

THE STATUS OF STATUS OFFENSES: HELPING REVERSE THE CRIMINALIZATION OF MENTAL ILLNESS

ELYN R. SAKS*

ABSTRACT

Robinson v. California finds a statute criminalizing being a narcotics addict unconstitutional. *Robinson* has language suggesting three views of why being a narcotics addict cannot be criminalized: the “status view”; the “involuntariness view”; and the “illness view.” A subsequent case, *Powell v. Texas*, seems to adopt the first view. This Article takes a step back to flesh out the different views and their strengths and weaknesses. It suggests that the second and third views are sounder: certain criminal behaviors—for example, disturbing the peace or a chaotic robbery—are more like symptoms of a disease than acts. They are things that happen to someone, not things that someone does. If such status offenses stop being criminalized, we may reverse the trend that people with mental illness are sent to jail and prison instead of to care.

TABLE OF CONTENTS

I. INTRODUCTION	368
II. RELEVANT CASE HISTORY	370

* Orrin B. Evans Professor of Law, Psychology, and Psychiatry and the Behavioral Sciences at the University of Southern California Gould School of Law; B.A., Vanderbilt University; M.Litt., Oxford University; J.D., Yale Law School; PhD, New Center for Psychoanalysis. I wish to thank Cindy Guyer of the USC Law School Library, for her excellent research assistance.

A. CONSTITUTIONAL LAWS PUNISHING ACTS.....	370
B. UNCONSTITUTIONAL LAWS PUNISHING STATUS	371
III. DIFFERENT INTERPRETATIONS OF <i>ROBINSON V.</i>	
<i>CALIFORNIA</i>	372
A. THE STATUS VIEW	372
B. THE INVOLUNTARINESS VIEW.....	375
C. THE ILLNESS VIEW	376
IV. NEW AND OLD PROPOSALS.....	379
A. THE VOLITIONAL INSANITY DEFENSE OR THE “WILD BEAST” TEST.....	379
B. VOLUNTARY ACT OR SYMPTOM OF MENTAL ILLNESS?	379
V. ALTERNATIVES TO CRIMINAL PUNISHMENT.....	382
VI. CONCLUSION	384

I. INTRODUCTION

The Eighth Amendment prohibits punishment based on status alone. In *Robinson v. California*, the United States Supreme Court struck down a California statute that made it a criminal offense to “be addicted to the use of narcotics.”¹ Then, in *Powell v. Texas*, a defendant challenged the constitutionality of a public drunkenness statute, using *Robinson* to argue that the statute criminalized the status of being an alcoholic.² The *Powell* Court refused to extend *Robinson* and stated that even if the defendant could not have avoided being drunk, he could have avoided being drunk in public.³ Thus, the Court upheld the statute because it criminalized the act of being drunk in public, not the status of being an alcoholic.⁴

The *Robinson* decision is subject to three different interpretations. First, that being a narcotics addict is a status and not an act.⁵ Second, that

¹ *Robinson v. California*, 370 U.S. 660, 660, 666–67 (1962) (quoting CAL. HEALTH & SAFETY CODE § 11721) (holding that criminalizing addiction would violate the Eighth and Fourteenth Amendments because addiction without more is a condition, much like mental illness or other diseases, which should not be criminalized).

² *Powell v. Texas*, 392 U.S. 514, 517, 532 (1968) (“Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.”).

³ *See id.* at 535–36.

⁴ *See id.* at 533–34. The opinion also noted that for some, such as the homeless, public intoxication should not be criminalized because the homeless cannot avoid being in public. *Id.* at 530. Similarly, someone who is “utterly unable” to control him or herself does not deserve punishment. *Id.* at 534–35.

⁵ *See generally id.* at 514 (indicating a difference of interpretation between the majority and

being a narcotics addict is involuntary, and it is wrong to punish someone for an involuntary condition and involuntary acts to which it gives rise.⁶ Third, that being a narcotics addict is an illness, and it is wrong to punish someone for having an illness.⁷

Status offenses should not be crimes, and this Article hopes to help prevent the transinstitutionalization of mental illness, or in other words, patients being placed in jail instead of treatment. People who have committed a crime that is a symptom of mental illness should be civilly confined and provided treatment; however, police often take these people to jail instead of hospitals.⁸ The causes of these incarcerations are complex and systemic.⁹ One explanation is that police think the person will not be admitted or held in the hospital. Yet someone who has committed acts that would be a crime if not for the mental illness should arguably be deemed dangerous, and thus be civilly committable.¹⁰ Alternatively, police may take those suffering from symptoms of mental illness to jail, rather than to more treatment-based interventions because taking them to jail is simply easier.¹¹ Such concerns are inhumane and inadequate to warrant excluding treatment-based responses to mentally ill persons who commit minor crimes.

the dissent); *Robinson*, 370 U.S. at 660 (indicating a difference of interpretation between the majority and the dissent).

⁶ *Powell*, 392 U.S. at 548–49 (White, J., concurring); *Robinson*, 370 U.S. at 674 (Douglas, J., concurring).

⁷ *Powell*, 392 U.S. at 560 (Fortas, J., dissenting); *Robinson*, 370 U.S. at 662–63.

⁸ Amy C. Watson, Melissa Schaefer Morabito, Jeffrey Draine & Victor Ottati, *Improving Police Response to Persons with Mental Illness: A Multi-Level Conceptualization of CIT*, 31 INT'L J.L. & PSYCHIATRY 359, 360 (2008).

⁹ For extensive discussion and studies, see generally LINDA A. TEPLIN, U.S. DEPARTMENT OF JUSTICE, NAT'L INST. OF JUSTICE, KEEPING THE PEACE: THE PARAMETERS OF POLICE DISCRETION IN RELATION TO THE MENTALLY DISORDERED (1986); Egon Bittner, *Police Discretion in Emergency Apprehension of Mentally Ill Persons*, 14 SOCIAL PROBLEMS 278 (1967); Christian Ritter, Jennifer L.S. Teller, Kristen Marcussen, Mark R. Munetz & Brent Teasdale, *Crisis Intervention Team Officer Dispatch, Assessment, and Disposition: Interactions with Individuals with Severe Mental Illness*, 34 INT'L J.L. & PSYCHIATRY 30 (2011); Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, NAT'L INST. JUST. J., July 2000; Watson et al., *supra* note 8.

¹⁰ See *United States v. Jones*, 463 U.S. 354, 354, 359 (1983) (accepting implicitly that stealing a jacket from a store made someone dangerous).

¹¹ See, e.g., Andrew Wasicek, *Mental Illness and Crime: Envisioning a Public Health Strategy and Reimagining Mental Health Care*, 48 CRIM. L. BULL. 106 (2012) (suggesting that police should respond to mentally ill offenders following the crisis intervention team model, by training police officers on how to effectively respond to a mentally ill person in crisis); Watson et al., *supra* note 8 (noting the ineffectiveness of utilizing typical police tactics with mentally ill individuals and suggesting implementation of the crisis intervention team model).

This Article tries to tease apart the ban on status offenses and evaluates the arguments behind each of the three *Robinson* interpretations. This Article argues that the best interpretation of a ban would find that crimes that are a symptom of mental illness should generally not be actionable. This should lead to a reversal of the trend to jail people instead of hospitalizing them. Part II provides a brief history of the relevant case law following *Robinson*. Part III explains three different interpretations of the *Robinson* holding and advocates which interpretations would best prevent the criminalization of crimes that are symptoms of mental illness. Part IV explores using the volitional insanity defense and the “wild beast” test to identify crimes that are symptoms of mental illness. Part V explores alternatives to criminalizing mental illness. Last, Part VI concludes.

II. RELEVANT CASE HISTORY

Subsequent cases have interpreted *Robinson* and *Powell* in conflicting ways. While some jurisdictions have found that a statute under review does not run afoul of *Robinson*, others have found just the opposite: that the statute punished a status instead of an *actus reus*, or an overt, intended act.

A. CONSTITUTIONAL LAWS PUNISHING ACTS

Like *Robinson*, which forbade criminalizing the status of being a narcotics addict without further evidence of illegal possession or use of such narcotics,¹² subsequent courts have upheld statutes that criminalize acts instead of statuses.

For example, in *State v. Little*, the Supreme Court of Nebraska affirmed a trial court’s decision convicting a man of indecent exposure, finding him to be a sexual sociopath, and committing him to a penitentiary under a Nebraska statute.¹³ The court distinguished the applicable statute from *Robinson* because the man’s punishment resulted from his act of indecent exposure, not merely his status as a sexual sociopath.¹⁴ Then, in *United States v. Ayala*, the Ninth Circuit rejected the argument that a statute punished mere status after a deported alien challenged his conviction for illegal reentry.¹⁵ The Ninth Circuit held that *Robinson*’s ban

¹² *Robinson*, 370 U.S. at 660.

¹³ *State v. Little*, 261 N.W.2d 847, 849 (Neb. 1978).

¹⁴ *Id.* at 852.

¹⁵ *United States v. Ayala*, 35 F.3d 423, 424 (9th Cir. 1994).

on criminalizing status did not apply because the statute criminalized the act of reentering the United States after deportation, not merely the status of being a deported alien.¹⁶ The Supreme Court of Utah also found that *Robinson* did not apply to a defendant with a measurable amount of methamphetamine in his system because the relevant statute criminalized the defendant's act of intentionally ingesting the substance, not his status of having drugs in his body.¹⁷ The court allowed statutes criminalizing having drugs in one's body as evidence of acts, but the court prohibited criminalizing having those drugs' metabolic byproducts because it would punish status.¹⁸

Thus, several courts have continued to follow *Robinson* by distinguishing between criminalizing statuses and criminalizing acts.

B. UNCONSTITUTIONAL LAWS PUNISHING STATUS

Powell, by defining going out in public as an act, threatened to undermine *Robinson's* prohibition on punishing status.¹⁹ But courts have continued to reinforce *Robinson* while working around *Powell*.

For instance, in *State ex rel. Harper v. Zegeer*, the court criticized *Powell* for allowing criminal punishment for alcoholics who, by definition, did not drink voluntarily, and held that incarcerating alcoholics for public intoxication violated West Virginia's prohibition of cruel and unusual punishment.²⁰ The court held that alcoholism is a defense to the charge of public intoxication,²¹ but because alcoholics may pose a danger to themselves and others, the State may remove them from the streets if it does not incarcerate them as criminals.²² The court ordered the State to create programs to rehabilitate alcoholics, instead of incarcerating them for their disease.²³

Other cases since *Powell* have focused on involuntary acts and how vague statutes punish ordinary behavior. In *Pottinger v. City of Miami*, vagrancy statutes prohibiting sleeping, sitting, or eating in public were unconstitutional because "arresting homeless people for harmless acts they

¹⁶ *Id.*

¹⁷ *State v. Robinson*, 254 P.3d 183, 191–92 (Utah 2011).

¹⁸ *Id.*

¹⁹ *Powell v. Texas*, 392 U.S. 514 (1968).

²⁰ *State ex rel. Harper v. Zegeer*, 296 S.E.2d 873, 875 (App. Ct. W. Va. 1982).

²¹ *Id.* at 886.

²² *Id.* at 878.

²³ *Id.* at 880–81.

are forced to perform in public effectively punishes them for being homeless.”²⁴ Because homelessness is an involuntary condition, arresting the homeless for harmless, life-sustaining acts unconstitutionally punishes status.²⁵ Further, in *Farber v. Rochford*, a court struck down an ordinance criminalizing loitering near liquor stores or bars for people “known to be” alcoholics, narcotic addicts, prostitutes, or felons because the statute was unconstitutionally vague.²⁶ Because the ordinance punished ordinary acts for those with a suspected status, it unconstitutionally penalized them for their status before they committed any criminal acts.²⁷

Therefore, courts have shown that it is possible to work around *Powell* to avoid punishing status, while reinforcing the protection and distinction set forth in *Robinson*.

III. DIFFERENT INTERPRETATIONS OF *ROBINSON V. CALIFORNIA*

Robinson is subject to at least three different interpretations: (1) being a narcotics addict is a status and not an act; (2) being a narcotics addict is an involuntary condition that causes involuntary acts for which punishment is wrong; and (3) being a narcotics addict is an illness, and it is wrong to punish someone for having an illness.

In subsequent cases, the Court and other courts have adopted the first view. *Robinson* itself upheld the legality of criminalizing the purchase, possession, use, or sale of narcotics, even if these acts are involuntary or result from the person’s illness.²⁸ As a matter of policy, however, the best understanding of the Court’s intuition in *Robinson* is the second and/or third view: it is wrong to punish people for involuntary conditions or illnesses.²⁹

A. THE STATUS VIEW

The majority view asserts that it is wrong to punish someone for what

²⁴ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563–64 (S.D. Fla. 1992) (citing *Powell*, 392 U.S. at 551–52 (White, J., concurring)).

²⁵ *Id.* at 1564–65.

²⁶ *Farber v. Rochford*, 407 F. Supp. 529, 530 (N.D. Ill. 1975).

²⁷ *Id.* at 534.

²⁸ *Robinson v. California*, 370 U.S. 660, 664 (1962). Subsequent courts, including *Powell*, follow this position.

²⁹ *Powell*, 392 U.S. at 560 (Fortas, J., dissenting); *Robinson*, 370 U.S. at 666.

he or she *is* rather than for what he or she *does*.³⁰ It consequently asserts that it is wrong to punish a person in a jurisdiction in which he or she has never used drugs,³¹ because criminal responsibility requires an act.³² Under the majority view, addiction cannot be criminalized because it is a status and so does not entail a voluntary act.³³

The problem with the majority view is that nearly all statuses can be reformulated as acts: the condition is one in which a person frequently does or has a tendency to do certain acts.³⁴ For example, punishing habitual drug use is tantamount to punishing being an addict. The acts of habitual drug use and the status of being an addict are indistinguishable. Similarly, punishing acts of vagrancy is equivalent to punishing being a vagrant. Constitutional rights should not depend on this sort of semantic difference.³⁵

Some courts punish addicts more harshly, and sentencing guidelines allow mental illness as an aggravating factor.³⁶ Addiction may go beyond habitual drug use; one must also have a strong propensity to do so. Still, dangerousness as a result of a condition or a illness is commonly used as an aggravating factor for imposing harsher sentences. These harsher sentences occur frequently where dangerousness as a result of mental illness is an aggravating factor for purposes of imposing the death penalty.³⁷ Certain conditions may even be imputable to someone without

³⁰ *Recent Court Decisions and Legislation Impacting Juveniles*, 14 U.C. DAVIS J. JUV. L. POL'Y 403, 411–12 (2010).

³¹ *Robinson*, 370 U.S. at 666.

³² CAL. PENAL CODE § 20 (1892).

³³ *Robinson*, 370 U.S. at 662–63.

³⁴ Benno Weisberg, *When Punishing Innocent Conduct Violated the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual "Crimes,"* 96 J. CRIM. L. & CRIMINOLOGY 329, 330 (2005).

³⁵ *Robinson* also suggests a partial solution: statutes could be reformulated so as to require evidence that a prohibited act took place in a particular jurisdiction. *Robinson*, 307 U.S. at 665.

³⁶ *United States v. Hines*, 26 F.3d 1469, 1477 (9th Cir. 1994) (justifying a harsher sentence because the defendant “posed an extraordinary danger to the community because of his serious emotional and psychiatric disorders” (internal quotation marks omitted)). Mental illness typically leads to more stringent sentences, but there are cases that have been decided differently. *See, e.g., United States v. Pinson*, 542 F.3d 822, 839 (10th Cir. 2008) (“[W]e encourage sentencing courts to consider that civil commitment procedures will be available if the defendant continues to pose a considerable risk to the public after confinement, mitigating the need for a prophylactic upward variance.”).

³⁷ *See, e.g., Jurek v. Texas*, 428 U.S. 262 (1976); *Sanchez v. State*, 223 P.3d 980 (Okla. 2009). For commentary, *see, for example, Ellen Fels Berkman, Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUMBIA L. REV. 291, 292 (1989); Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of*

any prior act.³⁸ The status of dangerousness may be attributed to someone for having certain qualities that increase his or her likelihood or propensity to be violent, yet he or she may have never acted violently.³⁹ For example, someone who is paranoid (fearful for his or her life) or who acts before asking questions may receive a harsher sentence for those traits alone. Sentence enhancements resulting from addiction effectively punish the status of being an addict.

Courts accept propensity as a basis for confinement as a preventive matter. For example, courts deny bail for dangerous people, although they do need to be charged with a serious crime.⁴⁰ Institutions detain “mentally disordered offenders” after their sentences are completed.⁴¹ And people who have not committed an overt act but are simply thought to be dangerous can be civilly committed.⁴²

In contrast, punishment requires culpability or blameworthiness for an act. It is wrong, for example, to punish people for their thoughts.⁴³ Even crimes of attempt require acts in furtherance of the crime, not just the intent to commit a crime.⁴⁴ Consequently, statuses like dangerousness, while related to acts that harm people, do not directly harm people.

“Mitigating” *Mental Disability Evidence*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 239, 242 (1994); Eileem P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351–76 (2006).

³⁸ See, e.g., Ann Hubbard, *The ADA, the Workplace, and the Myth of the ‘Dangerous Mentally Ill,’* 34 U.C. DAVIS L. REV. 849, 886–87 (2001) (noting that, in general, persons with mental disorders are stereotypically viewed as prone to violence); Mark S. Kaufman, ‘Crazy’ *Unil Proven Innocent? Civil Commitment of the Mentally Ill Homeless*, 19 COLUM. HUM. RTS. L. REV. 333, 343 (1988).

³⁹ See Kaufman, *supra* note 38; *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1236 (1974) (stating that society assesses the likelihood that a mentally ill individual will act violently against the magnitude of the harm the individual will cause, to decide how to treat them; for example, by preemptively confining the individual).

⁴⁰ See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987).

⁴¹ See, e.g., CAL. PENAL CODE § 2960 (1969).

⁴² See, e.g., IND. CODE ANN. § 12-26-1-1 (West 2012); MINN. STAT. ANN. § 253B.18 (West 2012); N.H. REV. STAT. ANN. § 135-C:34 (2012).

⁴³ See, e.g., *State v. Jones*, 387 P.2d 913, 926 (Mont. 1963) (affirming jury instructions stating that “in every crime or public offense there must exist a union or joint operation of act and intent”); *State v. Quick*, 19 S.E.2d 101, 103 (S.C. 1942) (holding that criminal intent, without an accompanying “overt act,” is not a crime); 1 CHARLES E. TORCI, *WHARTON’S CRIMINAL LAW* § 25 (15th ed. 1993) (stating that “mere harboring of an evil thought . . . does not constitute a crime”).

⁴⁴ *United States v. Prichard*, 781 F.2d 179, 181 (10th Cir. 1986) (“Mere intention to commit a specified crime does not amount to an attempt. It is essential that the defendant . . . do some overt act.”); TORCI, *supra* note 43, § 696 (“To constitute an attempt, the mere intent to commit a crime is not enough; the performance of an act is also necessary.”).

Because someone may have the status of dangerousness and never commit a harmful act, the status view imposes criminal punishment based on status. This scheme under the status view, therefore, punishes people for acts that may never materialize.

One way to save the status view is to prohibit punishing pure status, which does not involve any acts at all. Suppose, for example, that a psychiatrist could say someone was an addict who had never used drugs. The person's condition just made it more likely that if the person used drugs or alcohol, he or she would not be able to stop. In this instance, punishing this person would truly be punishing for status and not for an act, and would thereby be deemed unconstitutional.

Thus, the majority view ineffectively prevents punishment for mere propensities. Unless statutes are restricted to pure propensities, courts can almost always circumvent *Robinson* to reformulate statuses as acts. If being in a location constitutes an act, then any status could be criminalized, and the majority view does not prevent punishment for status.

B. THE INVOLUNTARINESS VIEW

A second interpretation of *Robinson* finds criminalizing an involuntary condition to be wrong because the condition is involuntary.⁴⁵ As the Court noted, one may contract addiction voluntarily or involuntarily.⁴⁶ But, once contracted, addiction is an involuntary condition that causes involuntary acts. Consequently, one should not be punished criminally for drug use if one is an addict. As with the first view's reformulation of statuses as acts, this view is also susceptible to courts' circumventing *Robinson* by re-conceptualizing voluntariness. For instance, a court could find that being an addict in a certain state is voluntary because the addict was presumably in the state voluntarily. Again, courts could interpret statutes to require that the prohibited act must have taken place voluntarily.

Society is uncertain whether addiction is voluntary or whether drinking is truly involuntary for an addict.⁴⁷ Perhaps the first drink is

⁴⁵ See *Robinson v. California*, 370 U.S. 660, 667 (1962).

⁴⁶ *Id.*

⁴⁷ See, e.g., A. Thomas McClellan, David C. Lewis, Charles P. O'Brien & Herbert D. Kleber, *Drug Dependence, a Chronic Medical Illness: Implications for Treatment, Insurance, and Outcomes Evaluation*, 284 JAMA 1689, 1693 (2000) ("It is not yet possible to explain the physiologic and psychological processes that transform controlled, voluntary use of alcohol and

voluntary, but once one has contracted the disease, it is hard to not drink. Or even if one is an alcoholic, the first drink on any given occasion is voluntary, but the addiction makes stopping impossible.⁴⁸ Under that logic, it would be constitutional not to punish the drunkard who is an alcoholic but to punish the occasional drunk who goes into public.⁴⁹

The matter is further complicated by the fact that the first drink requires an act, and recovering from alcoholism or drug addiction involves many more acts (for example, going to Alcoholics Anonymous, completing the twelve steps, committing to not drinking, and working to stay sober).⁵⁰ The role of choice in contracting and recovering from addiction is different than other involuntary conditions.

This second interpretation of *Robinson* is also somewhat broader than the illness view in at least one way: one could have an involuntary condition without having an illness. For example, homelessness coupled with certain acts is considered an involuntary condition that should not lead to criminal conviction.⁵¹ Vagrancy statutes can similarly be problematic because they criminalize inoffensive actions, like hanging around, if coupled with a status like being out of work, often an involuntary status.⁵² Even if this argument is rejected, however, certain acts can still be seen as symptoms of illness and should not be criminally punished.

C. THE ILLNESS VIEW

The third view is that addiction is an illness, and it is wrong to punish

other drugs into uncontrolled, involuntary dependence.”)

⁴⁸ Many of the opinions review the state of knowledge on addiction and alcoholism and note that there is considerable controversy about how to understand them and what they lead to and mean. See, e.g., *Powell v. Texas*, 392 U.S. 514, 517–18, 520, 522, 548, 559 (1968); McClellan et al., *supra* note 47, at 1691 (“Addictive drugs have well-specified effects on the brain circuitry involved in the control of motivated and learned behaviors . . . [g]iven the fundamental neuroanatomy and neuropharmacology of this system, it is understandable that addictive drugs could produce immediate and profound desire for their readministration.”).

⁴⁹ See *Powell*, 392 U.S. at 549, 552 n.4.

⁵⁰ See, e.g., Nady el-Guebaly, *The Meanings of Recovery from Addiction: Evolution and Promises*, 6 J. ADDICTION MED. 1 (2012); *Research Refines Alcoholism Treatment Options*, 24 ALCOHOL RES. & HEALTH 53 (2000); William White & Ernest Kurtz, *The Varieties of Recovery Experience: A Primer for Addiction Treatment Professionals and Recovery Advocates*, 3 INT’L J. SELF HELP & SELF CARE 21 (2006); Mark L. Willenbring, *The Past and Future of Research on Treatment of Alcohol Dependence*, 33 ALCOHOL RES. & HEALTH 55 (2010).

⁵¹ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992).

⁵² *Id.*

someone for an illness.⁵³ For instance, the *Robinson* Court noted that even one day in jail would be cruel and unusual punishment for the “crime” of having a common cold,⁵⁴ and that it would likewise be unconstitutional to punish someone for having mental illness or leprosy.⁵⁵ Mental illness is particularly important because many mentally ill people are arrested for minor crimes like disturbing the peace, vagrancy, and trespassing.⁵⁶

Imagine that a mentally ill person is standing on a street corner, flailing his arms, and screaming that beings are after him and that the world is coming to an end. His thoughts and speech are chaotic and hard to follow. While he is not attacking people—indeed, he stays far away from them—they are scared of him. This is clearly someone who is disturbing the peace of others. Unlike a harmless mentally ill person who appears “different,” who cannot be confined based on public animosity,⁵⁷ this person is acting in a way that manifests illness. Flailing one’s arms and screaming most likely constitutes a psychotic episode. Punishing a

⁵³ See *Robinson v. California*, 370 U.S. 660, 667 (1962).

⁵⁴ *Id.*

⁵⁵ *Id.* at 666. The *Powell* Court’s language is very helpful. It states that a person should not be subject to punishment “if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease.” *Powell v. Texas*, 392 U.S. 514, 521 (1968).

⁵⁶ See, e.g., DAN A. LEWIS, STEPHANIE RIGER, HELEN ROSENBERG, HENDRIK WAGENAAR, ARTHUR J. LURIGIO & SUSAN REED, *WORLDS OF THE MENTALLY ILL: HOW DEINSTITUTIONALIZATION WORKS IN THE CITY* 117 (1991) (finding that the charges most commonly brought against mentally ill individuals were criminal damages, trespass to land, and disorderly conduct); Alison Evans Cueller, Lonnie M. Snowden & Toby Ewing, *Criminal Records of Persons Served in the Public Mental Health System*, 58 *PSYCHIATRIC SERVICES* 114, 114 (2007) (noting that sixty-two percent of arrested individuals with mental illness had a nonviolent crime as their most serious offense); William H. Fisher, Kristen M. Roy-Bujnowski, Albert J. Grudzinskas, Jr., Jonathan C. Clayfield, Steven M. Banks & Nancy Wolff, *Patterns and Prevalence of Arrest in a Statewide Cohort of Mental Health Care Consumers*, 57 *PSYCHIATRIC SERVICES* 1623, 1623 (2006) (stating that the “most common charges” against mental health care consumers “were crimes against public order followed by serious violent offenses and minor property crimes”); Mark R. Munetz, Thomas P. Grande & Margaret R. Chambers, *The Incarceration of Individuals with Severe Mental Disorders*, 37 *COMMUNITY MENTAL HEALTH J.* 361, 361 (2001) (noting that the majority of crimes committed by mentally ill individuals are nonviolent and substance-abuse related). *But see, e.g.*, Nancy Wolff, Tina Maschi & J.R. Bjerklie, *Profiling Mentally Disordered Prison Inmates: A Case Study in New Jersey*, 11 *J. CORRECTIONAL HEALTH CARE* 4, 4 (2004) (finding a lack of homogeneity among the mentally disordered inmate population).

⁵⁷ See *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (“May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.”).

psychotic episode would be like punishing someone for having a cold. Illness is not blameworthy.

If the view that disturbing the peace in this manner should lead to civil confinement rather than jail prevails, however, the next question is whether this would be constitutionalizing a version of the insanity test, which the Court has always resisted.⁵⁸ The idea would be if the crime is a symptom of mental illness, the individual is not responsible (this argument would apply to the “involuntariness” view too).⁵⁹ It is unclear if this argument is more like an “insanity defense” rubric or a failure to act—the “action” is equivalent to sniffing when someone has a cold. Alternatively, even if this is an insanity defense standard, what is right should be more important than what is deemed unconstitutional. That is, when certain crimes (like disturbing the peace) manifest psychosis, states should not consider them crimes.

On the other hand, if responding to manifestations of psychosis with civil confinement instead of jail is seen as a kind of insanity defense, it would resemble the failed *Durham* standard.⁶⁰ *Durham v. United States* held that crimes that are the product of mental illness lead to an insanity acquittal.⁶¹ For the reasons discussed below, such as how to distinguish behaviors that are symptoms from culpable acts, this test has been rejected as unworkable.⁶² Nonetheless, if this kind of behavior should be deemed insane, it should be analyzed under either a volitional insanity defense or the old “wild beast” test.⁶³

⁵⁸ A number of the opinions in *Powell* discuss this issue. See *Powell*, 392 U.S. at 535 n.7, 538; Dora W. Klein, *The Mentally Disordered Criminal Defendant at the Supreme Court: A Decade in Review*, 91 OR. L. REV. 207, 221 (2012); Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1099 (2007); Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455, 471–78 (2008). For important Supreme Court cases regarding the insanity defense, see *Clark v. Arizona*, 548 U.S. 735 (2006), and *Leland v. Oregon*, 353 U.S. 790 (1952).

⁵⁹ See *Robinson*, 370 U.S. at 667.

⁶⁰ *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

⁶¹ *Id.* at 872.

⁶² See *United States v. Brawner*, 471 F.2d 969, 1017 (D.C. Cir. 1972) (providing reasons for overturning the *Durham* test).

⁶³ See, e.g., *Rex v. Arnold*, 16 How. St. Tr. 695 (1724); MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 6, 75–76 (1994).

IV. NEW AND OLD PROPOSALS

A. THE VOLITIONAL INSANITY DEFENSE OR THE “WILD BEAST” TEST

A crime that is a symptom of mental illness could be viewed as insane under two tests: either the newer volitional insanity defense or the older “wild beast” test.⁶⁴ Under the volitional insanity defense, a defendant is not responsible for his criminal conduct if “at the time he committed the proscribed act or acts, [he] lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law.”⁶⁵ The “wild beast” test states that “it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than . . . a wild beast, such a one is never the object of punishment.”⁶⁶ This section explores each of these tests and compares acts that are symptoms of mental illness with acts that are symptoms of physical illness.

B. VOLUNTARY ACT OR SYMPTOM OF MENTAL ILLNESS?

One primary issue is how to identify behaviors that are symptoms of mental illness.⁶⁷ A person disturbing the peace as described above (unless frankly feigning) is clearly undergoing a psychotic episode.⁶⁸ Delusional thoughts and disorganized speech are symptoms of psychosis.⁶⁹ Arguably, so is loitering somewhere because one is confused, and trespassing when one is confused and cannot distinguish public from private property.⁷⁰

More concerning and difficult to identify is behavior that is a product of mental illness that also resembles ordinary criminality. Antisocial personality disorder, for instance, is defined as “fail[ing] to conform to social norms with respect to lawful behaviors” and committing antisocial

⁶⁴ See CONN. GEN. STAT. ANN. § 53a-13 (West 2012); *Arnold*, 16 How. St. Tr. at 765.

⁶⁵ CONN. GEN. STAT. ANN. § 53a-13.

⁶⁶ *United States v. Freeman*, 357 F.2d 606, 616 (2d Cir. 1966) (citing *Arnold*, 16 How. St. Tr. at 765).

⁶⁷ See *Browner*, 471 F.2d at 983–84.

⁶⁸ See Stephan Haimowitz, *Law & Psychiatry: Can Mental Health Courts End the Criminalization of Persons with Mental Illness?*, 53 PSYCHIATRIC SERVICES 1226, 1226 (2002), available at <http://ps.psychiatryonline.org/article.aspx?articleid=87120>.

⁶⁹ See *About the First Episodes of Psychosis*, NAT'L ALLIANCE ON MENTAL ILLNESS, http://nami.org/Template.cfm?Section=First_Episode (last visited Feb. 24, 2014).

⁷⁰ Haimowitz, *supra* note 68.

acts—essentially, behaving criminally.⁷¹ Under this broad definition, any crime by a psychopath could be a symptom of mental illness.⁷²

On the other hand, such psychopathic acts are also voluntary: one makes a decision to do something and does it.⁷³ Thus, even if an act is a symptom of mental illness, it is controllable.⁷⁴ Contrast something like sniffing. This is something symptomatic of a cold and not a choice. But is this true? Imagine making it a crime to sniffle. It would be okay to blow your nose but not to sniffle. While it is hard not to sniffle, it is not impossible. One could construct a story about why sniffing affects others well-being as well. Even if so, it is likely that many would revolt at the idea of making sniffing a crime because sniffing is a clear symptom of illness—it is something that happens to one, not something one does.⁷⁵

The psychopathy problem also applies to crimes committed as a result of a mental illness that is not psychopathy, as raised in various opinions.⁷⁶ Just as disturbing the peace is not a crime when it is a manifestation of psychosis,⁷⁷ neither should robbery that is also a manifestation of illness be considered a crime, even for someone with something more than total deprivation of understanding. This is essentially the *Durham* problem previously mentioned.

Again, one might distinguish acts that are voluntary from things that happen to someone.⁷⁸ At the very least, the nexus between psychosis and the act is more evident in disturbing the peace than committing a robbery.⁷⁹ An exception might be a psychotically conducted robbery, in which a person strides into a bank and then twirls around, lifts a piece of paper with a picture of a gun and says, “give me your money, please,

⁷¹ See AM. PSYCHIATRIC ASS'N: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 659–63 (Am. Psychiatric Ass'n, 5th ed. 2013).

⁷² See *id.*

⁷³ See BLACK'S LAW DICTIONARY 1710–11 (9th ed. 2009) (defining “voluntary”).

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ The opinions note that some interpretations of *Robinson* are potentially limitless—that there would be no way to avoid saying that much of what we now call crime would not be actionable. See, e.g., *Powell v. Texas*, 392 U.S. 514, 533–34 (1968). The dissent in *Powell* asserts that this problem can be managed. *Id.* at 559 n.2 (Fortas, J., dissenting).

⁷⁷ See *State v. Robinson*, 254 P.3d 183, 193 (Utah 2011).

⁷⁸ See BLACK'S LAW DICTIONARY, *supra* note 73; Joel Mainland & Noam Sobel, *The Sniff Is Part of the Olfactory Percept*, 31 CHEMICAL SENSES 181, 188–89 (2006).

⁷⁹ See Virginia Aldige Hiday & Heathcote W. Wales, *Mental Illness and the Law*, in HANDBOOK OF THE SOCIOLOGY OF MENTAL HEALTH 563, 568–69 (Carol S. Aneshensel et al. eds., 2d ed. 2013).

please,” then laughs hysterically, before sitting on the ground, covering his face, and moaning. This obviously psychotic robbery is very different from an organized psychotic person who commits a typically executed robbery and knows what he is doing. While both have a mental illness, the former’s manifestation of symptoms at least more obviously detracts from his responsibility for his crime.

Perhaps, both the disturbing the peace and the psychotic robbery are examples of the original insanity defense, called the “wild beast test,” where one is not guilty if one is out of control and so ill that one’s actions do not even seem like ordinarily executed human actions.⁸⁰ Alternatively, perhaps the volitional insanity test is the best doctrinal rubric under which to understand these cases.⁸¹

One problem with the illness view, as suggested briefly above, is we can effectively punish for an illness if the act is something unavoidable. Suppose we make it a crime to have a cold in public. Given that most people have to be in public sometimes—or live with other people—and that colds are a very frequent phenomenon, punishing for being in public with a cold would at least raise questions. A person would effectively be punished for an illness if the unavoidable actions resulting from his or her illness were punishable.

This suggests a serious problem with the *Powell* opinion. If you can punish someone for being drunk in public, because they are voluntarily in public, why can you not punish someone for being mentally ill in public, when they are voluntarily in public? Or—to avoid the status problem—someone who is acting mentally ill in public?

In short, punishing someone for acting mentally ill in public looks an awful lot like punishing someone for his or her mental illness. In this scenario, we seem plainly to be criminalizing the condition of having a mental illness and not just being in public ill. The latter is but a pretext; punishing for being ill in public is effectively punishing for being ill.⁸²

On the other hand, we do burden behavior of people who are clearly sick. There are laws concerning the confinement and quarantine of people with tuberculosis (TB). People with TB could be confined against their

⁸⁰ *Rex v. Arnold*, 16 How. St. Tr. 695, 765 (1724).

⁸¹ CONN. GEN. STAT. ANN. § 53a-13 (West 2012).

⁸² A related point is that punishing someone for a symptom of his illness is punishing him for his illness by another name. See *Powell v. Texas*, 392 U.S. 514, 548 (1968) (White, J., concurring) (“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 compulsion.”).

will if they would not voluntarily stay away from the public. This was generally done as a civil matter, but some places authorized criminal law actions against the person. The crime, again, was not for being sick, but for voluntary behavior that endangered the public, namely, for not staying safely away from the public. This is a clear example of where an illness did lead to action against you if you did not keep yourself cloistered.⁸³

Once again, though, we would probably civilly confine the person and not charge and convict him of a crime. One can imagine scenarios, on the other hand, where someone deliberately exposes another for purposes of getting him ill (consider an AIDS patient who has unprotected sex without informing his partner of his status. We might want to be able to charge this person under the criminal law).⁸⁴

The question in our context is whether drinking or doing drugs is at the same level as having sex with AIDS or going out in public with an active case of TB. The latter two seem much likelier to lead to severe harm than the first.

V. ALTERNATIVES TO CRIMINAL PUNISHMENT

The prior sections argued against the status quo that criminalizes mental illness. This section considers alternative responses to those with symptoms of mental illness who have committed minor crimes. First, police officers should be retrained to recognize people who have committed minor crimes because of mental illness to avoid placing them in jail first. Second, a new legal doctrine should be established to protect those facing criminal liability for actions that are symptomatic of their mental illness. Third, practical interventions should be implemented to reduce, and eventually eradicate, arrests for minor infractions that are symptomatic of mental illness. Together, these responses work toward a goal of moving from the punitive impulse to jail, to a treatment structure, such as civil confinement or hospitalization.

⁸³ See, e.g., OSCAR A. CABRERA, JAMES G. HODGE & LAWRENCE O. GOSTIN, CENTERS FOR LAW AND THE PUBLIC'S HEALTH: A COLLABORATIVE AT JOHNS HOPKINS AND GEORGETOWN UNIVERSITIES, EXPRESS TUBERCULOSIS CONTROL LAWS IN SELECT U.S. JURISDICTIONS 14–15, 20 (2008), available at http://www.cdc.gov/phlp/docs/Centers_Report-Express_TB_Control_Laws-Final.pdf; CENTERS FOR LAW AND THE PUBLIC'S HEALTH: A COLLABORATIVE AT JOHNS HOPKINS AND GEORGETOWN UNIVERSITIES, TUBERCULOSIS CONTROL LAWS AND POLICIES: A HANDBOOK FOR PUBLIC HEALTH AND LEGAL PRACTITIONERS 28 (2009), available at <http://www.cdc.gov/tb/programs/TBLawPolicyHandbook.pdf>.

⁸⁴ See, e.g., CAL. HEALTH & SAFETY CODE § 120291 (West 2012); FLA. STAT. ANN. § 384.24 (West 2012); GA. CODE ANN. § 16-5-60 (West 2012); N.J. STAT. ANN. § 2C:34-5 (West 2012).

Too often, police take people who have committed minor crimes as a symptom of mental illness to jail, instead of hospitals, for treatment. Ideally, police officers should be trained to identify symptoms of mental illness. Police officers should be taught to treat those presenting symptoms of mental illness but who have not committed serious crimes with respect, compassion, and agency. Police should give them the option to go to a hospital for care.⁸⁵ Furthermore, police officers should be incentivized to pursue treatment-based alternatives to incarceration, perhaps with rewards for bringing mentally ill persons who have not committed serious crimes to treatment.⁸⁶

Possible approaches to doctrinal legal protection for those facing criminal liability for minor infractions symptomatic of mental illness include pleading insanity, “status offense” verdicts, and specialized mental health courts. The accused could plead the insanity defense already in place.⁸⁷ Courts could also employ a special “status offense” verdict, which amounts to an acquittal but allows civil confinement. And while most jurisdictions do not authorize specialized mental health courts,⁸⁸ these are exactly the cases that should be adjudicated by mental health courts.⁸⁹

Another issue is how much choice to give someone with mental illness. If someone denies that he or she has a mental illness that caused a crime, many jurisdictions allow people to reject an insanity plea.⁹⁰

⁸⁵ See, e.g., W. David Ball, *Mentally Ill Prisoners in the California Department of Corrections and Rehabilitation: Strategies for Improving Treatment and Reducing Recidivism*, 24 J. CONTEMP. HEALTH L. & POL'Y 1, 35 (2007) (advocating for better medical and psychiatric care for mentally ill offenders, and reform of California's mental health care treatment system); Wasieck, *supra* note 11 (explaining police's crucial role as “gatekeepers” to the mental health system, and describing the police's typical response to mentally ill offenders).

⁸⁶ See Ball, *supra* note 85.

⁸⁷ See e.g., 18 U.S.C. § 17 (2012) (authorizing an affirmative defense when a defendant could not discern right from wrong because of severe mental disease or defect).

⁸⁸ E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 520 (2012).

⁸⁹ See, e.g., Ronda Cress, J. Neil Grindstaff & S. Elizabeth Malloy, *Mental Health Courts and Title II of the ADA: Accessibility to State Court Systems for Individuals with Mental Disabilities and the Need for Diversion*, 25 ST. LOUIS U. PUB. L. REV. 307 (2006); Brenda C. Desmond & Paul J. Lentz, *Mental Health Courts: An Effective Way for Treating Offenders with Serious Mental Illness*, 34 MENTAL & PHYSICAL DISABILITY L. REPORTER 525 (2010); Anne Harper & Michael J. Finkle, *Mental Health Courts: Judicial Leadership and Effective Court Intervention*, 51 JUDGES' J. 4 (2012).

⁹⁰ Seventeen out of the forty-eight jurisdictions allow an insanity plea to be interposed over the defendant's objection, while the remaining jurisdictions refuse to allow such an imposition. See Robert D. Miller, Jonathan Olin, David Johnson, John Doidge, David Iverson & Emmanuel Fantone, *Forcing the Insanity Defense on Unwilling Defendants: Best Interests and the Dignity of the Law*, 24 J. PSYCHIATRY & L. 487, 500 (1996). A number of articles discuss the concept of

Similarly, people may choose to not raise mental illness as a mitigating factor in death penalty sentencing.⁹¹ On the other hand, people may not avoid civil confinement simply because they do not accept that they have a mental illness.⁹² Thus, the issue is whether choosing not to go to a mental health court is more like rejecting an insanity plea or more like denying the need for hospitalization. Most states with mental health courts allow participants to withdraw voluntarily.⁹³

VI. CONCLUSION

In conclusion, *Robinson v. California*, properly understood, should lead to decriminalizing “behavior,” like disturbing the peace and loitering, when that behavior is essentially a symptom of a person’s disease, or otherwise involuntary. Under *Robinson*, it is unconstitutional to punish a person for what he or she is, rather than for what he or she does because the law should not impose criminal liability on involuntary actions.

In interpreting *Robinson*, the second and third views are most

imposing an insanity defense. *See, e.g.*, Thomas R. Litwack, *The Competency of Criminal Defendants to Refuse, for Delusional Reasons, a Viable Insanity Defense Recommended By Counsel*, 21 BEHAV. SCI. & L. 135 (2003); Miller, *supra* (providing a survey of case law and statutes that discuss under what circumstances a court may impose an insanity defense on a defendant); Andrew D. Reisner, Jennifer Piel & Miller Makey Jr., *Competency to Stand Trial and Defendants Who Lack Insight Into Their Mental Illness*, 41 J. AM. ACAD. PSYCHIATRY & L. 85 (2013).

⁹¹ Competent people with mental illness may volunteer for execution and refuse to submit mitigating evidence. *See, e.g.*, Chapman v. Commonwealth, 265 S.W.3d 156 (Ky. 2007) (permitting the defendant to volunteer for the death penalty); State v. Berry, 686 N.E.2d 1097 (Ohio 1997) (finding that defendants with mental illness were competent to waive mitigating evidence); Hooper v. State, 142 P.3d 463 (Okla. Crim. App. 2006) (affirming the imposition of the death penalty on a defendant who waived his right to present mitigating evidence). *See generally* Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75 (2002) (advocating for a prohibition on volunteering for the death penalty during trial pleading and sentencing); Kamela Nelan, *Restricting Waivers of the Presentation of Mitigating Evidence by Incompetent Death Penalty “Volunteers,”* 27 DEV. MENTAL HEALTH L. 24 (2008) (arguing in favor of the necessity for an individualized hearing assessing “any potentially relevant mitigating evidence”).

⁹² *See, e.g.*, Addington v. Texas, 441 U.S. 418, 421 (1979) (holding that the question of the sanity of a person resisting civil commitment is properly left to the fact finder).

⁹³ *See, e.g.*, KY. REV. STAT. ANN. § 12 (West 2011) (“Participants may petition the Mental Health Court judge for termination from Mental Health Court.”); *Anchorage Coordinated Resources Project (ACRP), Anchorage Mental Health Court*, ALASKA CT. SYS., <http://courts.alaska.gov/mhct.htm> (last visited Mar. 10, 2014) (stating that the Anchorage Mental Health Court “is a voluntary ‘therapeutic’ or ‘problem-solving’ court”). *But see* OKLA. STAT. ANN. tit. 22, § 472 (West 2013) (not discussing whether a participant may withdraw voluntarily).

persuasive. It is unfair to punish a person for what he or she is, a status offense, rather than what he or she does, and the law should not impose criminal liability on involuntary actions. Further research should consider whether the *Robinson* doctrine is the most constitutionally sound and ethically appropriate approach to status offenses. As a matter of policy, it is wrong to imprison people whose behavior is a symptom of their illness and largely out of their control. Building doctrinal alternatives to criminal liability for offenses that are symptoms of a mental illness, and choosing systematic options that favor treatment and care over incarceration and punishment, should decrease transinstitutionalization.