally split between the Marshall plurality and the Fortas dissent, Justice White cast the decisive, concurring vote.[51] However, White agreed with the dissenters' general position. White expressed his view of *Robinson* as it related to the issue in *Powell* as follows:

> If it cannot be a crime to have an irresistible compulsion to use narcotics [under *Robinson*], I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.[52]

Given Justice White's views, the *Powell* dissent more closely states "the principles accepted by a majority of the Court than does the plurality opinion."[53] Thus while some on the *Powell* Court would limit *Robinson* to "a firm and impenetrable barrier to the punishment of persons who, whatever their bare desires and propensities, have committed no proscribed wrongful act,"[54] a majority of the Court would extend the case to assessments of responsibility for actions inherent in disease conditions.

C. IMPLICATIONS: THE DEMISE OF THE CRIMINAL LAW?

A leading commentator has noted that if Justice White had joined the dissent in *Powell*, the case would have "generated a precedent of revolutionary proportions."[55] However, as noted immediately above, White's opinion shares a much closer affinity to the dissent than to the

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[50] *Id.* at 567.

[51] *Id.* at 552-54 (White, J., concurring). Justice White concurred with the result reached by the plurality because he found insufficient evidence in the record to show that Powell was compelled to be intoxicated in public. *Id.*

[52] *Id.* at 548-49. For a view critical of White's position, see Herbert Fingarette, *The Perils of* Powell: *In Search of a Factual Foundation for the "Disease of Alcoholism,"* 83 HARV. L. REV. 793, 794 (1970). For similar views in the context of drug addiction, see Fingarette, *supra* note 32.

[53] Greenawalt, *supra* note 32, at 931.

[54] 392 U.S. at 548 (Black, J., concurring).

[55] GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 429 (1978).

plurality opinion.[56] It is thus important to explore the implications of the *Powell* dissent as possibly viable in shaping future law.[57]

Justice Marshall warned in his *Powell* opinion that embracing the dissenting position would lead to the Supreme Court's becoming "the ultimate arbiter of . . . standards in diverse areas of the criminal law."[58] In his concurring opinion in *Powell*, Justice Black expanded on this concern:

> [A]ny possible limits proposed for the rule [urged upon us] would be wholly illusory. If the original boundaries of *Robinson* are to be discarded, any new limits too would soon fall by the wayside and the Court would be forced to hold the States powerless to punish any conduct that could be shown to result from a "compulsion," in the complex, psychological meaning of that term. The result, to choose just one illustration, would be to require recognition of "irresistible impulse" as a complete defense to any crime; this is probably contrary to present law in most American jurisdictions.
>
> The real reach of any such decision, however, would be broader still, for the basic premise underlying the argument is that it is cruel and unusual to punish a person who is not morally blameworthy. . . . The criminal law is a social tool that is employed in seeking a wide variety of goals, and I cannot say the Eighth Amendment's limits on the use of criminal sanctions extend as far as this viewpoint would inevitably carry them.[59]

Thus, "irresistible impulses" by drug addicts to steal in order to support their habits may be a defense to theft charges brought against the addict.[60] Theft charges against "kleptomaniacs" and arson charges against

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[56] Even Justice Marshall's rather tentative plurality opinion suggests that he might eventually embrace the dissent position. *See supra* text accompanying notes 36-40, 43-47.

[57] Some have attempted to articulate limitations to the possible thrust of the *Powell* dissent. *See, e.g.*, Greenawalt, *supra* note 32, at 975:

> The starting point of a constitutional test in this area, therefore, should be whether the actor has a possible defense that he can not properly be blamed for and could not have been deterred from the wrongful act. A state should be permitted to preclude the asserted defense only if there is substantial reason for the Court to conclude that problems of identification would make the defense too difficult to administer or that some important purpose of punishment, not equally well accomplished by civil remedies, is served by punishing even those who are not blameworthy or deterrable.

Another somewhat confusing attempt to limit the *Powell* dissent is offered by Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the* Robinson *Doctrine to Homelessness and Other Contextual "Crimes,"* 96 J. CRIM. L. & CRIMINOLOGY 329, 361 (2005). The test for limiting *Robinson* is as follows: "[I]s the targeted conduct only unlawful in a particular context? If so, then the conduct is innocent, and if the defendant is unable either to escape the context, or avoid performing the conduct, it would violate the Eighth Amendment to hold him criminally liable." *Id.*

[58] *See supra* text accompanying note 42.

[59] 392 U.S. at 544-45 (Black, J., concurring).

[60] *See, e.g.*, Broeder & Merson, *supra* note 3, at 204; Note, *supra* note 10, at 652. For a criticism of the concept of "irresistible impulse" as either vacuous or "so expansive that it

"pyromaniacs" may be excused.[61] Punishment of sex offenders may be unconstitutional if the offense is "compulsive and symptomatic of disease."[62]

Ultimately, the implications of the *Powell* dissent may be far more extensive than even Justices Marshall and Black recognized. Rather than merely making the Court the "arbiter of mens rea" standards of the criminal law, the *Powell* dissent might render the principle of mens rea, and indeed the criminal law itself, a relic of the past. Recognition of the idea that persons are not responsible for actions produced by status conditions beyond their ability to change plants the seeds for radical change:

> Considered in light of an increasingly more sophisticated science of psychiatry, the "status one cannot change" rationale might conceivably yield results antithetical to the criminal law itself. It has been suggested that virtually all criminality may be the result of mental abnormality of some sort. Under this view of *Robinson*, the acceptance of such a position—like the acceptance of philosophical determinism—would lead to virtual abandonment of the criminal law; for the hypothesis upon which any system of criminal law must be founded is that individuals possess free will and are to be held responsible for their acts.[63]

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could include most criminal behavior," see Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 36-38 (2003). *See also* Fingarette, *supra* note 32, at 427 (noting that the concept of "involuntariness" is "hopelessly inappropriate" to deal with complexity of the problems of narcotic addition). For similar views, see ROBERT F. SCHOPP, AUTOMATISM, INSANITY, AND PSYCHOLOGY OF CRIMINAL RESPONSIBILITY 165-76 (1991).

[61] *See, e.g.*, Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463, 490-91 (1967).

[62] *See, e.g.*, Bason, *supra* note 2, at 59; Broeder & Merson, *supra* note 3, at 205; Note, *supra* note 10, at 653. Other consequences of the *Powell* dissent might be, *inter alia*: the abolition of "private" or victimless crimes, the elimination of strict liability crimes, and the "emasculation" of involuntary manslaughter and motor vehicle homicide law. Broeder & Merson, *supra* note 3, at 205-07.

[63] Note, *supra* note 10, at 654; *see also* Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2249-51 (1992) (stating that "acceptance of a loss-of-control defense for addicts and alcoholics could fundamentally undermine the [criminal justice] system's capacity to articulate an ideology of individual responsibility," thus also undermining "a central feature of our normative landscape").

The implications of extending *Robinson* into the mens rea area appear to reach even beyond issues relating to mental abnormality. If it is true, as many argue (see, e.g., New Jersey v. Sikora, 210 A.2d 193 (N.J. Sup. Ct. 1964) (testimony of Dr. Noel C. Galen); John R. Silber, *Being and Doing: A Study of Status Responsibility and Voluntary Responsibility*, 35 U. CHI. L. REV. 47 (1967)), that all human "action" is the product of subconscious mental activity, itself a fundamental ingredient in defining our basic status condition (who we are as people), then all actions are necessarily linked to status conditions. On this view, there is no distinction between being and doing, thus making punishment of any act unconstitutional punishment of a status under *Robinson*. *See also* Sherry F. Colb, *Some Thoughts on the Conduct/Status Distinction*, 51 RUTGERS L. REV. 977 (1999).

D. LOWER COURTS AND *POWELL*

Until the recent *Jones* decision, discussed in the next section, the lower courts have generally refused to recognize mens rea defenses for acts attributable to illnesses or other status conditions[64] even though the *Powell* dissent remains arguably authoritative. Attention will be directed here to just one case denying such recognition, *Moore v. United States*,[65] "a judicial conversation of uncommon erudition."[66] The holding in *Moore* represents the "near universal [judicial] hostility" to any version of a mens rea, lack-of-control defense pressed by alcoholic or drug-addicted defendants under *Powell*.[67]

In *Moore*, the United States Court of Appeals for the District of Columbia considered, among other things, whether the "admittedly confused and divergent" opinions in *Robinson* and *Powell* precluded the conviction of a heroin addict, Moore, for possession of that substance.[68] Moore argued that his addiction created an overpowering need to use and thus to possess the drug.

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[64] WAYNE R. LAFAVE, CRIMINAL LAW 181-82 (4th ed. 2003); PAUL H. ROBINSON, CRIMINAL LAW 186 (1997) ("Nothing further has come of the voluntariness language in [the dissent of] *Powell*."). Professor Robinson offers the following explanation of why the Supreme Court has gone no farther than *Powell*:

> The Court may have realized that, despite the wisdom of having a voluntariness . . . requirement, to constitutionalize it logically would have drawn the Court into constitutionalizing, or trying to distinguish, the host of criminal law doctrines that are based on some degree of involuntariness. This includes not only the general disability excuses, such as insanity, duress, and involuntary intoxication, but also doctrines of mitigation, such as provocation and extreme emotional disturbance. Criminal law theory has struggled with and changed the accepted wisdom on these and other issues central to criminal responsibility many times during the past century. The Court might have thought it unwise to impede this continuing development by constitutionalizing, and thereby solidifying, matters that ought to remain fluid until we are more certain of their proper formulation.

ROBINSON, *supra*, at 186-87.

However, outside the Eighth Amendment context, the Supreme Court has utilized the "void for vagueness" doctrine under the Due Process Clause to render unconstitutional certain so-called "status crimes" traditionally captured under the broad rubric of "vagrancy." *See* Papachristou v. Jacksonville, 405 U.S. 156 (1972). Prior to *Papachristou*, many commentators had argued that such "crimes" as being a "dissolute person," a "common gambler," or a "habitual loafer" were status conditions perhaps unpunishable under *Robinson*. *See, e.g.*, Anthony G. Amsterdam, *Constitutional Restrictions on the Federal Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 234-41 (1967); Cuomo, *supra* note 61, at 465-67.

[65] 486 F.2d 1139 (1973) (en banc), *cert. denied*, 414 U.S. 980 (1973) (mem.).

[66] Boldt, *supra* note 63, at 2250.

[67] *Id.* at 2310.

[68] 486 F.2d at 1142.

While there was no majority opinion for the court, a majority did refuse to extend a defense under *Powell*. In his plurality opinion, Judge Wilkey admitted that "the interpretation that *Robinson* held that it was not criminal to give in to the irresistible compulsion of a 'disease[]' weaves in and out of the *Powell* opinions, but there [was] definitely no Supreme Court holding to this effect."[69] But even if the *Powell* dissent were viewed as authoritative, Wilkey unconvincingly attempted to distinguish *Moore* on the ground that "acquisition and possession of the addictive substance [heroin] . . . are *illegal* activities, whereas in *Powell* the 'addict' induced his [alcohol] addictive state through *legal* means."[70] Probably the primary reason for Wilkey's refusal to extend a *Powell* defense to Moore was his concern about the implications of such a move. The "logic" of Moore's claim, if recognized, "would carry over to all other illegal acts of any type whose purpose was to obtain narcotics for his own use."[71]

In a dissenting opinion joined by three other members of the *Moore* court, Judge Wright observed that while *Powell* left the state of the law

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[69] *Id.* at 1150 (plurality opinion).

[70] *Id.* at 1151 (emphases in original). Such a view suggests that an alcoholic is, in a sense, innocent in becoming addicted and thus may have defenses for acts associated with addiction. Such defenses would apparently be unavailable to heroin addicts whose addictions are not "innocent" in the first place. Under this view, however, it is difficult to understand why *Robinson* would forbid punishing heroin addiction itself given that it is almost always the product of illegal acts.

[71] *Id.* at 1145. Wilkey elaborated:

> Under [Moore's] theory, . . . only if there is a resulting loss of self-control can there be an absence of *free will* which, under [broad principles of criminal responsibility], would provide a valid defense to the addict. If there is a demonstrable absence of free will (loss of self-control), the illegal acts of possession and acquisition cannot be charged to the user of the drugs.
>
> But if it is absence of free will which excuses the mere possessor-acquirer, the more desperate bank robber for drug money has an even more demonstrable lack of free will and derived from precisely the same factors as appellant argues should excuse the mere possessor.

Id. at 1145-46 (emphases in original).

In a concurring opinion, Judge Leventhal agreed that Moore had no defense under *Powell* but suggested that such a defense might constitute "sound policy" if enacted legislatively. *Id.* at 1160 (Leventhal, J., concurring). Judicial recognition of a constitutional defense would cause concerns similar to those expressed by Wilkey:

> If drug dependence really negatived mens rea, it would be a defense not only to the offense of possession or purchase of prohibited drugs but to other actions taken under the compulsion of the need to obtain the drug. If there is an impairment and lack of capacity to alter conduct, there is no way in which the line can be drawn in mens rea terms so as to exclude the very large percentage of addicts who must support their habit by engaging in retail sales, or, indeed, committing other crimes in order to satisfy their compulsion for drugs.

Id. at 1179. Leventhal saw Justice White's apparent approval in principle of the *Powell* dissent as not undercutting Marshall's plurality opinion. *Id.* at 1198. Therefore, *Powell* did not require recognition of an Eighth Amendment defense in *Moore*.

"obscure," *Powell* and *Robinson* appear "to stand for the proposition that an addict cannot constitutionally be subjected to criminal process for engaging in conduct which is itself inherent in the disease of addiction."[72] Therefore, Wright argued that Moore could not be punished for possession of heroin because heroin possession was logically entailed in being a heroin addict.

Judge Wright expounded on the status of the Cruel and Unusual Punishments Clause after *Robinson* and *Powell*:

> Although *Powell* left unsettled the precise relationship between criminal responsibility and the Constitution, no member of the Court expressed even the slightest disagreement with the basic proposition that the Eighth Amendment provides only the floor and not the ceiling for development of common law notions of criminal responsibility. . . .
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> . . . .
>
> The concept of criminal responsibility is, by its very nature, "an expression of the moral sense of the community." In western society, the concept has been shaped by two dominant value judgments—that punishment must be morally legitimate, and that it must not unduly threaten the liberties and dignity of the individual in his relationship to society. As a result, there has historically been a strong conviction in our jurisprudence that to hold a man criminally responsible, his actions must have been the product of a "free will.". . . Thus criminal responsibility is assessed only when through "free will" a man elects to do evil, and if he is not a free agent, or is unable to choose or to act voluntarily, or to avoid the conduct which constitutes the crime, he is outside the postulate of the law of punishment.[73]

Judge Wright saw the Eighth Amendment's homage to "evolving standards of decency" and protection of human dignity as particularly fertile ground for generating constitutional principles of mens rea.[74] As "the constitutional floor," the Amendment's abhorrence of "cruel punishment" provided a rich doctrinal basis for bringing the Constitution to the substantive criminal law.

In addressing "perhaps the most troublesome question arising out of recognition of the addiction defense," Wright read *Powell* as indicating that the Court's position was that the defense should be limited to acts such as possession that are "inherent in the disease itself" rather than extend to instances where "an addict may in fact be 'compelled' to engage in other types of criminal activity in order to obtain sufficient funds to purchase his necessary supply of narcotics."[75] Wright saw his position as "but a short

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[72] *Id.* at 1239 (Wright, J., dissenting).

[73] *Id.* at 1240-41.

[74] *Id.* at 1235-36.

[75] *Id.* at 1255-57.

step past the principles announced in the Supreme Court's opinions in *Robinson* and *Powell*."[76]

Finally in a separate dissent, Judge Bazelon would go farther:

> I cannot . . . accept [Judge Wright's] view that the addiction/responsibility defense should be limited to the offense of possession. I would also permit a jury to consider addiction as a defense to a charge of, for example, armed robbery or trafficking in drugs, to determine whether the defendant was under such duress or compulsion, because of his addiction, that he was unable to conform his conduct to the requirements of the law.[77]

The *Moore* majority's denial of a mens rea defense represents the approach taken by the vast majority of courts after *Powell*. While a few cases struck down statutes employing criminal sanctions to mere status conditions,[78] until the recent *Jones* case, no appellate court had invalidated punishment of acts deemed inherently linked to status conditions.[79]

III. *JONES*: A NEW DIRECTION

Jones v. Los Angeles[80] is the first federal appellate court decision to hold that conduct derivative of a status may not be criminalized.[81] As such, the case represents a dramatic change in the direction of Eighth Amendment jurisprudence.

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[76] *Id.* at 1260.

[77] *Id.* (Bazelon, J., dissenting).

[78] Prior to the Supreme Court's invalidation of vagrancy statutes on due process grounds, see *supra* note 64 (discussing *Papachristou*), some lower courts struck down "status crimes" entailed in vagrancy statutes as unconstitutional under *Robinson*. *See, e.g.*, Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969) (invalidating statute prohibiting, among other things, "loitering" or "leading an idle, immoral, or profligate course of life"); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969) (striking down statute prohibiting, among other things, being "able to work" but having no "visible and known means of a fair, honest, and reputable livelihood").

Outside the context of vagrancy, courts sometimes also appealed to *Robinson* as grounds for striking down "punishment" for status conditions. *See, e.g.*, Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971) (invalidating punishment of "wayward minors").

[79] At least one federal district court had, however, invalidated such acts on Eighth Amendment as well as due process vagueness grounds. *See* Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

[80] 444 F.3d 1118 (9th Cir. 2006), *vacated*, No. 04-55324, 2007 WL 3010591, at *1 (9th Cir. Oct. 15, 2007).

[81] *Id.* at 1139 (Rymer, J., dissenting). At least one federal district had found that the Eighth Amendment protected homeless persons against arrests for lying down, sleeping, standing, or performing other essential life-sustaining activities in public. *See Pottinger*, 810 F. Supp. at 1561-65.

A. THE *JONES* CASE

In *Jones*, a three-judge panel of the Ninth Circuit Court of Appeals considered the constitutionality of a city ordinance that criminalized "sitting, lying, or sleeping" on public streets and sidewalks.[82] The statute was attacked by Jones and other homeless individuals, who claimed that enforcement of the ordinance against them constituted cruel and unusual punishment under *Robinson/Powell* because conduct such as sitting or sleeping on public streets represented involuntary actions inherently linked to their status as homeless persons. In an opinion by Judge Wardlaw, the court agreed with Jones and issued an injunction against enforcement of the ordinance against homeless individuals.[83]

The court found that Jones and the other appellants, all of whom met the federal definition of a "homeless individual,"[84] lived on the streets of the "Skid Row" district of Los Angeles, an area with the "highest concentration of homeless individuals in the United States," where "desperate poverty, drug use, and crime [abounds], [and] where Porta-Potties serve as sleeping quarters and houses of prostitution."[85] The court noted a long-standing policy by the City of "concentrating and containing the homeless in the Skid Row area"[86] which, because of inadequate shelters and other temporary housing, meant that on any given night at least 1000 people would be relegated to city sidewalks, "the only place to be."[87] Moreover, the court found that the appellants had not chosen their homelessness but rather that it had resulted from a variety of causes such as mental illness,

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[82] The statute imposed punishment of a fine up to $1000 and/or imprisonment of up to six months. L.A., CAL., MUN. CODE § 41.18(d) (2005), as cited in *Jones*, 444 F.3d at 1123.

[83] *Jones*, 444 F.3d at 1127, 1138.

[84] Federal law defines the term "homeless individual" to include

> (1) an individual who lacks a fixed, regular, and adequate nighttime residence; and (2) an individual who has a primary nighttime residence that is—
>
> (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);
>
> (B) an institution that provides a temporary residence for individuals intended to be institutionalized; or
>
> (C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

42 U.S.C.A. § 11302(a) (2000), as quoted in *Jones*, 444 F.3d at 1120-21.

[85] *Jones*, 444 F.3d at 1121.

[86] *Id.* (citing Edward G. Goetz, *Land Use and Homeless Policy in Los Angeles*, 16 INT'L J. URB. & REGIONAL RES. 540, 543 (1992)).

[87] *Id.* at 1122-23.

substance abuse, domestic violence, low-paying jobs and "most significantly" from the "chronic lack of affordable housing."[88]

The court saw the ordinance as "one of the most restrictive municipal laws in the United States."[89] As a result of its "expansive reach . . . , the extreme lack of available shelter in Los Angeles, and the large homeless population, thousands of people violate the Los Angeles ordinance every day and night, and many are arrested, losing what few possessions they may have."[90] Based on these factors, the court concluded that "the City is criminalizing the status of homelessness."[91]

The court rejected the City's arguments that some of the appellants lacked standing to raise their Eighth Amendment claim because they had merely been cited or arrested, and some of them jailed, under the ordinance but none convicted for its violation.[92] The court cited *Robinson* for the proposition that the protection of the Cruel and Unusual Punishments Clause "governs the criminal law process as a whole, not only the imposition of punishment postconviction."[93] On this view, "a person suffers constitutionally cognizable harm as soon as he is subjected to the

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[88] *Id.* at 1123-25. The court described the circumstances of the arrests of some of the *Jones* appellants. Some were on the street because they missed the bus to the shelter, others because their welfare payments were insufficient to pay for treatment for physical and mental afflictions, still others because physical injuries precluded them from working. The court also noted that the police confiscated belongings such as blankets, clothes, cooking utensils, and other personal effects that appellants had left on the street subsequent to their arrests. *Id.*

[89] *Id.* at 1123-24. The court observed that other cities' ordinances directed at the homeless provide ways to avoid criminalizing the status of homelessness by making an element of the crime some other conduct, such as obstructing traffic, in combination with sitting, lying, or sleeping in a state of homelessness.

[90] *Id.* at 1124.

[91] *Id.* at 1125.

[92] One claim for an alleged lack of standing was that if appellants had been put on trial, they could have successfully raised necessity defenses. The court found that, while theoretically viable, the practical realities of homelessness, including lack of effective counsel and inducements to plead guilty, made raising such defenses highly unlikely. Moreover, the promise of a defense at trial would hardly alleviate the preconviction harms inflicted upon homeless people through their loss of possessions when arrested, given that they have so few resources and may find that everything they own "may have disappeared by the time they return to the street." *Id.* at 1131.

[93] *Id.* at 1128-29. The court also appealed to a post-*Robinson* case, *Ingraham v. Wright*, 430 U.S. 651, 657 (1977), for the proposition that the Cruel and Unusual Punishments Clause places three distinct limits on the government's criminal law powers: "First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." *But see infra* note 116 and accompanying text (noting Supreme Court's view that Eighth Amendment claims arise only after conviction and punishment).

criminal process," an event that begins "well before conviction."[94] The court explained:

> A more restrictive approach to standing, one that made conviction a prerequisite for any type of Cruel and Unusual Punishment Clause challenge, would allow the state to criminalize a protected behavior or condition and cite, arrest, jail, and even prosecute individuals for violations, so long as no conviction resulted. Under this approach, the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the Clause cannot be subject to the criminal process.[95]

The court did not explain how preconviction events such as arrests or pretrial detention were "in effect punishment," nor did it address the Supreme Court caselaw holding that *any* preconviction "punishment" is per se unconstitutional under the Due Process Clause[96] and decisions specifically holding that pretrial detention of arrestees awaiting trial is *not* "punishment" for due process purposes.[97]

Turning to an analysis of *Robinson/Powell*, the court rejected the view of the district court in *Jones* that homelessness was not a constitutionally cognizable status. Given the evidence of the extent of homelessness and the paucity of available shelter, the *Jones* court found that the City "encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless."[98] In terms reminiscent of the dissents by Fortas and Wright in *Powell* and *Moore*, respectively,[99] the court explained:

> A[n] analysis of *Robinson* and *Powell* instructs that the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment.[100]

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[94] *Jones*, 444 F.3d at 1129.

[95] *Id.*

[96] Bell v. Wolfish, 441 U.S. 520, 535 (1979) (holding that pretrial detention of persons accused of crime is not punishment due to an absence of punitive intent and that, "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt"). See *infra* notes 128-38 and accompanying text for a discussion of *Wolfish* as it relates to *Jones*.

[97] *See supra* note 96; *see also* United States v. Salerno, 481 U.S. 739 (1987) (pretrial detention to protect public safety from possible criminal acts by detainee held not "punishment"); Schall v. Martin, 467 U.S. 253 (1984) (preadjudication detention of juvenile thought to pose a "serious risk" of committing additional offenses if released held not "punishment"); *infra* notes 123-32, 141-52 and accompanying text.

[98] 444 F.3d at 1132.

[99] *See supra* notes 48-50, 72-76 and accompanying text.

[100] 444 F.3d at 1132.

Rejecting the ultimate authority of Marshall's plurality opinion, the court concluded that "five Justices in *Powell* understood *Robinson*" to mean "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being."[101] Such a view of *Robinson* was "persuasive authority" to the *Jones* court while "the precedential [authority] of the *Powell* plurality [was] limited to its precise facts."[102] Thus, the proper inquiry should focus on "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.'"[103]

Therefore, because homeless individuals are in a "chronic state" that may have been brought about "innocently and involuntarily,"[104] and because "sitting, lying, and sleeping" are "biologically compelled," "unavoidable consequences of being human,"[105] the city could not apply the ordinance against the homeless even though its language specified various acts rather than a status condition.[106] "By criminalizing sitting, lying, and sleeping, the City is in fact criminalizing appellants' status as homeless individuals."[107]

The *Jones* court attempted to limit its holding by announcing, "[W]e do not hold that the Eighth Amendment includes a *mens rea* requirement."[108] Rather, it stated that "all we hold is that so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce [the ordinance] at all times and places throughout the City against homeless individuals for involuntarily sitting, lying, and sleeping in public."[109]

Judge Rymer dissented in *Jones*. Rymer refused to see *Jones* as that "rare type of case" where the Eighth Amendment places restrictions on the substantive criminal law.[110] Noting that *Jones* was breaking new Eighth

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[101] *Id.* at 1135.

[102] *Id.*

[103] *Id.* at 1136 (White, J., concurring) (quoting Powell v. Texas, 392 U.S. 514, 550 n.2 (1968)).

[104] *Id.*

[105] *Id.*

[106] *See supra* notes 82-84 and accompanying text.

[107] 444 F.3d at 1137.

[108] *Id.*

[109] *Id.* at 1138. The court noted that the ordinance could be applied to punish conduct such as panhandling and obstructing public roads that is not an "unavoidable consequence of being homeless." *Id.* at 1137. The court also claimed no part in attending to underlying social policy concerns, leaving it to the legislative and executive branches to deal with the "homeless problem," perhaps by providing sufficient shelter. *Id.* at 1138.

[110] *Id.* (Rymer, J., dissenting.).

Amendment ground, Rymer found the ramifications of the majority's action "quite extraordinary."[111]

Rymer saw no basis for applying Eighth Amendment protections to parties who had merely been arrested but not convicted. He chided the majority for its view that standing was established through the deprivations of liberty entailed by being brought within the criminal process, noting that "this is an action arising under the *Eighth Amendment*, where injury comes from cruel and unusual punishment—*not* under the Due Process Clause, where injury comes from deprivation of a liberty or property interest . . . ."[112] Moreover, even if standing were granted to the unconvicted appellants, they would lose their claim of unconstitutional punishment on the merits because they may avoid punishment by gaining an acquittal through raising a defense of necessity.[113]

Unlike the majority, Judge Rymer read *Robinson* and *Powell* narrowly, finding that *Robinson* does not apply to criminalization of conduct.[114] Thus, the meaning of *Robinson/Powell* was simply that criminal penalties can be imposed only if the accused has committed "some actus reus."[115]

B. ASSESSING *JONES*

While Judge Rymer warned that *Jones* portended "remarkable ramifications," he offered no explanation of the case's significance. In fact, no member of the *Jones* court suggested any hint at the meaning of the case. This Section takes on that task by assessing *Jones*, first in terms of its grant of standing to the appellants who had not been convicted for violating the ordinance, and then in its avowal of the *Powell* dissent.

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[111] *Id.* at 1138-39.

[112] *Id.* at 1141. Rymer found that the Cruel and Unusual Punishment Clause "places no limits on the state's ability to *arrest*," concluding that Eighth Amendment protections "do not attach until after conviction and sentence." In distinguishing Eighth Amendment and due process issues, Rymer noted:

> [T]here is a difference between the protection afforded by the Eighth Amendment, and protection afforded by the Fourteenth. Protection against deprivations of life, liberty and property without due process is, of course, the role of the Fourteenth Amendment, not the Eighth. The majority's analysis of the substantive component of the Eighth Amendment blurs the two. However, the *Eighth Amendment* does not afford due process protection when a *Fourteenth Amendment* claim proves unavailing.

Id. at 1141, 1147.

[113] *Id.* at 1140, 1148.

[114] *Id.* at 1145.

[115] *Id.*

1. "Punishment" of the Nonconvicted

The *Jones* court granted standing to assert an Eighth Amendment claim to homeless appellants who had merely been cited or arrested, and in some cases jailed, without actually being convicted of violating the Los Angeles ordinance. The sole Supreme Court ground for the court's action was a single phrase of dicta from a United States Supreme Court opinion noting that the Eighth Amendment not only limits kinds and degrees of punishment but also "imposes substantive limits on what can be made criminal and punished as such."[116] While such language can be read simply to refer to *Robinson* and *Powell*, cases where sanctions were imposed postconviction, the *Jones* court, either in ignorance of or simple disregard for Supreme Court teaching to the contrary, read the phrase to mean that the Eighth Amendment "governs the criminal law process as a whole not only the imposition of punishment postconviction."[117] Therefore, for the court, "a person suffers constitutionally cognizable harm as soon as he is subjected to the criminal process," possibly "well before conviction."[118] In reaching this conclusion, the *Jones* court disregarded the contrary view of the Fifth Circuit Court of Appeals that Eighth Amendment relief is available only after conviction[119] and relied instead on a single federal district court case allowing standing to assert a preconviction remedy[120] and on dicta from two other federal cases suggesting such a possibility.[121] Solely on this basis, the *Jones* court concluded that it is "well-established Supreme Court authority"[122] that conviction is not necessary for Eighth Amendment relief.

In applying the Cruel and Unusual Punishments Clause to homeless appellants who had merely been cited or arrested, and in some cases jailed, the court found that such infringements on liberty "could in effect punish individuals in the preconviction stages of the criminal law enforcement process."[123] The court offered no analysis of how or why these

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[116] *Id.* at 1127-28 (majority opinion) (citing Ingraham v. Wright, 430 U.S. 651, 657 (1977)). The *Jones* Court did not refer to *Graham v. Connor*, 490 U.S. 386, 393 n.6 (1989), where the Court described *Ingraham* as "confirming" the view that Eighth Amendment protections do not attach until after conviction and sentence.

[117] 444 F.3d at 1128; *see supra* note 116.

[118] 444 F.3d at 1129.

[119] *Id.* at 1129-30 (rejecting Johnson v. City of Dallas, 61 F.3d 442, 443-45 (5th Cir. 1995)); *see also supra* note 116.

[120] Joyce v. San Francisco, 846 F. Supp. 843, 853-54 (N.D. Cal. 1994).

[121] 444 F.3d at 1129 (citing Church v. Huntsville, 30 F.3d 1132, 1139 (11th Cir. 1994) (suggesting but not stating that plaintiffs had not been convicted); Pottinger v. Miami, 810 F. Supp. 1551, 1559-60 (S.D. Fla. 1992) (same)).

[122] *Id. But see supra* note 116.

[123] 444 F.3d at 1129; *see supra* text accompanying note 95.

preconviction intrusions constituted "in effect punishment" or how such a sanction is sufficient to trigger application of a constitutional text limited on its face to *actual* "punishment."[124] If the *Jones* court meant to say that something "tantamount to punishment" is sufficient to bring the case within the scope of the Cruel and Unusual Punishments Clause, it is deviating from the path taken by the Supreme Court in requiring "punishment," and nothing but, as a necessary condition for the clause's applicability.[125] On the other hand, assuming that the *Jones* court meant to say that the preconviction intrusions were in fact "punishment," serious problems arise.

Punishment is a distinct sanction that embodies a host of unique constitutional consequences.[126] As such, conceptual clarity is essential for sound analysis of the text of constitutional provisions (in particular the Cruel and Unusual Punishments Clause) that are limited to the punitive sanction.[127] The *Jones* court offered no definition of punishment nor did it appeal to any precedent offering such. The court simply concluded that the appellants were punished, thereby begging an essential constitutional

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[124] *See supra* note 9.

[125] While it is clear that "an imposition must be 'punishment' for the Cruel and Unusual Punishment Clause to apply," Ingraham v. Wright, 430 U.S. 651, 670 n.39 (1976), the Court has had few occasions to define the meaning of "punishment" for Eighth Amendment purposes. *See infra* notes 208-10 and accompanying text (discussing Trop v. Dulles, 356 U.S. 86 (1958)). *See infra* notes 241-50 and accompanying text for a discussion of the Court's definition of punishment in all constitutional contexts.

Outside the Eighth Amendment, the Supreme Court and commentators alike have traditionally employed the concept of punishment as the relevant criterion for distinguishing when proceedings are "criminal" for purposes of the Fifth and Sixth Amendments. *See, e.g.*, FLETCHER, *supra* note 55, at 409. Sometimes, however, the Court has suggested that some sanctions, while perhaps not punitive per se, are sufficiently similar to punishment to trigger Fifth and Sixth Amendment protections. Consider, for example, Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791 (1982), where I examine how the Supreme Court found certain aspects of the juvenile justice system to be punitive without explicitly saying so.

[126] The presence of the punitive sanction provides the distinguishing features of the criminal law and distinguishes the "criminal" from civil procedures. GEORGE F. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 4-5 (1998). Criminal defendants are afforded special protections under the Constitution such as the privilege against self-incrimination applicable in "criminal cases" under the Fifth Amendment and the right to confront witnesses against him in "criminal prosecutions" under the Sixth Amendment. *See* U.S. CONST. amends. V and VI.

Moreover, the presence of punishment is a necessary predicate for relief under the Bill of Attainder and Ex Post Facto Clauses. U.S. CONST. art. I, § 9, cl. 3. *See* United States v. Brown, 381 U.S. 437, 445, 456-57 (1965); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319 (1866); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

[127] *See generally* Gardner, *supra* note 125; Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607 (1996).

question. In Part IV, I will discuss the concept of punishment in detail. Such a discussion is not necessary here, however, in order to show that the appellants in *Jones* were not "punished" in the relevant constitutional sense by the preconviction intrusions of their liberty.

In *Bell v. Wolfish*,[128] the United States Supreme Court upheld the confinement of pretrial detainees who attacked their detention as unconstitutional punishment in the absence of an adjudication of guilt. While viewing the detention as nonpunitive, the Court announced that any pretrial punishment would be per se unconstitutional under the Due Process Clause.[129] For government action to constitute punishment, the action must be motivated by punitive purposes,[130] specifically those of retribution or deterrence.[131] Thus, coercive governmental action is not punishment if it is aimed at and reasonably achieves nonpunitive purposes other than the concerns for retribution and deterrence unique to punishment.[132]

In fact, no punishment as defined by *Wolfish* or under any other definition was administered to the homeless appellants in *Jones* through the citations, arrests, and pretrial detentions. Each of these was a governmental action motivated by nonpunitive purposes; thus, none constituted punishment.

Before addressing the nonpunitive nature of these actions, however, attention should be directed to extending Eighth Amendment application to citations and arrests per se. Both citations and arrests constitute "seizures of the person" and are thus governed by specific provisions of the Fourth Amendment,[133] making Eighth Amendment coverage of such seizures on its

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[128] 441 U.S. 520 (1979).

[129] *Id.* at 539. The *Wolfish* Court stated that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535.

[130] While defining punishment in terms of a punitive purpose may appear circular, some circularity is avoided by identifying the punitive purposes as the desire to seek retribution or achieve deterrence. *See* Maria Fasarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1671-72, 1679-81 (1980).

[131] The *Wolfish* Court fashioned the following test for punishment: "[I]f a restriction or condition [of pretrial detention] is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." 441 U.S. at 539. The Court then expanded its reasoning in a footnote:

> [I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may *on its face appear* to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective. . . . Retribution and deterrence are not legitimate nonpunitive governmental objectives.

Id. at 539 n.20 (emphasis added).

[132] *Id.*

[133] The Fourth Amendment provides:

face questionable. Moreover, in cases of excessive, even deadly, governmental force in effectuating arrests, where the Cruel and Unusual Punishments Clause would appear to be most relevant to the arrest context, the Supreme Court has specifically dealt with the problem under the Fourth Amendment.[134]

As the constitutional text specifically governing the law of arrest, the Fourth Amendment operates procedurally and does not shape substantive criminal law doctrine.[135] Thus, the Fourth Amendment would have nothing whatsoever to say about the substantive crime of sitting on the sidewalk so long as probable cause supported the arrest for that offense. In light of these Fourth Amendment considerations, the *Jones* court makes a highly questionable move in applying the Eighth Amendment to the citation and arrest contexts already governed by a different constitutional provision.

The *Jones* court found that given their homeless status, appellants are certain to continue sitting, lying, and sleeping in public thoroughfares and thus face prospects of future citations and arrests that entail restrictions on personal liberty, deprivations of property, and impositions of shame and stigma.[136] The court's position seems to be that an Eighth Amendment remedy is available whenever one is arrested for crimes the person could not help committing. If this is the court's view, it is difficult to see why it would not extend to other classes of blameless persons who are subjected to the shame and stigma inherent in being arrested and charged with a crime. *Jones* would thus seem to allow an Eighth Amendment remedy for innocent persons who are mistakenly arrested and charged with crimes they did not commit. Such situations routinely occur where the arrests are supported by probable cause and are thus perfectly legal under the Fourth Amendment. If such arrests constitute "punishment" they immediately become

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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[134] *See* Tennessee v. Garner, 471 U.S. 1 (1985) (deadly force not permitted under the Fourth Amendment to effectuate an arrest unless necessary to prevent the escape of one posing a serious threat of death or serious injury to others); *see also* Graham v. Connor, 490 U.S. 386, 395 (1989) (stating that "all claims that law enforcement officers have used excessive force—deadly or not—in making an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment").

[135] *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 1-4 (2d ed. 1997).

[136] Jones v. Los Angeles, 444 F.3d 1118, 1127 (9th Cir. 2006), *vacated*, No. 04-55324, 2007 WL 3010591, at *1 (9th Cir. Oct. 15, 2007).

unconstitutional, however, under *Wolfish* as a due process matter[137] whether or not they are also "cruel and unusual" under the Eighth Amendment. An Eighth Amendment cause of action thus appears redundant and perhaps even less extensive than presently available due process remedies. Judge Rymer was therefore correct in his *Jones* dissent in concluding that issues concerning preconviction deprivation of liberty are due process and not Eighth Amendment matters.[138]

In addition to applying an inappropriate constitutional text to the citations and arrests, the *Jones* court's failure to address the conceptual nature of punishment may create hazards in future cases. To the extent that the *Jones* court attended at all to the issue of whether the citations and arrests in the case constituted punishment, the court focused entirely on the impact of those intrusions upon the homeless appellants, and specifically on the impositions of shame and stigma. The court never addressed the possible underlying purposes of the citations and arrests. Contrary to the purposive approach adopted by the Supreme Court in *Wolfish*,[139] the *Jones* court's sole focus on the negative effects[140] of citations and arrests on their recipients may lead future courts to conclude that since anyone receiving citations and being arrested suffers shame and stigma, all citations and arrests constitute punishment. Such a conclusion would render all citations and arrests unconstitutional pretrial punishment under *Wolfish*, a huge step towards the "demise of the criminal law" at least in its ability to bring to justice those who violate its provisions.

Of course the way to avoid such slippery slope implications would be to limit punitive citations and arrests to the facts of *Jones* or to other contexts where the afflicted persons in some sense supposedly "could not help" being arrested. Such limitations explained by the *Jones* court would have been helpful to at least create the impression that the court had thought about the implications of its decision.

Aside from its inattention to relevant constitutional texts outside the Eighth Amendment, the *Jones* court commits its most egregious error in concluding that preconviction punishment was visited upon the homeless appellants. Citations and arrests are simply not "punishments" under *Wolfish*.[141] Citations are official summonses directing a person to appear

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[137] *See supra* note 129 and accompanying text.

[138] *See supra* note 112 and accompanying text.

[139] *See supra* note 131 and accompanying text.

[140] For a discussion of the "punitive effect" definition of punishment, see Fasarinis, *supra* note 130, at 1675-78; Gardner, *supra* note 125, at 811-12.

[141] *See supra* note 131.

before a court.[142] As alternatives to "full custody" arrests, police often issue citations to persons they have "probable cause" to believe have violated the law.[143] The citation process amounts to a brief detention of the suspect while the officer issues the citation. Once issued, the suspect is released.[144] The purpose of the citation is to initiate a criminal action and direct the suspect to appear in court on a set date to respond to the charge specified in the document. Such purposes serve the administrative goal of bringing suspects into the criminal justice system, which may or may not eventually dispense punishment. Because being issued a citation is an intrusion supported by legitimate nonpunitive objectives, it is not punishment under *Wolfish*.[145]

Arrests also require probable cause and serve essentially the same purposes as citations but entail taking the suspect into custody in order to charge him with a crime.[146] Moreover, warrantless searches "incident to arrest" are generally allowed to a greater extent than similar searches subsequent to the issuance of a citation.[147] Arrests serve administrative purposes and thus do not constitute punishment.[148]

The *Jones* court also found the pretrial detention of the homeless appellants to be cruel and unusual punishment. Such a finding is even more surprising than the court's conclusions regarding citations and arrests given that three Supreme Court cases have specifically held that pretrial detention is *not* punishment.[149] The Court has held that such detention is directed at the nonpunitive purposes of assuring that suspects appear for trial[150] or do not commit criminal offenses while awaiting trial.[151]

The *Jones* court made no attempt to show that the jailing of the homeless appellants was for any punitive purpose or was excessive in light

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[142] YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, QUESTIONS 8 (11th ed. 2005).

[143] *Id.*

[144] *Id.*

[145] *See supra* note 131.

[146] *See* KAMISAR ET AL., *supra* note 142. Arrests constitute nonpunitive detention to allow the processing of a criminal case. Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 362 (1990).

[147] *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 174-89 (4th ed. 2004).

[148] *See supra* note 131. Even if the police had used excessive force in arresting the homeless appellants, they still would not have been subjected to punishment: "The use of force against persons who . . . have been arrested but not convicted, is not punishment in the Eighth Amendment sense. It may be many things, but it is not punishment." Landry, *supra* note 127, at 1636.

[149] *See* Bell v. Wolfish, 441 U.S. 520 (1979); *see also* United States v. Salerno, 481 U.S. 739 (1987); Schall v. Martin, 467 U.S. 253 (1984).

[150] *See Wolfish*, 441 U.S. at 539.

[151] *See Salerno*, 481 U.S. at 739; *Schall*, 467 U.S. at 253.

of articulated nonpunitive purposes.[152] Without such a showing, the court's finding of punishment is unjustified and directly at odds with Supreme Court precedent.

The abject failure of the *Jones* court to even raise the issue of whether citations, arrests, and pretrial jailing could be punishment in light of relevant Supreme Court caselaw defining punishment renders the decision analytically bankrupt. Therefore, the decision to grant standing to the unconvicted appellants does not command adherence by courts considering this issue in future cases.

2. Punishment of the Convicted

The *Jones* court is on firmer ground, however, in concluding that the appellants convicted of violating the city ordinance and convicted thereunder were subjected to unconstitutional punishment under *Robinson/Powell*. The court extends *Powell* to invalidate punishment for acts inherently linked to a status condition resulting through no fault of the offender. Given the ambiguity of *Powell*, such an extension is understandable. It is, in fact, less surprising that *Jones* so extended *Powell* than that prior courts, through no more than judicial restraint, had failed to do so.

While the *Jones* court claims that they are not holding that "the Eighth Amendment includes a mens rea requirement,"[153] it appears that that is exactly what they hold. The point of *Jones* is not that the appellants did not "act" (they clearly "sat," "lay," etc.) but that they could not help such actions given their homeless status.[154] *Jones* thus resurrects the concerns raised earlier that recognition of a mens rea component to *Robinson* would have a revolutionary impact on the criminal law.[155]

As Justice Fortas and Judge Wright had done in the past,[156] the *Jones* court attempted to limit its decision to the facts of the particular case.[157] But, as Justice Black suggested in his *Powell* concurrence, such a limitation

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[152] *See supra* note 131.

[153] *See supra* note 108 and accompanying text.

[154] Justice Black's observations about the "actions" of Powell are on point here. *See supra* note 41. The *Jones* court's conclusion would have been more convincing had it drawn a distinction between cases where homeless people *choose* to sit, lie down, or go to sleep in public and those where they do everything they can to avoid sitting, lying down, or falling asleep in public but lose consciousness (faint from exhaustion, etc.) and are found "sitting, lying, or sleeping" in public. In the former case, "action" independent of homeless status clearly exists, while in the latter, no action is present and thus any state response would be directed solely to homeless status.

[155] *See supra* text accompanying notes 43-47, 59-63, and 71.

[156] *See supra* text accompanying notes 48 and 75-76.

[157] *See supra* text accompanying notes 108-09.

appears to be no more than "illusory" judicial fiat.[158] After all, if homeless people cannot be punished for their "biologically compelled" acts of sitting or sleeping in public,[159] they would also seemingly be immune from punishment for such similar criminal but biologically compelled actions as public urination and defecation and the "indecent exposure" inherent therein. If homeless people cannot be punished for the "unavoidable consequences of being human,"[160] their public sex acts would arguably also be unpunishable. If homeless people steal blankets to keep from freezing while sitting on the streets, it is difficult to see, in principle, how they could be punished for theft after *Jones*. Similarly, assuming that indigency is a common aspect of homelessness,[161] when economically impoverished homeless persons rob or steal to satisfy the biologically compelled need for food and drink, they also would appear to have a defense under *Jones*.

Furthermore, why in principle would *Jones* be limited to the homeless? Why would homeless people be protected from punishment for their criminal acts inherent in their homeless status without similar protections being afforded to alcoholics and drug addicts who commit criminal acts linked to their "disease status"? Surely pedophiles will soon make compelling arguments under *Jones* that their sexual acts are compulsive, irresistible actions inherent in their "disease"[162] and are thus unpunishable under the Eighth Amendment. While Justice Marshall hoped that *Robinson* would bring the Constitution "but a very small way into the substantive criminal law,"[163] the course taken by the *Jones* court would again thrust *Robinson* deeply into the bowels of the law's longstanding struggle to define the contours of the mens rea principle.[164]

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[158] *See supra* text accompanying note 59.

[159] *See supra* text accompanying note 105.

[160] Jones v. Los Angeles, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated*, No. 04-55324, 2007 WL 3010591, at *1 (9th Cir. Oct. 15, 2007).

[161] Several of the *Jones* appellants were described as suffering severe economic deprivation. *See id.* at 1124-25.

[162] The Supreme Court has recognized pedophilia as a "serious mental disorder" or "mental abnormality" that prevents afflicted persons from "exercising adequate control" over their dangerous behavior. Kansas v. Hendricks, 521 U.S. 346, 358-63 (1997). Some members of the Court would go so far as to see pedophiles as "mentally ill" persons who suffer from "a classic case of irresistible impulse, namely, [that they] cannot 'control the urge' to molest children . . . ." *Id.* at 376 (Breyer, J., dissenting). *See also* Kansas v. Crane, 534 U.S. 407 (2002) (discussing the inability of "exhibitionists" to control themselves).

[163] *See supra* text accompanying note 42.

[164] For an examination of the historical evolution of mens rea, see Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635.

The *Jones* approach would thus appear to unleash anew all the concerns involved in the constitutionalization of mens rea.[165] Surely Justice Marshall counseled wisely in advocating that trust be placed in legislative bodies to determine the broad range of mens rea doctrines in light of shifting "religious moral, philosophical and medical views of the nature of man."[166]

In holding that acts inherent in status conditions cannot be punished under the Eighth Amendment, *Jones* reaches a conclusion contrary to that reached by the D.C. Circuit in *Moore*.[167] Moreover, in granting standing to pretrial appellants, *Jones* is directly at odds with a contrary holding of the Fifth Circuit Court of Appeals.[168] With the direction suggested by *Jones*, it is time for the Supreme Court to finally clarify the meaning of *Robinson/Powell*. In resolving the standing issue, the Court is urged to follow the analysis presented above.[169]

The Court should also reject the position of the *Jones* court on the merits—that the Constitution forbids punishment for acts intrinsic to status conditions. Such rejection should not involve the total rejection of *Robinson*, however. As will be shown in Part V, the *Robinson* Court was

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[165] *See supra* notes 53-63 and accompanying text. For agreement that *Jones* has indeed unleashed these concerns, see Recent Case, *Constitutional Law—Eighth Amendment—Ninth Circuit Holds That "Involuntary Conduct Cannot Be Punished,"* Jones v. City of Los Angeles, 444 F.3d 1119 (9th Cir. 2006), 120 HARV. L. REV. 829 (2007); *see also* Sara Gerry, Recent Development, Jones v. City of Los Angeles: *A Moral Response to One City's Attempt to Criminalize, Rather than Confront, Its Homelessness Crisis*, 42 HARV. C.R.-C.L. L. REV. 239 (2007); *infra* note 293 and accompanying text.

For arguments in favor of extending Eighth Amendment relief to the homeless, see Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the* Robinson *Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293 (1996); Weisberg, *supra* note 57.

[166] *See supra* notes 45-46 and accompanying text. *See generally* Fingarette, *supra* note 52 (arguing that it is unwise to fashion mens rea defenses linked to diseases as matters of constitutional law given the variety of policy uncertainties). *See also supra* text accompanying note 59 (regarding the views of Justice Black); *infra* note 293.

[167] United States v. Moore, 486 F.2d 1139 (1973); see *supra* notes 69-71 and accompanying text for a discussion of *Moore*.

[168] *See* Johnson v. Dallas, 61 F.3d 442 (5th Cir. 1995) (denying standing to raise Eighth Amendment claims to homeless persons who had not been convicted).

[169] *See supra* text accompanying notes 123-53. In urging a denial of Eighth Amendment standing, I do not intend to minimize the plight of the homeless. *See* Tanene Allison, *Confronting the Myth of Choice: Homelessness and* Jones v. City of Los Angeles, 42 HARV. C.R.-C.L. L. REV. 253 (2007) (providing a first-hand discussion of some of the problems encountered by homeless people). Certainly attention should be directed to the problem by both the public and private sectors. When appropriate in particular cases, the necessity defense should be made available at trial as noted by Judge Rymer. *See supra* note 113 and accompanying text. But as previously argued *supra* in notes 116-52 and accompanying text, it would require turning the Cruel and Unusual Punishments Clause on its head to grant standing to the nonconvicted homeless appellants.

correct in concluding that status conditions cannot be criminalized but should have reached its decision on more narrow constitutional grounds. By misapplying the Cruel and Unusual Punishments Clause the Court opened the door to a broad judicial consideration of mens rea principles, as evidenced by the unfortunate decision in *Jones*. Before detailing in Part IV the erroneous use of the Eighth Amendment in *Robinson*, it is helpful to review how that Court's choice of doctrine led from the question of whether an action is required as a prerequisite to punishment to a judicial inquiry into when one is criminally responsible for his actions.

3. Robinson, *the Eighth Amendment, and* Jones

As evidenced by Justice White's dissenting opinion,[170] *Robinson* was controversial from its inception, particularly in the Court's choice of the Eighth Amendment as the basis of the opinion. Apart from merely citing a single case dealing with a death penalty issue,[171] the majority offered no explanation of how or why the Eighth Amendment applied in *Robinson*. Justice Douglas attempted such in his concurring opinion, arguing that *Robinson* fell within the Court's proportionality cases.[172] But as others have pointed out,[173] the problem in *Robinson* was not that the sanction at issue was excessive but rather that it was imposed at all. The point of *Robinson* was that drug addiction, a status condition, could not be subjected to the criminal sanction.

It thus remains a mystery why the Court chose the Eighth Amendment as the vehicle to address the problem posed in *Robinson*.[174] Perhaps it was simply the only plausible constitutional alternative given the Court's

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[170] *See supra* note 31 and accompanying text.

[171] *See supra* note 20.

[172] *See supra* text accompanying note 24.

[173] *See supra* note 2.

[174] One commentator says this: "[T]he Court's opinion attempts no real explanation or justification for the decision reached. It merely says it is cruel and unusual to punish one for merely being sick. But why?" Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 386 (1966). Another finds an "absence of any obvious rationale for [the] decision." Fingarette, *supra* note 52, at 796. On the other hand, only the Eighth Amendment and, perhaps, the prohibitions against *ex post facto* law specifically speak to substantive matters within the criminal law. Greenawalt, *supra* note 32, at 1.

"allergy" at the time to substantive due process,[175] the doctrine under which Justice Harlan would have decided *Robinson*.[176]

But if the Court was hoping to choose a more narrow constitutional ground with its choice of the Eighth Amendment than would have been the case under due process, the choice ironically appears to have had the opposite effect.[177] By choosing the language of "cruel punishment" under the Eighth Amendment with its attendant concerns for protecting "human dignity" and "humane treatment,"[178] the Court invited a broad inquiry into the host of normative issues involved in assessing blameworthiness in an "age of enlightenment" concerned with prohibiting "barbarous actions."[179] Under such doctrinal footing, it is not surprising that some would see the Eighth Amendment as the constitutional "floor" for developing criminal responsibility doctrines necessary to assure the "moral legitimacy" of punishment.[180] Such doctrines are not, of course, limited to actus reus issues but also preclude "the law of punishment" from being applied to those whose actions are not the product of "free will" or who are "unable to avoid" the commission of criminal offenses.[181]

Jones is thus perhaps the inevitable result of the Court's choice of deciding *Robinson* under the Eighth Amendment. This choice was misguided from the beginning. As will be shown in the next section, the Court misapplied the Eighth Amendment in *Robinson* because the punitive sanction was never at issue in the case.

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[175] *See* text at *supra* note 31. Since the time of *Robinson*, the Supreme Court has more actively applied the Due Process Clause to invalidate criminal statutes. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating statutes punishing sodomy); Roe v. Wade, 410 U.S. 113 (1973) (invalidating statutes punishing abortion).

[176] *See supra* text accompanying note 26. *See, e.g.*, Paul G. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case*, 64 MICH. L. REV. 235, 256 n.72 (1965); Packer, *supra* note 4.

[177] At first glance, the Due Process Clause would appear to afford a broader ground for decision than "the more specific cruel and unusual punishment standard." Cuomo, *supra* note 61, at 478, n.78; *see also* Jeffrey A. Rowe, *Revisiting* Robinson: *The Eighth Amendment as Constitutional Support for Theories of Criminal Responsibility*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 95, 107-08 (2005). As will be shown in Part V *infra*, however, the due process rationale actually yields a much narrower decision in *Robinson* than does the Eighth Amendment (discussed immediately hereafter).

[178] The basic concept underlying the Eighth Amendment "is nothing less than the dignity of man," and protection against "inhuman treatment." Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

[179] *See supra* text accompanying note 25. Some commentators shortly after *Robinson* predicted that the "decency test" of the Eighth Amendment would not yield a broad inquiry into questions of criminal responsibility, at least not without "considerable distortion" of the history and theory of excuses. Dubin, *supra* note 174, at 393.

[180] *See supra* text accompanying note 73.

[181] *Id.*

IV. *ROBINSON*: PUNISHMENT OR MALISHMENT?

As mentioned earlier, governmental imposition of punishment carries with it unique constitutional consequences not necessarily attendant to other legal sanctions.[182] As is clear from the *Wolfish* case,[183] the Court sometimes appeals to the concept of punishment to decide cases under constitutional texts that neither specifically speak to the "criminal" process nor explicitly speak in terms of "punishment."[184] While some have criticized such utilization of the concept of punishment as an "empty semantic exercise,"[185] in Eighth Amendment cases defining the Amendment's scope on the basis of the presence or absence of punishment is essential given the fact that "punishment" is a necessary prerequisite for applicability of the Cruel and Unusual Punishments Clause.[186]

"Punishment" thus requires careful definition in order for proper application of the Cruel and Unusual Punishments Clause. After sketching a definition derived from the philosophical literature and the relevant caselaw, I argue that the sanction employed in *Robinson* was not punishment, but instead constituted what I call "malishment." Thus, *Robinson* was not a case involving cruel and unusual punishment.

A. THE CONCEPT OF PUNISHMENT: THE PHILOSOPHIC VIEW

Philosophers are interested in two kinds of issues involving punishment: the definitional inquiry into the meaning of the concept and the normative examination of whether the imposition of punishment is morally justifiable.[187] The definitional inquiry is of philosophical interest primarily because it is deemed essential to avoid blurring definitional and justificatory issues so that definitions do not foreclose justificatory examination.[188] Conflating the definitional and justificatory questions

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[182] *See supra* notes 125-26 and accompanying text.

[183] *See supra* notes 128-32 and accompanying text.

[184] *See, e.g.*, Flemming v. Nestor, 363 U.S. 603 (1960) (retroactive termination of Social Security benefits not violative of Ex Post Facto Clause because termination did not constitute "punishment").

[185] *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 569 n.7 (1979) (Marshall, J., dissenting). Rather than invoke the concept of punishment, Justice Marshall advocated a straight balancing test that weighed the liberty interests of pretrial detainees against the state's asserted interests.

[186] *See infra* note 205 and accompanying text; *infra* note 270.

[187] *See, e.g.*, Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95 (1970) (noting that "recent influential articles have quite sensibly distinguished between questions of definition [of punishment] and justification"); J. KLEINIG, PUNISHMENT AND DESERT 11 (1973).

[188] EDMOND L. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 56 (1966) ("[W]e want to avoid allowing any part of the justification (or dis-justification) of punishment to creep

renders it more difficult to pursue the conceptual analysis required by the definitional project and more difficult to pursue the normative analysis required by the justificatory project. It is therefore "the beginning of wisdom" to distinguish questions of the definition of punishment from questions of its justification.[189]

Probably the most widely accepted characterization of the "standard case" or definition of legal punishment within the philosophical literature is that of H.L.A. Hart:

> (i) [Punishment] must involve pain or other consequences normally considered unpleasant.
>
> (ii) It must be for an offence against legal rules.
>
> (iii) It must be of an actual or supposed offender for his offence.
>
> (iv) It must be intentionally administered by human beings other than the offender.
>
> (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[190]

For present purposes, conditions (ii) and (iii) are of central importance. Punishment must be for an *offense against legal rules* and must be visited upon an *offender* for violating those rules.

In order to avoid stopping, by definition, retributivist accusations that utilitarianism justifies framing and punishing innocent persons, or "scapegoats"[191] (an accusation stopped by definition if condition (iii) is necessary for punishment),[192] Hart also identifies several cases of "sub-standard" punishment.[193] To avoid the definitional stop of the classic

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into its definition, so that a case for acceptance or rejection or reform can seem to turn on 'the very meaning' of punishment.").

[189] H.L.A. Hart, *Prolegomenon to the Principles of Punishment* 4, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1969). Incidentally, Hart also urges a distinction between two types of justificatory issues: the "general justifying aim" and the "distribution" of punishment. *Id.* (I am indebted to my colleague, Bob Schopp, for suggestions in wording the above paragraph.)

[190] *Id.* at 4-5.

[191] Defenders of utilitarian theory sometimes employ a "definitional stop" response to retributivists who accuse utilitarianism of justifying punishment of the innocent. The definitional stop argument is that it is a contradiction in terms to speak of "punishing" the innocent, and the utilitarian justification for punishment is a theory only about punishment. *See* Greenawalt, *supra* note 32, at 939 n.61. *See generally* John Rawls, *Two Concepts of Rules*, *in* PUNISHMENT, SELECTED READINGS 58 (Joel Feinberg & Hyman Gross eds., 1975).

[192] *See supra* note 190 and accompanying text.

[193] Hart includes punishment for violations of non-legal rules imposed within families or schools, of legal rules imposed by non-designated officials, and for vicarious punishment for actions done by others. Hart, *supra* note 189.

scapegoat objection to utilitarian justifications of punishment, Hart includes in his definition "punishment of persons . . . who neither are in fact nor supposed to be offenders."[194] Thus, condition (iii) of the standard case is abandoned in order for consideration of the argument that utilitarianism justifies the "punishment" of scapegoats. Note, however, that even in this and the other sub-standard cases of punishment, a breach of a rule is still an essential prerequisite of punishment.[195]

Others have added to Hart's conditions.[196] However, the requirement of an offense or undesirable action is invariably articulated as a prerequisite for punishment. "Punishment is always for something"[197]: violating a "rule of law,"[198] committing an "offense,"[199] or performing a "wrongful act"[200]; "[n]o ordinary sense of the word punishment includes inflictions that are unrelated to prior wrongdoing."[201]

Since punishment is always for an offense, it is also, in a sense, "determinate" in proportion to the seriousness of the offense.[202] The determinacy of punishment is often added to Hart's conditions as a defining characteristic of punishment. Thus, as one commentator puts it, we are punishing someone if, among other things consistent with Hart's conditions, "we determined—within at least some limits—at the time of our decision to punish what the nature and magnitude of the [inflicted] unpleasantness

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[194] *Id.*

[195] *See supra* note 193.

[196] *See, e.g.*, Feinberg, *supra* note 187 (punishment by definition expresses social disapprobation); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 310, 318 (2d ed. 1960) (punishment is logically related to harmful conduct and moral culpability); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 21, 31 (1968) (in addition to Hart's five conditions, a sixth should be added: punishment must be imposed for the dominant purpose of preventing offenses against legal rules or of exacting retribution from offenders, or both).

[197] A.M. Quinton, *On Punishment*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 6, 10 (Gertrude Ezorsky ed., 1972).

[198] *See* Rawls, *supra* note 191, at 61; Thomas Hobbes, *On Punishments and Rewards*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT, *supra* note 197, at 3.

[199] *See* Kurt Baier, *Is Punishment Retributive?*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT, *supra* note 197, at 16.

[200] *See* Herbert Morris, *Persons and Punishment*, *in* PUNISHMENT, SELECTED READINGS, *supra* note 191, at 74, 78.

[201] Landry, *supra* note 127, at 1627. The word "punishment" is, however, sometimes used metaphorically as when one boxer "punishes" another. 7 ENCYCLOPEDIA PHILOSOPHY 29 (1967). Commission of an offense is, however, a necessary feature of the "standard case" of punishment involved whenever the sanction is employed by the state. *Id.* "[P]unishment can only exist in relation to a past wrong." Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001).

[202] Criminal sentences are in a sense "fixed" by the concept of proportionality between offense and punishment. *See* Cuomo, *supra* note 61, at 507.

would be."[203] In contrast to the determinate nature of punishment, legal responses to status conditions—reflected in civil commitment of the mentally ill and confinement of the dangerous—tend to be indeterminate at the time of their imposition.[204]

B. PUNISHMENT AND THE COURTS

Although the Supreme Court has recognized that "an imposition must be 'punishment' for the Cruel and Unusual Punishments Clause to apply,"[205] the Court has rarely addressed the question of whether a given penalty constituted punishment for Eighth Amendment purposes. The issue simply has not often been relevant because in most of its cases punishment was clearly present and the only issue was whether the punishment was cruel.[206]

Leaving aside the prison conditions cases discussed later, when the Court has specifically addressed the punishment issue, it has employed a punitive purpose approach similar to that described in the above discussion of the *Wolfish* case.[207] Thus, in *Trop v. Dulles*,[208] an early case, the Court addressed the question of whether denaturalization of persons convicted by court-martial for wartime desertion constituted punishment under the Eighth Amendment. The Court rejected the Government's argument that the sanction was not punitive but rather a regulatory exercise of the congressional war power necessary to maintain military discipline. The Court found that the denaturalization was imposed for purposes of

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[203] Richard Wasserstom, *Some Problems with Theories of Punishment, in* JUSTICE AND PUNISHMENT 173, 178-79 (J. Cederblom & W. Blizek eds., 1977); *see also* Morris, *supra* note 200, at 78 (noting that "with punishment there is an attempt at some equivalence between the advantage gained by the wrongdoer—partly based upon the seriousness of the interest invaded, partly on the state of mind with which the wrongful act was performed—and the punishment meted out").

[204] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 363 (1997) (noting the "indefinite duration" of the commitment of "mentally abnormal" sex offenders under Kansas statute); Wasserstrom, *supra* note 203 (finding that with coerced therapy, the decision as to appropriate treatment is always subject to revision upon a showing that an alternative response would be more beneficial or the patient's condition has improved so as to no longer require a therapeutic response).

[205] Ingraham v. Wright, 430 U.S. 651, 670 n.39 (1976).

[206] For example, in numerous cases the Court has assessed the constitutionality under the Eighth Amendment of the death penalty. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976). Also, in several cases the Court has examined whether clearly punitive sentences of incarceration are unconstitutionally excessive in relation to the underlying offense. *See, e.g.*, Ewing v. California, 538 U.S. 11 (2003); Harmelin v. Michigan, 501 U.S. 957 (1991); Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980).

[207] *See supra* notes 128-32 and accompanying text.

[208] 356 U.S. 86 (1958).

"reprimanding the wrongdoer" and "to deter others" and thus was punitive.[209] Moreover, although the *Trop* Court was sharply divided, four Justices in the plurality and four in dissent suggested that the definition of punishment should be analyzed separate from and prior to the issue of cruelty under the Eighth Amendment.[210]

Unfortunately, the Court has failed to employ in subsequent cases the approach taken by the *Trop* Justices. The cases, particularly those relating to prison life, suggest considerable confusion because the Court has, in some instances, simply begged the punishment question or, in others, failed to treat it as analytically distinct from, and logically prior to, the question of cruelty.

The issue of defining punishment for Eighth Amendment purposes has arisen most often in the context of civil rights actions brought by prison inmates who attack prison conditions or actions of prison officials. While it is clear that such inmates are being punished by being incarcerated in the first place, it is not always clear whether allegedly cruel situations occurring in prison constitute punishment for the particular crime leading to the inmate's imprisonment, for an act committed while in prison, or perhaps for no act at all.[211]

In *Estelle v. Gamble*,[212] the Court held that an inmate could not establish that inadequate medical care constituted cruel and unusual punishment without showing "deliberate indifference" to his medical needs by the prison doctors. The Court specified that "deliberate indifference" by prison officials to "the serious medical needs of prisoners constitutes 'unnecessary and wanton infliction of pain,'" thus supporting a cause of action under the Eighth Amendment.[213] The Court did not explain, however, whether the "deliberate indifference" factor supplied the punitive purpose element necessary to the definition of punishment[214] or whether it constituted the "cruelty" of punishment already defined.[215] It appeared,

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[209] *Id.* at 96 (plurality opinion).

[210] *Id.* at 94-100 (plurality opinion), 124 (dissenting opinion). The ninth Justice, Justice Brennan, did not utilize the Eighth Amendment in his analysis of the problem in *Trop*, but relied instead upon a theory of congressional abuse of the war power. Brennan agreed with the plurality that denationalization was punitive and found that it constituted an unnecessarily harsh exercise of the war power. *Id.* at 105-14 (Brennan, J., concurring).

[211] For a thorough treatment of these cases, see generally Landry, *supra* note 127.

[212] 429 U.S. 97 (1976).

[213] *Id.* at 104.

[214] *See supra* notes 128-32, 209, and accompanying text.

[215] *See also* Whitley v. Albers, 475 U.S. 312 (1986) where the Court denied an Eighth Amendment claim by a prison inmate who was shot in the leg by a guard attempting to quell a prison riot. The Court observed that the guard's action "did not purport to be punishment at all" but rather an action undertaken to "resolve a disturbance." *Id.* at 319-20. The Court

however, to adopt the latter view by observing that "these elementary principles establish the government's obligation to provide medical care for those whom it is *punishing by incarceration*."[216]

In *Wilson v. Seiter*,[217] a case rejecting a claim that general prison conditions[218] constituted cruel and unusual punishment, the Court did attend to the issue of whether the deliberate indifference requirement (the culpable state of mind factor) defines punishment or cruelty. Interestingly, the Court suggested it might apply to either depending on the circumstances. In cases where a punishment is defined by statute and imposed by a sentencing judge, a "culpable state of mind" might be required to make the punishment "cruel."[219] On the other hand, if neither statute nor sentencing judge specified particular harsh treatment alleged to be "punishment,"[220] the

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specified, however, that had the guard's action been the product of "obduracy and wantonness" or imposed "maliciously and sadistically for the very purpose of causing harm," it would have fallen under the Cruel and Unusual Punishments Clause. *Id.* at 319-21. The Court did not explain whether the intent requirement was necessary to render the action "punishment" or to establish its "cruelty."

[216] 429 U.S. at 103 (emphasis added). The Court has offered some clarification of the "deliberate indifference" standard. A prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847 (1994).

For an argument that Estelle v. Gamble dealt with issues of the government's duty to care for and protect those in its custody rather than with issues of cruel punishment, see Philip M. Genty, *Confusing Punishment with Custodial Care: The Troublesome Legacy of* Estelle v. Gamble, 21 VT. L. REV. 379 (1996). On this theory, *Estelle* should have been decided as a substantive due process case, not as an Eighth Amendment case. *Id.*

[217] 501 U.S. 294 (1991).

[218] The petitioner, Wilson, sought declaratory and injunctive relief as well as $900,000 in damages for prison overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean restrooms, unsanitary dining facilities, and housing with mentally and physically ill inmates. *Id.* at 296.

[219] *Id.* at 299. Thus, in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), where the state sought to impose a second electrocution of a prisoner sentenced to death after the first attempt failed due to a malfunction of the electric chair—the prisoner's attempt to bar the second electrocution because the first attempt constituted cruel and unusual punishment failed because "the officials lacked the culpable state of mind necessary for the punishment to be regarded as 'cruel,' regardless of the actual suffering inflicted." *Wilson*, 501 U.S. at 299.

[220] For an alleged deprivation within a prison to qualify as "punishment," it must satisfy an "objective component" determining whether the deprivation is "sufficiently serious" to form the basis of an Eighth Amendment violation. *Wilson*, 501 U.S. at 298. Thus, for example, a mere allegation of lodging two inmates in a single cell was not sufficiently serious to trigger an inquiry into the "subjective" deliberate indifference issue. *Id.* (describing Rhodes v. Chapman, 452 U.S. 337 (1981)).

treatment is not punishment unless it is imposed with deliberate indifference by prison officials.[221]

The *Wilson* Court saw the statutorily defined and judicially imposed punishment as being sent to prison in general, not being sent to prison as defined by all the harsh and unpleasant conditions that exist in prison.[222] Thus, for those conditions to be "punishment," they must be imposed through the "deliberate indifference" of prison officials. The *Wilson* Court insisted that an "intent requirement" is implicit in the word "punishment."[223] "If the pain inflicted is not formally meted out as *punishment* by the statute or sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."[224] Because it could not be shown that the prison conditions were the product of the "deliberate indifference" of prison officials, the conditions did not constitute "punishment" and thus the Eighth Amendment was inapplicable.

The negative implication of *Wilson* is that if the prison officials had imposed harsh and unpleasant prison conditions[225] through "deliberate indifference" to the basic needs of the inmates, the conditions would have constituted "punishment." But if punishment is always "for something,"[226] for what would the inmates be punished? Not for the crimes which triggered their sentences, since the punishment for those crimes is the prison sentence in general, not the prison sentence as defined by all its inherent conditions.[227] One is left with the conclusion that such "punishment," similar to that in *Robinson*, would be for a status condition, here that of being an inmate.[228]

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[221] *Id.*

[222] *Id.* at 301. The Court found "no basis" for the position that "all conditions that exist in prison, even though prison officials neither know nor have reason to know about them, constitute 'punishment.'" *Id.* at 301 n.2.

[223] *Id.* at 300.

[224] *Id.*

[225] *See supra* note 220.

[226] *See supra* text accompanying note 197.

[227] *See supra* text accompanying note 222.

[228] The *Wilson* Court quoted a view that "the infliction of punishment is a deliberate act intended to chastise or deter," 501 U.S. at 300 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)). The Court offered no explanation of how "punishing" inmates for merely being in a prison would make sense as chastisement or deterrence.

If "deliberate indifference" to the basic needs of inmates constitutes "punishment" for the status of being an inmate, constitutional problems surely arise. But such problems do not appear to raise Eighth Amendment issues. Similar to the situation in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973) (discussed *infra* notes 237-39 and accompanying text), deliberate indifference to the needs of inmates appears more a situation of gratuitous cruelty than of harsh punishment for an offense. Thus the remedy would lie under the Due Process, rather than the Cruel and Unusual Punishments Clause. *Id.*

A similar conclusion follows from the Court's decision in *Hudson v. McMillian*[229] which held that excessive physical force by a guard against an inmate constitutes cruel and unusual punishment if it is administered maliciously and sadistically. The Court did not discuss how or why the guard brutality would constitute "punishment," although Justice Thomas in dissent suggested that the issue had been left open[230] and would be a "critical question" in future cases of this type which might find "isolated and unauthorized" acts not to be punishment, thus rendering *McMillian* a "dead letter."[231]

The Court has yet to address Thomas's "critical question" of how the Eighth Amendment's punishment requirement is met by guard brutality or, for that matter, by "deliberate indifference" to the basic needs of inmates. Without clarification of this question, Eighth Amendment jurisprudence is set adrift from its textual moorings. If, for example, it is "punishment" when a guard brutalizes a prisoner, would it not similarly be punishment,

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Given the passive nature of "deliberate indifference," such a response to the needs of inmates *qua* inmates raises a different type of due process problem than that raised by *Robinson* where the state actively attempted to punish a status condition. *Robinson* constituted a situation which I characterize as "malishment" (see *infra* notes 250-63 and accompanying text), rather than simply as a case of gratuitous state cruelty. *Robinson* manifested an institutionalized attempt to statutorily impose punishment (malishment) for a status. In the deliberate indifference cases, on the other hand, inmates suffer not as a consequence of statutorily imposed institutionalized cruelty but rather through the ad hoc nonfeasance of state officials.

By the same token, instances of active cruelty against inmates such as malicious guard brutality (see *supra* note 215 (discussing Whitley v. Albers, 475 U.S. 312 (1986))) do not constitute malishment cases, nor punishment ones for that matter (see discussion of *Johnson*, 481 F.2d 1028, *infra* notes 237-39 and accompanying text), but instead ad hoc instances of governmental cruelty actionable under the Due Process Clause. *Johnson*, 481 F.2d 1028; *see also* Genty, *supra* note 216.

[229] 503 U.S. 1 (1992).

[230] The grant of certiorari in *McMillian* was limited to the question of whether a single incident of force upon an inmate by prison officials which did not cause a significant injury could be the basis for an Eighth Amendment claim. *Id.* at 17 (Thomas, J., dissenting). The majority answered the question affirmatively, so long as the officials "maliciously and sadistically" used force to cause harm," a situation that violates "contemporary standards of decency" under the Eighth Amendment. *Id.* at 9.

[231] 503 U.S. at 22 n.2 (Thomas, J., dissenting). Justice Thomas was joined by Justice Scalia in his *McMillian* dissent. In subsequent cases Thomas and Scalia have raised "substantial doubts" that the Eighth Amendment proscribes "prison deprivations that are not inflicted as part of a sentence," Helling v. McKinney, 509 U.S. 25, 42 (1993) (Thomas, J., dissenting) (majority found inmate exposure to environmental tobacco smoke actionable under the Eighth Amendment), and have found that restrictions to prison visitation are "not punishment within the meaning of the Eighth Amendment," Overton v. Bazzetta, 539 U.S. 126, 145 (2003) (Thomas, J., concurring) (majority found visitation restriction for inmates with two substance-abuse violations did not constitute "inhumane prison conditions" so as to trigger Eighth Amendment applicability).

thus raising an Eighth Amendment claim, if a police officer simply approaches a citizen on the street and for no reason beats her with his baton? If it is punishment for prison medical officials to be deliberately indifferent to an inmate's medical needs, would it not similarly be punishment, again raising Eighth Amendment claims, if state officials are deliberately indifferent to the medical needs of patients in a state mental institution?[232]

Punishment is by definition a response to an offense.[233] To see "punishment" in the police brutality and mental hospital examples just mentioned is to substitute cruelty for punishment, thus collapsing the Eighth Amendment terms "cruel" and "punishment" into a single concept: cruelty.[234] Such a situation cannot constitute a sound state of constitutional interpretation. As noted by a careful commentator, "Eighth Amendment doctrine will make sense only if courts diligently link a purported punishment to a crime"[235] or at least to an underlying noncriminal offense.[236]

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[232] The Supreme Court appears to have ruled that Eighth Amendment remedies are unavailable to involuntarily committed mental patients even if hospital officials are "deliberately indifferent" to their medical and psychological needs. *See* Youngberg v. Romeo, 457 U.S. 307, 312 (1982) (holding lower court erroneously instructed jury in *Estelle*'s "deliberate indifference" standard in case of patient's allegations of unsafe conditions in hospital in which he was confined). The Court noted with approval the position of the Third Circuit Court of Appeals that the "Eighth Amendment, prohibiting cruel and unusual punishment of those convicted of crime, was not an appropriate source for determining the rights of the involuntarily committed." *Id.*

[233] See *supra* notes 196-201 and accompanying text.

[234] Such an approach is contrary to the Court's own precedent; see the discussion of the *Trop* case, *supra* notes 208-10 and accompanying text. *See also* Graham v. Conner, 490 U.S. 386 (1989) (suggesting Fourth Amendment applicability to the police brutality example).

[235] Landry, *supra* note 127, at 1660. For an argument that the prison conditions cases are really due process cases and not Eighth Amendment situations, see Genty, *supra* note 216.

[236] Harsh penalties for violations of prison rules, for example, may be sufficiently analogous to imposed sentences to implicate the Cruel and Unusual Punishments Clause. *Helling*, 509 U.S. at 41 (Thomas, J., dissenting). "As a legal term of art, 'punishment' has always meant a 'fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.'" *Id.* at 38 (quoting BLACK'S LAW DICTIONARY 1234 (6th ed. 1990)).

A similar view was expressed earlier by Judge Posner in discussing the futility of a cruel and unusual punishment claim made by inmates who suffered injury in a bus accident occurring while the inmates were being transported by prison officials:

> [T]he plaintiffs . . . get nowhere if the words "unusual" and "punishment" were given anything like their normal meanings. The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century; Samuel Johnson's *Dictionary of the English Language* (1755) defines "punishment" as "Any infliction or pain imposed in vengeance of a crime." If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment, and "cruel and

To deny Eighth Amendment remedies to persons subjected to nonpunitive governmental cruelty is not, of course, necessarily to deny relief for a violation of constitutional rights. Thus, in his opinion for the Second Circuit Court of Appeals in *Johnson v. Glick*,[237] Judge Friendly found the Eighth Amendment inapplicable in a case where a jail guard brutally beat an inmate awaiting trial. In reviewing the applicable Eighth Amendment caselaw at the time, Friendly stated that "the thread common to all these cases is that 'punishment' has been deliberately administered for a penal or disciplinary purpose."[238] The *Johnson* case, in contrast, constituted a "spontaneous attack" by a guard which Friendly found to be "cruel" and hopefully "unusual" but which "[did] not fit any ordinary concept of 'punishment.'"[239] Therefore, the inmate was denied an Eighth Amendment remedy but Judge Friendly assumed that brutal police conduct violated a right guaranteed by the Due Process Clause instead.

Arguably, the Supreme Court should follow a similar approach in the prison condition cases. The issues in those cases speak more to alleged breaches of the duty of government to care for those in its custody than to instances of cruel punishment. As such, the cases are more accurately conceptualized as due process, rather than Eighth Amendment, cases.[240]

Outside the Eighth Amendment context, the Court has decided a variety of cases hinging on whether a given governmental response to undesirable conduct constituted "punishment." I have traced the early development elsewhere.[241] The Court appears recently to have settled on a general approach in determining whether a contested sanction constitutes punishment.[242] If the legislature designates the sanction as punitive, the

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unusual" because the Supreme Court has interpreted the term to forbid unauthorized and disproportionate, as well as barbarous, punishments. . . . But if the guard accidentally stepped on the prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.

Duckworth v. Franzen, 780 F.2d 645, 651-52 (7th Cir. 1985).

[237] 481 F.2d 1028 (2d Cir. 1973).

[238] *Id.* at 1032.

[239] *Id.*; *see also supra* note 236.

[240] *See* Genty, *supra* note 216.

[241] *See* Gardner, *supra* note 125, at 798-819.

[242] *See* Smith v. Doe, 538 U.S. 84, 92 (2003) ("The framework for our inquiry [into determining the presence of 'punishment'] is well established"). The approach described immediately *infra* in the text has been followed explicitly by the Court in the following cases: *Smith*, 538 U.S. at 92 (holding mandatory registration by sex offenders not to be punishment for purposes of the Ex Post Facto Clause); Kansas v. Hendricks, 521 U.S. 346 (1997) (holding commitment of sex offender at completion of prison sentence not to be punishment for purposes of the Double Jeopardy and Ex Post Facto Clauses); Hudson v. United States, 522 U.S. 93 (1997) (holding monetary penalties and occupational debarment not to be punishment for purposes of the Double Jeopardy Clause); United States v. Ursery,

matter is essentially settled.[243] If, however, the legislative intent indicates that the sanction is a nonpunitive civil sanction, the Court will defer to the legislature unless a party challenging the sanction shows by the "clearest proof" that the sanction is "so punitive in purpose or effect as to negate [the government's] intention to deem it civil."[244] In addressing the question of punitive purpose or effect, the Court routinely appeals to the "useful guideposts"[245] established in *Kennedy v. Mendoza-Martinez*,[246] a case that articulated "the tests traditionally applied to determine whether a [sanction] is penal or regulatory in character."[247] These "tests" include the following:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[248]

Some aspects of these "tests" obviously correspond to Hart's "standard case" of punishment.[249] Punishment involves "an affirmative disability or restraint" applied to "behavior" routinely sought to be "deterred." Thus, in contexts outside the prison conditions cases, the Court appears to have embraced the standard view that punishment by definition imposes unpleasantness upon a person as a response to his commission of an undesirable act.

C. *ROBINSON* AND "MALISHMENT"

In *Robinson*, the California statute imposed a jail sentence of ninety days to one year for the "misdemeanors" of using or being addicted to heroin.[250] As a response to "misdemeanors," the sentence imposed a painful consequence (time in jail) and was fixed in its duration, and thus

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518 U.S. 267 (1996) (holding forfeiture of property not punishment for purposes of the Double Jeopardy Clause); Allen v. Illinois, 478 U.S. 364 (1986) (holding commitment as a "sexually dangerous person" not punishment for purposes of the privilege against self-incrimination); Bell v. Wolfish, 442 U.S. 520, 539 (1979) (holding that pretrial detention was not punishment "prior to an adjudication of guilt").

[243] *Smith*, 538 U.S. at 92.

[244] *Id.*; *see also Hendricks*, 521 U.S. at 361.

[245] *Smith*, 538 U.S. at 97.

[246] 372 U.S. 144 (1963).

[247] *Id.* at 168.

[248] *Id.* at 168-69 (emphasis added).

[249] *See supra* note 190 and accompanying text.

[250] *See supra* notes 17-18.

appears to have been a punitive sanction.[251] As applied to the offense of drug use, the statute clearly imposed punishment. Is the same thing true, however, with its application to the status of being addicted to narcotics? Given the fact that the commission of an offense is a central defining characteristic of punishment[252] it is logically impossible to "punish" a status condition. However, no member of the *Robinson* Court questioned the possibility that the Eighth Amendment might be inapplicable because the sanction at issue did not constitute punishment.

If the sanction at issue in *Robinson* was not "punishment," what was it? In fact, it constituted no recognizable or defensible legal sanction.

The State of California attempted the impossible: to impose punishment in a situation where it logically, by definition, could not be imposed. The circumstances are similar to a hypothetical situation posited by John Rawls where he imagines an institutionalized attempt to punish innocent persons (scapegoats) whenever doing so would be in the best interests of society.[253] Because actual or perceived violation of the law by an offender is required as part of the definition of punishment Rawls embraces,[254] the attempt to "punish" the scapegoat is impossible. Therefore, the institutionalized response to the scapegoat is not "punishment" but something different which Rawls calls "telishment."[255] Through the device of a thought experiment about the implications of institutionalizing telishment, Rawls attempts to defend utilitarianism against the retributive criticism that it permits punishing/telishing scapegoats.

The logical problem with applying punishment in *Robinson* is even more fundamental than in Rawls's telishment situation. Rawls imagines the institution of telishment in order to discuss the scapegoat criticism of utilitarianism without being stopped from such discussion by the definition of punishment.[256] As noted above, Hart provides a "sub-standard case" of "punishment" so as to avoid the definitional stop,[257] but even in the sub-standard case, a breach of a rule is still an essential factor for punishment.[258] Because status conditions do not constitute "breaching a rule," "punishing" them is simply not possible, even in Hart's sub-standard cases of punishment. Whatever the California sanction for narcotics addiction was, it was not "punishment."

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[251] *See supra* note 250; *see also supra* notes 190-202 and accompanying text.

[252] *See supra* notes 233-36 and accompanying text.

[253] Rawls, *supra* note 191, at 62.

[254] *Id.* at 61; *see supra* text accompanying note 190 (discussing Hart's condition (iii)).

[255] Rawls, *supra* note 191, at 62.

[256] *Id.* at 61-62.

[257] *See supra* notes 191-95 and accompanying text.

[258] *See supra* notes 195-96 and accompanying text.

The sanction in *Robinson* did not constitute any acceptable legal sanction. It was not coerced therapy; the sanction lacked the indeterminacy of therapeutic dispositions[259] and made no pretense at treatment.[260] It was not a quarantine; the disease of drug addiction is not contagious. The sanction was not a form of preventive detention; its determinate nature belied such[261] and the statute made no mention of confinement of addicts because they are dangerous.

I suggest that the best way to understand the *Robinson* sanction is as a statutory *attempt to punish*[262] in circumstances where it was logically impossible to actually do so. The sanction is thus one not recognized in the law. Similar to the institution of "telishment," I propose that California's response to drug addiction in *Robinson* be understood in terms of a new concept, which I will call "malishment," defined as the institutionalized attempt by a governmental entity to punish a status condition. Because *Robinson* involved "malishment" and not "punishment,"[263] the Eighth Amendment was not applicable in that case.

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[259] *See* Allen v. Illinois, 478 U.S. 364, 369-70 (1986) (fact that persons institutionalized as "sexually dangerous" persons were released as soon as they were rehabilitated evidenced a therapeutic rather than a punitive commitment); *In re* Felder, 93 Misc. 2d 369, 402 N.Y.S. 2d 528 (1978) (juvenile court dispositions with six month or twelve month mandatory minimum sentences indicated punishment and belied therapeutic dispositions); *supra* note 204 and accompanying text; *see also* Gardner, *supra* note 125, at 818. *But see In re* De La O, 378 P.2d 793 (1963) (recognizing commitments of drug addicts for periods of six months minimum to five years maximum as therapeutic, not punishment).

[260] In a dissenting opinion in *Robinson*, Justice Clark argued that the sanction in *Robinson* constituted a permissible therapeutic response to drug use. Justice Clark offered no explanation of how the incarceration of "incipient addicts" would cure them apart from observing that when paroled, such persons would be subjected to "frequent tests" to detect renewed use which may in turn lead to the "civil commitment" of the addict. Robinson v. California, 370 U.S. 660, 681 (Clark, J., dissenting). None of this justifies the conclusion that being jailed for being an addict could in any meaningful sense be characterized as a dispensation of therapy. No other member of the court joined Justice Clark in seeing the jail sentence as therapeutic.

[261] *See* Gardner, *supra* 125, at 818; *supra* note 204 and accompanying text. In preventive detention situations "the length of confinement depends, or at least should depend, on the individual rather than the state or a statutory provision." Slobogin, *supra* note 60, at 52.

[262] While certainly not analyzing the *Robinson* problem in such terms, Justice Douglas might have instinctively perceived the case to involve an attempt to punish rather than as a case of actual punishment. Douglas specifically says that the California statute is a "direct attempt to punish" addicts who cannot be committed civilly. *Robinson*, 370 U.S. at 677 (Douglas, J., dissenting).

[263] *Hudson v. McMillian*, 503 U.S. 1 (1992) (discussed *supra* notes 229-32 and accompanying text) might also appear to be a malishment case, but the guard's action in that case was not an "institutionalized attempt by a governmental entity to punish a status condition," but rather was a manifestation of pure brutality and cruelty visited upon a person occupying the status of inmate. *See supra* note 228.

D. "PUNISHMENT" OR "MALISHMENT": WHY DOES IT MATTER?

The Supreme Court's failure to carefully attend to the concept of punishment in *Robinson*, and to a lesser degree in the prison cases,[264] is unfortunate for a variety of reasons. While thorough consideration of each of these reasons cannot be explored here, brief discussion should suffice for present purposes.

First of all, for the *Robinson* Court to extend a constitutional provision to a new and controversial context[265] by totally disregarding a key concept of the provision's text is sloppy judicial craftsmanship and, given the lack of precedent and the absence of any analysis,[266] a blatant exercise of judicial activism. Clearly, from its inception to the present, the Cruel and Unusual Punishments Clause is about "punishment,"[267] the noun modified by the adjectives "cruel and unusual." Failure to attend to constitutional text is a fundamental flaw in constitutional interpretation. As Professor Richard Fallon states, "[T]he text must be held dispositive" for "[a]n 'interpretation' that is unsupportable by the text, as measured by conventional norms, is not constitutional interpretation as our tradition knows it."[268] In the context of

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[264] *See supra* notes 232-36 and accompanying text.

[265] *See supra* notes 9-16 and accompanying text.

[266] *See supra* notes 170-76 and accompanying text.

[267] *See generally* Granucci, *supra* note 10. *See also* Landry, *supra* note 127, at 1609, 1624-25 (providing dictionary definitions of "punishment" at time of adoption of Bill of Rights, all of which include inflictions related to past wrongdoing); *supra* notes 208-10, 236 and accompanying text.

For an argument that, at the time of the adoption of the Bill of Rights, the word "punishment" might have meant pretrial torture aimed at inducing confessions in addition to the penalty administered as a consequence of being convicted for a criminal offense, see Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 667-81 (2007). *But see* Granucci, *supra* note 10, at 849 n.46 (suggesting that early English concerns regarding the evils of torture might have been directed not at pretrial torture but to torturous punishments inflicted upon conviction). In any event, there is no reason to believe that the founders intended the Eighth Amendment to address pretrial torture given their inclusion of the Fifth Amendment's prohibition against coerced self-incrimination. *See* Furman v. Georgia, 408 U.S. 238, 260 n.2 (1971) (Brennan, J., concurring) (discussing the exchange between Patrick Henry and George Mason, who pointed out that torture to induce confessions was prohibited by the right against self-incrimination).

[268] Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244 (1987) (identifying five kinds of constitutional arguments that have a legitimate place in constitutional interpretation, i.e., arguments from the constitutional text, the Framers' intent, constitutional theory, judicial precedent, and moral or policy values). While he prioritizes the arguments in the order given above, he argues that in most cases the arguments can each be reconciled with one another, thus rendering prioritizing them unnecessary.

Applying Professor Fallon's model to the facts of *Robinson* supports this author's conclusion that the Court improperly applied the Eighth Amendment. The textual argument

the malishment sanction in *Robinson*,[269] the argument from the text excludes Eighth Amendment applicability to that case. Referring again to Professor Fallon, while the text of the Eighth Amendment "may not tell us precisely what 'cruel and unusual punishments' are, the language does require that the amendment's prohibition apply only to actions that can plausibly be described as 'punishments.'"[270]

Moreover, there is no basis for believing that the word "punishment" as articulated in the Eighth Amendment should be interpreted in any other manner than ordinary language terms. Rather than a term of art broad enough to cover malishment, "punishment" should be understood in its ordinary language usage as unpleasantness visited upon an offender for his offense.[271] Expanding usage of ordinary language to legal terms of art should be done with caution.[272] In Professor Fallon's words, "For the Constitution to remain a constraint on judicial decision-makers, suggested

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has been made. The case did not involve "punishment" (see *supra* notes 182-262 and accompanying text), therefore the Amendment was inapplicable. Such a conclusion is also consistent with the Framers' intent argument. While little evidence of their intent exists, *Furman*, 408 U.S. at 258 (Brennan, J., concurring), there is no reason to believe that they had any other definition of punishment in mind than that understood in the dictionaries of the day. *See supra* note 236. As for arguments from constitutional theory, the application to Eighth Amendment applicability is less clear. Some constitutional theories, originalism for example, would arguably deny extending the Eighth Amendment to the *Robinson* facts, while open system theories may support the opposite conclusion. See Fallon, *supra*, at 1211-27 for discussion of originalist and open system theories. As for precedent prior to *Robinson*, there was none that required extending the Eighth Amendment to the case. *See supra* notes 9-20, 170-76 and accompanying text.

The final type of argument identified by Professor Fallon, moral and policy argument, provides some support for applying the Eighth Amendment in *Robinson*. To the extent anyone on the *Robinson* Court offered any justification for Eighth Amendment applicability, it was Justice Douglas who argued that an Eighth Amendment remedy was necessary to avoid the "barbarous action" of making sickness a crime. *See supra* text accompanying note 25.

Even if arguments from underlying constitutional value might justify Eighth Amendment applicability in *Robinson*, the other four arguments clearly do not. Under Professor Fallon's model, if there exists conflict within the five kinds of arguments, they then become prioritized, thus rendering the Eighth Amendment inapplicable under arguments from the text, Framers' intent, precedent, and possibly also under constitutional theory.

[269] *See supra* text accompanying notes 250-63.

[270] Fallon, *supra* note 268, at 1195. Professor Ely adds:

> The Cruel and Unusual Punishment Clause does invite the person interpreting it to freelance to a degree, but the freelancing is bounded. The subject is punishments, not the entire range of government action, and even in that limited area the delegation to the interpreter is not entirely unguided: only those punishments that are in some way serious ("cruel") and susceptible to sporadic imposition ("unusual") are to be disallowed.

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980).

[271] *See supra* notes 189-201 and accompanying text.

[272] *See* Fallon, *supra* note 268, at 1253.

interpretations that depart too far from the ordinary moral and political vocabulary of the society have to be disfavored."[273]

As will be shown in Part V, the *Robinson* Court reached the right result but did so under the wrong constitutional text.[274] The temptation to find a remedy for the obvious evil of malishing a status condition led the *Robinson* Court to "play[] fast and loose with Eighth Amendment doctrine,"[275] thus inviting criticism that the Court hypocritically makes law out of whole cloth while claiming to follow the Constitution,[276] and in turn, bringing disrespect to the Court. Surely, we should expect the Supreme Court to at least go through the motions of attending to the text of the Constitution.

In addition to problems of shabby craftsmanship, *Robinson* set into place the slippery slope regenerated by *Jones*[277] but with implications far beyond.[278] As noted above, the full reach of *Robinson* may lead to the abandonment of mens rea in light of a full-fledged acknowledgment of psychological determinism, thus resulting in Packer's "demise of the criminal law."[279]

Some have argued that such a demise is long overdue. For decades critics of the criminal justice system have advocated its abolition in favor of a preventative system based entirely on rehabilitation when possible and incapacitation of the dangerous when necessary.[280] Recently, with the availability of supposedly more effective tools for accurately predicting future dangerousness, new calls are being made urging the abandonment of the criminal sanction,[281] and thus the criminal law,[282] in favor of a new

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[273] *Id.*

[274] As a description of the *Robinson* Court, the words of T.S. Eliot are strikingly appropriate: "The last temptation is the greatest treason: To do the right deed for the wrong reason." T. S. ELIOT, MURDER IN THE CATHEDRAL 44 (1935).

[275] Landry, *supra* note 127, at 1675.

[276] *Id.* at 1675-76.

[277] *See supra* text accompanying notes 80-115.

[278] *See supra* text accompanying notes 153-66.

[279] *See supra* text accompanying notes 58-63.

[280] *See, e.g.*, KARL MENNINGER, THE CRIME OF PUNISHMENT 190-218 (1966); BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW 32-84 (1963).

[281] *See* Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121 (2005) (advocating discarding the "punishment model" in favor of one centering on preventing dangerous persons from offending).

[282] The punitive sanction is generally understood to be the defining characteristic of the "criminal" system. *See supra* notes 123-26.

systematic therapeutic/incapacitative model.[283] Forces threatening the demise of the criminal law thus appear to be gathering momentum.

The objections to the abolition of the criminal justice system, with its employment of punishment of offenders for their offenses, in favor of a forward-looking preventative system are well known and, I believe, compelling. Many influential thinkers have counseled against jettisoning the criminal system and offered defenses of it both in terms of its usefulness in providing public security and in its homage to human dignity. Proponents of the security rationale argue that the criminal law, with its actus reus and mens rea requirements, affords law-abiding persons protection and security[284] from governmental interference in their lives. One need simply avoid the culpable commission of a criminal offense to be virtually assured that the government will not interfere in the conduct of one's life.

Such assurance is not available under the therapeutic/incapacitative model. If incapacitation of the dangerous were the sole consideration, there appears to be no reason why any past action would be required once the predictive instruments indicated that an individual was sufficiently dangerous to justify state intervention.[285] Citizens would thus be at risk of government sanction not for what they have done, a matter over which they have considerable control, but for the kind of person the state believes them to be, a matter over which they have little control.

Some advocates of the therapeutic/incapacitative model attempt to soften these criticisms by requiring commission of a harmful act as a prerequisite for intervention, but without the necessity of proving mens rea, thus dispensing with the requirement that the act be culpably committed.[286] Such a move does not solve the insecurity problem, however. As H.L.A. Hart puts it:

> In a system in which proof of *mens rea* was no longer a necessary condition for conviction the occasions for official interferences in our lives would be vastly increased. If the doctrine of *mens rea* were abolished, every blow, even if it was apparent that it was accidental or merely careless, and therefore not under the present

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[283] Professor Slobogin suggests that his preventive model might require the commission of a harmful act that is "nonaccidental and unjustified." Apparently ignoring the phenomenon of "accident prone" people, Slobogin says that "[a]s an empirical matter, a person who has not done (or tried) anything harmful or whose harmful act is inadvertent or justifiable is unlikely to be considered a risk in any event." Slobogin, *supra* note 281, at 135.

[284] Such security is in addition to any enjoyed by the criminal system's deterrence of criminal offenses.

[285] Robinson, *supra* note 201, at 1439.

[286] Such is the position, for example, of Barbara Wootton. *See* WOOTTON, *supra* note 280, at 52-53, 66, 75-79; *see also supra* note 283.

> law a criminal assault, would in principle be a matter for investigation under the new scheme. This is so because the possibilities of a curable condition would have to be investigated and if possible treated.[287]

Other theorists defend the institution of punishment as administered through the criminal justice system as itself a basic human right. For example, in his paper *Persons and Punishment*,[288] Herbert Morris argues[289] that guilty persons have a moral right to be punished for their criminal offenses. Under Professor Morris's theory, the moral right to be punished derives from a more fundamental natural right, inalienable and absolute: the right to be treated as a person. Persons are entitled to have their choices respected; therefore, when one chooses responsibly to engage in morally reprehensible conduct prohibited by a just system of criminal law, one chooses also the consequences of his offense: punishment. That choice is to be respected.

On the other hand, the therapeutic/incapacitative model regards deviant conduct as merely symptomatic of a pathological dangerous condition rather than conduct of responsible human agents whose choices are worthy of respect. Preventive interventions are directed towards treating present abnormality or confining the dangerous, and the preventive model makes no attempt to proportion the degree or kind of response to past

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[287] H.L.A. Hart, Book Review, 74 YALE L.J. 1325, 1330 (1965). Hart adds: "This expansion of police powers would bring with it great uncertainty for the individual citizen and, though official interference with his life would be more frequent, he will be less able to predict their incidence if any accidental breach of the criminal law may be an occasion for them." *Id.*; *see also* Hart, *Punishment and the Elimination of Responsibility* 158, 181-85, *in* PUNISHMENT AND RESPONSIBILITY, *supra* note 189. Sanford Kadish, in *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 288 (1968) adds:

> But it is crucial to keep in mind as well the positive side of the criminal law. It not only provides for the punishment of the guilty, it also protects the rest of us against official interference in the conduct of our lives and does so primarily through the much maligned concept of innocence. Where a person has behaved as well as a human being can behave, the requirement of mens rea . . . protects him. To abandon mens rea and to substitute a Wootton code—in which . . . the occurrence of the harm as a purely factual consequence of a person's physical movements suffices for conviction—removes this essential safeguard. Even the best of us may be swept into the net, for the test of our eligibility for sanctions is not our responsible acts and the consequences for which we may fairly be held responsible, but sheer accident; and accident, by definition, may befall us all. Nor is it any comfort that we will no longer be exposed to condemnation and punishment as such. Whatever it is called we will be exposed to coercive intervention by the state in our daily lives regardless of our most dutiful efforts to comply with what is required of us. Even if the proposal would more effectively deal with the threat of crime . . . it would do so by substituting what most of us would consider a greater threat to our security and liberty.

[288] Morris, *supra* note 200.

[289] The description of Morris's work in the text is drawn from my previous work. *See* Martin R. Gardner, *The Right to be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838, 839-46 (1981).

conduct. This is in direct contrast to the institution of punishment which necessarily attends to past offenses by limiting the amount of suffering one must endure to that deemed proper to pay the "debt" owed society through commission of the offense. Moreover, when preventive interventions are therapeutically grounded, they are blatantly paternalistic and highly coercive insofar as the therapist is assumed to know, and thus permitted to utilize, those treatments that will be beneficial to the patient even though the patient may object to their use. On the other hand, rather than seeking to benefit the offender, the primary thrust of punishment is to exact from the offender his debt to society, payment of which removes his guilt. Given the alternatives of an indefinite period of preventive detention or a specified period of punishment, the right to be punished becomes an important right that offenders may wish to claim.[290] Unlike therapy, punishment offers the offender opportunities to plan his future accordingly and to pay the price for his action within a system which treats him as a responsible moral actor.[291]

Regardless of whether or not one is convinced by arguments for retaining the criminal justice system, if the system is to be abandoned such decision should not come from court decisions but through the legislative process. As Justice Marshall pointed out in his *Powell* opinion and as the above defenses of the criminal system and its utilization of punishment make clear, administering criminal justice entails a host of "religious, moral, philosophical, and medical views of the nature of man."[292] Such issues involve value judgments best suited to legislative bodies.[293]

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[290] See, e.g., the discussion of *Vitek v. Jones*, 445 U.S. 480 (1980), in Gardner, *supra* note 289, at 854-57 (inmate has a constitutionally protected "liberty" interest in remaining in prison (being punished) that could not be infringed by being transferred to a mental institution without procedural protections).

[291] Others have advanced views similar to Morris's. *See, e.g.*, C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1953).

> Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth. Their very kindness stings with intolerable insult. To be "cured" against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we "ought to have known better," is to be treated as a human person made in God's image.

See also Fingarette, *supra* note 32, at 444 (observing that "lawful and proper threat of [punishment] may be . . . a morally humane approach" that regards the addict as an "autonomous person, responsible for guiding his life, and subject to law").

[292] Powell v. Texas, 392 U.S. 514, 536 (1968); *see supra* text accompanying note 46. This view suggests that criminal law is a "process" rather than a "substantive *corpus juris*":

Finally, if judges are obligated to "carry things to their logical conclusion"[294] and if the logical conclusion of *Robinson* is a process that leads to *Powell* and then to the *Jones* approach and beyond, ultimately ending in the total demise of the criminal law, *Robinson* must be revisited by the Supreme Court. Even if that process can somehow be stopped short of its logical conclusion, sufficient doctrinal damage has already been done to require repair. How that repair should occur is the subject of the next section.

V. *ROBINSON* AND SUBSTANTIVE DUE PROCESS

The position of the *Jones* court on the issue of the scope of the *Robinson* decision is unique among the federal courts of appeal. Clearly, it is time for the Supreme Court to clarify matters. The recommendation here is that the Court do so by reaffirming the result in *Robinson* under the Due Process Clause, thereby rejecting the *Jones* analysis and narrowing *Robinson*'s expanse to actus reus issues.

> [C]riminal law collapses virtually by definition into politics, for it is through politics and the processes of representative democracy that society expresses its developing norms and negotiates the accommodation of new imperatives within existing moral and philosophical commitments. If criminal law truly is and shall remain a community practice, and a flexible and dynamic one at that, then the competent forum for that practice must be the legislature, not a constitutional court whose judgments are manifestly less representative, ostensibly final and authoritative, and, thus, difficult to undo.

Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1302 (1998).

[293] *See supra* note 292; *see also, e.g.*, Harris v. McRae, 448 U.S. 297, 326 (1980) (stating that it is not the mission of the Court to decide wise social policy or matters "out of harmony with a particular school of thought") (quoting Williamson v. Lee Optical, Inc. 348 U.S. 483, 488 (1955)); Maher v. Roe, 432 U.S. 464, 479 (1977) (holding that when an issue involves sensitive policy choices the "appropriate forum for their resolution in a democracy is the legislature"); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies."); *Williamson*, 348 U.S. at 488 (noting that the Court does not strike down state laws because they may be "unwise" or "improvident"); Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, Inc., 313 U.S. 236, 246 (1941) (finding concerns about the "wisdom, need, or appropriateness" of legislation involves choices which should be left to the states and to Congress).

Ironically, if the *Robinson* case has anything to say about the substantive criminal law, it might cut in the opposite direction than that described in this Article. Rather than leading to the demise of the criminal law, *Robinson* can be read to embody the right to be punished as described *supra* at notes 289-92 and accompanying text. *See* Gardner, *supra* note 289, at 846-52. On this view it would be unconstitutional to abolish the criminal justice system in lieu of one founded on therapeutic and incapacitive principles.

[294] Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

A. THE PROBLEM IN *ROBINSON*: MALISHMENT AS IRRATIONAL STATE ACTION

As shown above, *Robinson* is not a case about punishment. Rather, the malishment imposed by the California statute constituted totally senseless governmental action. Putting someone in jail for ninety days to one year for being sick is simply absurd.[295]

The only possible rationale for malishing drug addicts might be to deter them from becoming addicts in the first place, assuming, of course, that drug addiction is a product of voluntary use of illegal narcotics prior to becoming addicted.[296] While most addicts no doubt do become addicted in such circumstances, for those whose addiction results from medically prescribed narcotics or for those born with narcotic addictions[297] any proffered justification of their malishment as a basis for deterring their addiction is clearly irrational. Any appeal to deterrence similarly fails even in cases of addiction resulting from voluntary use of illegal narcotics. The very same statute that malished addiction also punished *use* of the narcotics causing addiction.[298] Any possible deterrence rationale was thus exhausted through the punishment of narcotic use. In short, the malishment sanction at issue in *Robinson* simply makes no sense.

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[295] The absurdity is famously illustrated by Samuel Butler:

> Prisoner at the bar, you have been accused of the great crime of labouring under pulmonary consumption, and after an impartial trial before a jury of your countrymen, you have been found guilty. . . . You were convicted of aggravated bronchitis last year; and I find that though you are now only twenty-three years old, you have been imprisoned on no less than fourteen occasions for illnesses of a more or less hateful character . . . .
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> . . . .
>
> You may say that it is not your fault. The answer is ready enough at hand, and it amounts to this—that if you had been born of healthy and well-to-do parents, and been well taken care of when you were a child, you would never have offended against the laws of your country, nor found yourself in your present disgraceful position. If you tell me that you had no hand in your parentage and education, and that it is therefore unjust to lay these things to your charge, I answer that whether your being in a consumption is your fault or no, it is a fault in you, and it is my duty to see that against such faults as this the commonwealth shall be protected. You may say that it is your misfortune to be criminal; I answer that it is your crime to be unfortunate.

SAMUEL BUTLER, EREWHON 120, 123 (Jonathan Cape Ltd. 1923) (1872). *See supra* text accompanying notes 259-62 for discussion eliminating any recognized sanction as present in *Robinson*.

[296] The *Robinson* Court recognized the possibility that addiction may innocently or involuntarily result from prescribed drugs or from the moment of birth. Robinson v. California, 370 U.S. 660, 667 n.9 (1962).

[297] *Id.* The California statute in *Robinson* drew no distinction between innocently and culpably derived addiction.

[298] *See supra* note 17.

Justice Harlan realized as much, finding it an arbitrary exercise of state power to apply the statutory jail term to addicts.[299] No legitimate state interest supported the statute. Thus the unconstitutionality of the statute in *Robinson* was a result of arbitrary law-making, not of cruel punishment.

B. ARBITRARINESS AND DUE PROCESS

As a "bulwark[] . . . against arbitrary legislation,"[300] the Due Process Clause of the Fourteenth Amendment[301] is the proper remedy for resolving the issue in *Robinson*. The jail sentence obviously entailed a restriction of constitutionally protected "liberty"[302] and malishment constituted a "substantial arbitrary imposition[]" and a "purposeless restraint[]" clearly contrary to due process.[303]

While application of substantive due process is, of course, controversial,[304] the constitutional principle offended in *Robinson* is

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[299] Although Harlan offers virtually no analysis or explanation of his position, the arbitrariness he identifies appears to be different from that inherent in the employment of malishment as discussed in this article. Harlan sees arbitrary state action in California's imposition of sanctions "for a bare desire to commit a criminal act" (addicts desire to use narcotics). *See supra* text accompanying note 26. The objection here seems to be that the statute's application to addicts dispenses with the traditional actus reus requirement and is thus "arbitrary" or irrational on *policy grounds*. While such an argument is itself compelling (see *infra* notes 311-19 and accompanying text), it is different from the argument presented in this Article which is grounded on logical, not policy, considerations. It is certainly a bad idea to dispense with actus reus, but it is also a logical impossibility to employ the punitive sanction without a criminal act. *See supra* text accompanying notes 250-63. It is the illogic of malishment, not its unwisdom, that constitutes its arbitrariness as argued in this Article.

[300] Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (citing Hurtado v. California, 110 U.S. 516, 532 (1884)).

[301] The Fourteenth Amendment provides in part: "[N]o State [shall] deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV.

[302] *Id.*; Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("[F]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); Meyer v. Nebraska, 262 U.S. 390, 397 (1923) (finding that the term "liberty" in the Due Process Clause "denotes . . . freedom from bodily restraint" among other things).

[303] *Poe*, 367 U.S. at 543 (Harlan, J., dissenting). On other occasions, the Court has invalidated criminal statutes on due process grounds. See, for example, *supra* note 64 for a discussion of the *Papachristou* case striking down vagrancy statutes as unconstitutionally vague. *See also* Lambert v. California, 355 U.S. 225 (1957) (holding that due process requires some consideration of defendant's claimed unawareness of statutory duty to register as a convicted felon as a prerequisite for conviction for failure to register); *supra* note 175.

[304] "That 'substantive due process' is a dirty phrase is well recognized by lawyers and law students." Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for A New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1971) (listing objections to use of substantive due process); *see also* LAFAVE, *supra* note 64, at 141-51 (noting reluctance of Court to invalidate statutes in situations necessitating passing judgment on "the wisdom, need and propriety of laws that touch economic problems, business affairs or social

narrow.[305] The employment of malishment would have been perfectly constitutional had there been any rational basis for its employment, however wrongheaded some may think such employment to be.[306] Finding that the malishment in *Robinson* is irrational and arbitrary involves little judicial involvement in policy matters.[307] This Article's suggested rethinking of *Robinson* as a due process case involves an essentially value-neutral analysis of California's attempt to apply the punitive sanction where it was logically impossible to do so, thus resulting in indefensible and obviously irrational state action.

A finding that malishment is inherently unconstitutional creates no danger of slippery slope problems in future cases. The factual context of *Robinson* is so unusual that similar cases are simply not likely to arise.[308] Thus by invalidating the imposition of the jail sentence in *Robinson* as a *sui generis* instance of unconstitutional malishment, the case can be cabined within acceptable bounds, thereby avoiding the mischief created by the Court's use of the Eighth Amendment.[309]

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conditions" as well as decisions finding that a particular criminal prohibition is not related to an injury to the public). *But see* Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating on due process grounds sodomy statutes as applied to consenting adults in private).

[305] For some time a variety of commentators have urged the Court to liberally apply the Due Process Clause to clearly define the imprecision in the elucidation of principles of criminal responsibility. *See generally* Dubin, *supra* note 174; Broeder & Merson, *supra* note 3, at 203 (suggesting *Robinson* is really a due process case aimed at "completely overhauling" state substantive criminal law through the principle that "criminal law cannot be used to punish conduct which is morally blameless and/or which is relatively innocuous in terms of the social evils sought to be prevented").

[306] The "traditional inquiry" of substantive due process is whether there "is any rational basis (however wrongheaded we may think it) for what the legislature has done." Packer, *supra* note 2, at 1076. The Supreme Court has rarely invalidated legislation under this narrow standard. For examples of this rarity, see Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925) (statute requiring attendance of students only in public schools did not constitute the exercise of any "proper power" of the state and thus constituted "arbitrary and unreasonable" state action); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (statute prohibiting teaching of foreign languages to school children deemed "arbitrary and without reasonable relation to any end within the competency of the state").

[307] In setting aside the criminal statute in *Robinson*, "the Court took no power of critical importance away from the legislature[]." Thus "[l]egislative primacy in matters of substantive criminal law remained the rule." Bilionis, *supra* note 292, at 1332.

[308] The law in question in *Robinson* raised an "atypical risk[] of harshness when measured against the usual requirements for criminal liability[:]" the "risk of arrest and conviction without any proof of an actus reus." *Id.* at 1330.

[309] Consequently, Professor Amsterdam is simply wrong when he says that "[f]or practical purposes, it probably matters little whether *Robinson* is conceived as the Eighth Amendment case it calls itself or the substantive due process case it appears to be." Amsterdam, *supra* note 64, at 234. Similarly wrong is the view that "to say that a conviction is unfair because cruel and unusual is not very different from saying that it is unfair because arbitrary and unreasonable." Manes, *supra* note 3, at 244.

By revisiting *Robinson* as a due process rather than an Eighth Amendment case, the Court would, as it has in other cases, uphold the result of a prior case by applying different constitutional grounds.[310] The Court should thus rethink *Robinson* at its earliest opportunity.

C. *ROBINSON* AS VIOLATIVE OF DUE PROCESS: THE CONSTITUTIONAL FALLOUT

Finding the malishment in *Robinson* to be unconstitutional would establish the narrow holding that there can be no punishment without a criminal act, thus embracing the actus reus principle as a matter of constitutional necessity. Apart from being logically linked to the concept of punishment,[311] the act requirement is an essential principle of criminal law theory for a variety of policy reasons.[312]

For centuries the criminal law has embraced the maxims *nullum crimen sine lege* and *nulla poena sine lege* (no one may be punished for an offense unless the conduct constituting that offense has been defined by an institution authorized to do so).[313] Conduct is thus essential for criminality. Acts, not private thoughts or perceived propensities, are required.[314] Part of the reason for requiring an act is to avoid false charges. Proving thoughts or propensities is fraught with obvious uncertainty. As one jurist put the matter, "[T]he thought of man is not triable, for the devil himself knows not the thought of man . . . ."[315] As Justice Black noted in *Powell*, there is no way to distinguish "between desires of the day-dream variety and fixed intentions that may pose a real threat to society."[316]

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[310] *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 429-30 (1986) (noting that *Escobedo v. Illinois*, 378 U.S. 478 (1964), was originally decided as a Sixth Amendment case but "in retrospect" is now perceived as a case guaranteeing the Fifth Amendment privilege against self-incrimination); Roe v. Wade, 410 U.S. 113, 167-68 (1973) (Stewart, J., concurring) (finding that *Griswold v. Connecticut*, 381 U.S. 479 (1965), decided originally under the "penumbra" of Bill of Rights Protections, can "rationally be understood" only as a substantive due process case).

[311] See *supra* text accompanying notes 187-204, 250-63.

[312] No exhaustive discussion of the act requirement is possible here. For some such discussion, see FLETCHER, *supra* note 55, at 421-39.

[313] PACKER, *supra* note 196, at 72.

[314] GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 1 (2d ed. 1961).

[315] Brian, C.J., Year Book 17 ED. IV., Pasch. fo. 1 & 2 (1478), *translated in* COLIN BLACKBURN, A TREATISE ON THE EFFECT OF THE CONTRACT OF SALE ON THE LEGAL RIGHTS OF PROPERTY AND POSSESSION IN GOODS, WARES, AND MERCHANDISE 191 (J.C. Graham, ed., Blackstone Publ'g Co., 2d ed. 1887) (1845).

[316] Powell v. Texas, 392 U.S. 514, 543 (1968) (Black, J., concurring). Even if there were a way to read a person's mind, punishment for evil thoughts would be problematic. Most law-abiding people occasionally hope that some harm will befall another. If such hopes were punishable, virtually "all mankind would be criminals, and most of their lives would be

Moreover, punishing mere thoughts would satisfy neither deterrent nor retributive purposes. While conduct may be deterred, it is less certain that thoughts can be.[317] As a retributive matter, punishment is unjust unless offenders freely choose to offend; persons must have the opportunity to desist from wrongful activity however evil their thoughts.[318] Thus, conduct serves as a moral prerequisite for the infliction of punishment.[319]

VI. CONCLUSION

This Article has examined the implications of the recent reemergence of constitutionalization of the criminal law's mens rea principle resulting from the interpretation of *Robinson v. California* by the court in *Jones v. Los Angeles*. I have argued that those implications pose at least a threat to the ongoing vitality of the criminal law as traditionally understood, perhaps even to its very existence. I have presented arguments why such a threat should be resisted and shown that it has arisen because of misapplication of the Eighth Amendment in *Robinson* resulting from the Court's failure to carefully attend to the concept of punishment, a failure shared by the *Jones* court in portions of its opinion.

In addressing these threats, I have urged the Supreme Court to utilize due process principles in reconsidering *Robinson* as a case manifesting arbitrary state action as illustrated by my characterization of the sanction at issue as "malishment," a blatantly indefensible imposition of governmental power. On such reconsideration, the Court should clarify *Robinson* as holding, merely but far from insignificantly, that an action is a constitutional prerequisite for infliction of the punitive sanction.

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passed in trying and punishing each other." DRESSLER, *supra* note 14, at 70 (quoting 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND 78 (1883)).

[317] DRESSLER, *supra* note 14, at 70; ROBINSON, *supra* note 64, at 178.

[318] DRESSLER, *supra* note 14, at 70.

[319] *Id.* Holmes adds:

> The reason for requiring an act is that an act implies a choice, and that it is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise. But the choice must be made with a chance of contemplating the consequence complained of, or else it has no bearing on responsibility for that consequence. If this were not true, a man might be held answerable for everything which would not have happened but for his choice at some past time.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (1881).