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ABSTRACT

Eighth Amendment Jurisprudence proscribes criminalization based on "status." Based on United States Supreme Court case law, for the purposes of this paper, "status" is understood to mean an "ongoing state of being." This paper argues that race is "status" and thus criminalizing people of color based on race violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. Further, in the United States, racial "status" is criminalized both directly and indirectly. Racial "status" is criminalized directly by police officers' frequent use of racial profiling to build criminal cases against people of color. On the other hand, racial status is criminalized indirectly when police officers interpret conduct that is inextricably tied to racial "status" as inherently criminal. Finally, this paper argues that recriminalization of "felons" is an unconstitutional criminalization of "status," disproportionately harming communities of color.

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INTRODUCTION

While many are familiar with the Eighth Amendment's Cruel and Unusual Punishment Clause, many are likely unaware that 1960s Eighth Amendment jurisprudence proscribes punishing individuals based on "status" rather than "conduct." In 1962, the Supreme Court held in *Robinson v. California* that punishing people for "status" crimes constitutes cruel and unusual punishment under the Eighth Amendment.[1] In other words, the

1. 370 U.S. 660, 666–67 (1962).

Supreme Court has held that while individuals may be punished for actions they take, they may not be punished simply for *who they are*. This principle will be referred to throughout this paper as "the *Robinson* doctrine."

In recent years, this Constitutional ban on criminalizing "status" has been the subject of much litigation, and has specifically been used to challenge the constitutionality of laws criminalizing homelessness.[2] Court battles have erupted around whether homelessness is "status" within the meaning of this Eighth Amendment jurisprudence, and if it is, whether anti-camping ordinances unlawfully criminalize "status."[3] However, there has been little discourse as to whether race qualifies as "status" and, consequently, whether racial profiling violates the Eighth Amendment. Notably, the District Court for the Northern District of California recognized race as "status" within the meaning of the *Robinson* doctrine in its 1994 decision, *Joyce v. City & County of San Francisco*.[4]

This paper will argue that race is "status" within the *Robinson* doctrine's definition and that various police practices and legal standards criminalize individuals based on "status" in violation of the Eighth Amendment's Cruel and Unusual Punishment Clause. There are two ways in which people of color are unconstitutionally criminalized for their racial "status:" directly and indirectly. This paper will argue that direct criminalization of racial "status" occurs when individuals are racially profiled and subsequently punished. This paper will then argue that indirect criminalization of racial "status" occurs when individuals are punished for conduct that is inextricably tied to their racial "status." This paper contends that both direct and indirect criminalization of "status" violates people of color's Eighth Amendment rights. Finally, this paper will argue that recriminalization of "felons" unconstitutionally criminalizes "status," thus disproportionately harming communities of color.

Unlike *Robinson*, this paper does not focus on one specific statute or ordinance that purportedly violates the Eighth Amendment. Rather, this paper will analyze various procedures and legal standards utilized by police officers to obtain arrests and by prosecutors to obtain convictions, ultimately arguing that these procedures inherently criminalize racial "status" in violation of the Eighth Amendment.

Part I will focus on direct criminalization of people of color based on "status" by defining "status," qualifying race as "status," and discussing how racial profiling directly criminalizes people of color based on racial "status." Specifically, this section will examine the "reasonable suspicion" standard and how police officers use racial "status" to build "suspicion." This section

2. 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).

3. *Id.*

4. 846 F. Supp. 843, 857 (N.D. Cal. 1994).

will also analyze three examples of criminalization based on racial "status:" *Terry* stops, pretextual traffic stops, and border searches. Case law will be used to elucidate the prevalence of racial profiling in regular police practices and to demonstrate the direct link between racial "status"-based profiling and criminalization.

Part II will explore the blurred line between "conduct" and "status," drawing on modern interpretations of the *Robinson* doctrine. This section will argue that criminalizing conduct that is inextricably tied to "status" constructively criminalizes "status" in violation of the Eighth Amendment. While race clearly qualifies as "status" and not "conduct," understanding where the Supreme Court drew the line between "status" and "conduct" is vital to understanding that criminalizing conduct that is inextricably tied to race constructively criminalizes "status."

This section will explore how various policies and legal standards criminalize conduct as a pretext for unconstitutionally criminalizing racial "status."

Part II will also examine the "reasonable suspicion standard" and how it criminalizes conduct that is inextricably tied to racial "status." This section will specifically examine conduct police officers frequently cite to establish "reasonable suspicion," such as "flight" and "presence in high crime neighborhoods." Additionally, this section will analyze the doctrine of "consent" searches and examine whether these searches are constructively consensual given the fraught relationship between law enforcement and communities of color. Finally, this section will analyze the *Mendenhall* seizure standard and argue that it does not account for subjective racial experiences, thus constructively criminalizing racial "status."

Finally, Part III will argue that recriminalization of "felons" unconstitutionally criminalizes "status." While this section does not argue that racial "status" is directly criminalized in the context of recriminalizing "felons," it notes that criminalization of "felon" "status" disparately impacts communities of color.

Preliminarily, this paper will provide context by briefly reviewing Eighth Amendment jurisprudence and providing background on how the Supreme Court established that the Cruel and Unusual Punishment Clause of the Eighth Amendment precludes criminalization of individuals based on their "status."

HISTORICAL BACKGROUND: UNDERSTANDING THE "*ROBINSON* DOCTRINE"

Under the Eighth Amendment to the United States Constitution, the government may not inflict cruel and unusual punishment upon individuals.[5]

5. U.S. CONST. amend. VIII.

Eighth Amendment jurisprudence specifically proscribes criminalizing individuals based on their "status" rather than their "conduct."[6] In *Ingraham v. Wright,* the Supreme Court established that the Cruel and Unusual Punishment Clause "imposes substantive limits on what can be made criminal and punished as such."[7] One such "substantive limit" is the government's inability to criminalize a person based solely on "status."[8] This means that as a matter of law, if a policy criminalizes an individual based on "status," it violates the Eighth Amendment.

This doctrine was first established in 1962 in *Robinson,* a case in which an individual addicted to narcotics was arrested for his "status" as a "drug addict" rather than for any actual drug use within the jurisdiction.[9] In *Robinson,* the Supreme Court held that a law criminalizing narcotic addiction constituted cruel and unusual punishment because the law criminalized individuals purely for their addicted "status" rather than for any specific conduct.[10]

When the *Robinson* petitioner was arrested, the police had no evidence that he had ever used narcotics in California.[11] They simply observed track marks on his arm, determined he was a "narcotic addict," and arrested him.[12] It was not the officers' arrest itself that was unconstitutional, but rather the law that empowered them to make this arrest.[13] The statute criminalized "being addicted to narcotics" in addition to criminalizing the actual use of narcotics.[14]

To emphasize its objection to punishing "status," the Court noted that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[15] The Court held that criminalizing individuals who have "never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Eighth Amendment."[16]

I. Racial Profiling Directly Criminalizes Racial "Status" In Violation Of The Eighth Amendment.

Part I will focus on direct criminalization of people of color based on "status" by defining "status," establishing that race qualifies as "status," and

6. Ingraham v. Wright, 430 U.S. 651, 728 (1977); *Robinson*, 370 U.S. at 667.
7. *Ingraham*, 430 U.S. at 728.
8. *Robinson*, 370 U.S. at 667.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 667.

discussing how racial profiling directly criminalizes people of color based on "status."

A. Race Qualifies Under *Robinson* as "Status"

There is no simple definition or legal standard for what constitutes "status" set forth by *Robinson*. There is no factor balancing test or bright line standard. Thus, in seeking to understand how the Court conceptualized "status" when establishing the *Robinson* doctrine, one must look at the facts of *Robinson* and identify what made the Court classify being addicted to narcotics as "status."

The *Robinson* Court specifically stated that, "[t]o be addicted to the use of narcotics is said to be a 'status' or condition and not an act."[17] Presumably, the Court would not have objected to officers arresting the *Robinson* petitioner for the *use* of narcotics.[18] Rather the Court was specifically concerned with the statute's codified criminalization of "*being* addicted to narcotics."[19] The Court also seemed concerned with the idea of punishing someone for an *ongoing* state of being rather than an isolated act.[20] The Court noted that the anti-narcotic statute made it possible for those addicted to narcotics to be prosecuted "at any time before [they] reform."[21] The Court was concerned about the statute making individuals "continuously guilty of this offense."[22] So, *Robinson* clarified that "status" is effectively an ongoing state of being, and that explicit criminalization of a state of being is unconstitutional. Notably, the Supreme Court reexamined the *Robinson* doctrine six years later in *Powell v. Texas*, a case that will be discussed in Part II of this paper.[23] In his *Powell* dissent, Justice Fortas interpreted *Robinson*'s binding precedent as establishing that the Eighth Amendment precludes infliction of criminal penalties on individuals for being "in a condition" that they are "powerless to change."[24]

Using the Court's language and reasoning from *Robinson*, this paper will define "status" as an "ongoing state of being" and "not an act."[25] Race is clearly not an act, but an ongoing state of being. Race is an immutable characteristic, meaning that individuals cannot change their race or stop being racialized. As in *Robinson*, racialized individuals are "continuously guilty" of being racialized, because it is an ongoing state of being rather than

17. *Id.* at 662.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 667.
22. *Id.*
23. *See generally* 392 U.S. 514 (1968).
24. *Id.* at 567 (1968) (Fortas, J., dissenting) ("[H]e was utterly powerless to avoid criminal guilt").
25. *Robinson*, 370 U.S. at 662.

an isolated act.[26] Importantly, lower courts have already recognized race as status.[27]

B. Fourth Amendment Violations Based on Racial Profiling Criminalize Racial "Status."

Racial profiling is defined by the *American Civil Liberties Union* as "the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual's race, ethnicity, religion or national origin."[28] This section will argue that racial profiling is direct criminalization based on "status," because when racial profiling occurs, race is the "but-for" cause of police officers' suspicion of criminal activity. This section will discuss various practices of racial profiling common in modern day policing and show how each practice unconstitutionally criminalizes individuals based on racial "status."

The Fourth Amendment of the United States Constitution generally protects against warrantless searches and seizures,[29] but there are many exceptions to this requirement and many of them disproportionately harm people of color. While police normally need "probable cause" that an individual committed a crime to obtain a search warrant, there are some types of searches, known as *Terry* stops, that officers may conduct with only "reasonable suspicion."[30] Under *Terry v. Ohio*, a police officer may briefly stop an individual if the officer "reasonably suspects" that the individual is engaged in criminal activity.[31] Reasonable suspicion is a lower standard than probable cause and requires officers to articulate "specific reasonable inferences which [they] are entitled to draw from the facts in light of [their] experience" that suggest criminal activity is afoot.[32] Reasonable suspicion is supposed to be more than an "inchoate and unparticularized suspicion or 'hunch.' "[33] Reasonable suspicion must also be associated with a particular individual.[34]

1. Terry stops criminalize racial "status."

If police officers have "reasonable suspicion," *Terry* allows them to briefly detain suspects for questioning "upon suspicion that [they] may be

26. *Id.*
27. *See Joyce*, 846 F. Supp. at 857.
28. *Racial Profiling: Definition*, ACLU, https://www.aclu.org/other/racial-profiling-definition (last visited Mar. 31, 2023).
29. U.S. CONST. amend. IV.
30. Terry v. Ohio, 392 U.S. 1, 27 (1968).
31. *Id.*
32. *Id.*
33. *Id.*
34. Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

connected with criminal activity."[35] With reasonable suspicion established, officers may also "conduct a carefully limited search of the outer clothing" of individuals "in an attempt to discover weapons which might be used to assault" the officer.[36] The low standard for establishing "reasonable suspicion" essentially allows police officers to articulate a few facts they subjectively believe make an individual "suspicious" to justify searching them without a warrant. Application of this legal standard is dangerous for people of color because a biased officer could believe people of color are suspicious simply based on their race, but articulate other facts indicating "suspicion" as a pretext for racial profiling.

This phenomenon is neither hypothetical nor conjectural since it played out in the case of *Floyd v. City of New York*.[37] In that case, the New York City Police Department (NYPD) implemented a "stop-and-frisk" policy, allowing officers to make regular and pervasive *Terry* stops.[38] Officers were permitted to "frisk," individuals if they "reasonably suspected" that they were "armed and dangerous."[39] Black and Latinx plaintiffs filed a class-action lawsuit, alleging that the NYPD had implemented the policy in a racially discriminatory manner, in violation of their Fourteenth Amendment Equal Protection Clause rights.[40]

Ultimately, the evidence showed that NYPD officers conducted more *Terry* stops in neighborhoods with more people of color and that even in predominantly White neighborhoods, Black and Latinx individuals were more likely to be stopped.[41] Additionally, evidence showed that NYPD officers were more likely to use force during stops of Black and Latinx individuals than during stops of their White counterparts.[42] Even though the NYPD was warned in 1999 that the "stop-and-frisk" policy was being conducted in a racially discriminatory manner, the NYPD pressured its officers to make more stops, and to target "the right people" (Black and Latinx men) for the stops.[43] This is clearly racial profiling and thus constitutes direct criminalization of individuals based on "status" in violation of the Eighth Amendment, because "but-for" the plaintiffs' racial "status," they would not have been criminalized at higher rates. Although this policy was challenged under the Fourteenth Amendment, it was never challenged under the Eighth Amendment, even though it unconstitutionally criminalizes individuals based on "status."

35. *Terry*, 392 U.S. at 27.
36. *Id.* at 30.
37. *See generally* 959 F. Supp. 2d 540 (S.D.N.Y. 2013).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

2. Pretextual traffic stops criminalize racial "status."

Terry stops are not restricted to pedestrians. In fact, police officers may conduct *Terry* stops of vehicles with reasonable suspicion that a crime has occurred or is occurring.[44] Additionally, a non-*Terry* routine traffic stop may be conducted by police officers if "the police have probable cause to believe that a traffic violation has occurred."[45] This means that probable cause of an out-of-date license plate or a broken taillight is sufficient grounds to commence a traffic stop. While more stringent than the reasonable suspicion standard, probable cause is still not a high standard. If police officers can articulate facts showing they had probable cause that a traffic violation has occurred, the traffic stop is lawful.

As Wayne LaFave observed in his article, *The "Routine Traffic Stop" From Start To Finish: Too Much "Routine," Not Enough Fourth Amendment*, "[w]ith respect to traffic offenses, the establishment of probable cause based on the word of the officer is practically a given."[46] This means that police officers can lawfully initiate a traffic stop based on pretextual factors such as a minor traffic violation, when they might really be pulling someone over for "driving while Black."

"Driving while Black" is an expression used to describe the common phenomenon of Black drivers who have committed no crime being stopped, questioned, and/or searched by police officers based on an ostensible traffic violation.[47] Additionally, police officers may use traffic stops to investigate their "suspicions" concerning criminal activity, even if those suspicions are unrelated to the traffic violation the driver was initially pulled over for, and even if the officers' "suspicions" are not supported by any evidence of the driver's criminal behavior.[48] Accordingly, if an officer pulls over a driver based on probable cause that a traffic violation was committed, the officer needs only subjective suspicion to escalate the routine traffic stop to resemble a criminal investigation.

Being pulled over is especially dangerous for drivers of color because it opens the door for potential criminalization. This is when drivers' of color Eighth Amendment rights are arguably violated. If drivers of color are pulled over due to racial profiling, they are stopped based on "status," and if the traffic stop escalates to criminalization, drivers of color are criminalized because of their racial "status." As David Harris noted in his article *The Stories, the Statistics and the Law: Why 'Driving While Black' Matters,*

44. *Terry*, 392 U.S. at 27.

45. *Whren v. United States*, 517 U.S. 806, 810 (1996).

46. Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1847 (2004).

47. David A. Harris, *The Stories, the Statistics and the Law: Why 'Driving While Black' Matters University of Minnesota Law Review*, 84 MINN. L. REV. 265, 265 (1999).

48. *Whren*, 517 U.S. at 810.

"[t]raffic offenses open the door to stops, searches, and questioning, based on mere hunches, or nothing at all."[49]

Notably, the Supreme Court held in *Pennsylvania v. Mimms* that in any lawful traffic stop, the police may order the driver to exit their vehicle without any suspicion that they are dangerous.[50] Additionally, in *Maryland v. Wilson*, the Supreme Court held that officers may also order passengers out of the car in any lawful traffic stop.[51] Further, once a vehicle is pulled over by police officers, the "plain view exception" also comes into play.[52] Under this exception, without a warrant, a police officer may seize an item in "plain view" as long as the officer sees the object from a legal vantage point.[53] Drivers' of color Fourth Amendment rights are bruised if not completely decimated under the combined weight of these Supreme Court cases expanding police officers' power to easily pull drivers over and subsequently transform "routine traffic stops" into criminal investigations.

For example, in 2016, the U.S. Department of Justice Office of Community Oriented Policing Services (COPS Office) released an Assessment of the San Francisco Police Department, reporting that "Black people were 24 percent more likely to be stopped for a traffic violation than their estimated population in the driving community and 9 percent more likely than their estimated population among potential traffic violators."[54] Additionally, the report stated, "Black and Latinx drivers were disproportionately arrested and searched following traffic stops and less likely to be found with contraband than White drivers."[55] Finally, the report noted, "[t]he racial disparity in traffic stops and post-stop outcomes appears to be large and statistically significant."[56] If the "but-for" cause of drivers of color being pulled over is racial profiling, this criminalization is based on racial "status" and thus not only violates drivers' of color Fourth Amendment rights, but also their Eighth Amendment rights.

3. Border searches criminalize racial "status."

Additionally, some types of searches fall into the "special needs exception" to the warrant requirement, meaning that they do not require probable cause, reasonable suspicion, or a warrant. The special needs exception applies when (1) the government conducts searches with the

49. Harris, *supra* note 47, at 266.

50. 434 U.S. 106, 111 (1977).

51. 519 U.S. 408, 415 (1997).

52. LaFave, *supra* note 47, at 1857.

53. Horton v. California, 496 U.S. 128, 136–37 (1990).

54. U.S. DEPARTMENT OF JUSTICE: COMMUNITY ORIENTED POLICING SERVICES, COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF THE SAN FRANCISCO POLICE DEPARTMENT (2016).

55. *Id.*

56. *Id.*

primary purpose of advancing some "special need" besides criminal law enforcement, and (2) the government's search program is "reasonable" considering the balance of public and private interests.[57]

Border searches fall within this exception, meaning no probable cause, reasonable suspicion, or warrant is needed to conduct searches near the United States' international borders. Under this exception, federal officers are permitted to conduct "routine" warrantless searches without even having reasonable suspicion if the individuals being searched are within 100 miles of the border.[58] At United States Border Patrol Interior fixed checkpoints, the Supreme Court has held that the Constitution permits referrals to "secondary" screening points simply "on the basis of Mexican ancestry."[59] Additionally, United States' immigration policy allows federal officers to stop and detain "anyone they suspect to be undocumented."[60]

This is clearly racial profiling which unconstitutionally criminalizes racial "status," because this policy authorizes secondary detention or screening based on race. This means that in some instances, "but-for" an individual's race, they would not be referred to secondary screening or detained at the border. Sarah Houston's law review article, *Now the Border is Everywhere: Why a Border Search Exception Based on Race Can No Longer Stand*, critiques the extensive exceptions to Fourth Amendment protections specifically present at the border.[61] Houston wrote, "[a]lthough [United States] courts have agreed that '[r]acially selective law enforcement violates this nation's constitutional values at the most fundamental level,' they have carved out an exception when it comes to law enforcement activity on the border."[62] Houston's article also builds upon Devon Carbado and Cheryl Harris's argument that "the Supreme Court has created an 'immigration exceptionalism' within Fourth Amendment jurisprudence by constitutionalizing the use of race in the immigration context."[63] The lack of Fourth Amendment protection associated with border searches is a prime example of this.

II. Common Policing Practices Indirectly Criminalize Racial "Status" In Violation Of The Eighth Amendment.

This section will first explore the blurred line between "conduct" and "status." Then, this section will examine modern interpretations of the

57. 68 AM. JUR. 2d *Searches and Seizures* §117.

58. The Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3) (2006).

59. United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976).

60. Sarah Houston, *Now the Border is Everywhere: Why a Border Search Exception Based on Race Can No Longer Stand*, 47 MITCHELL HAMLINE L. REV. 197, 198 (2020).

61. *Id.*

62. *Id.*

63. *Id.*; Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1550 (2011).

Robinson doctrine, arguing that criminalizing conduct that is inextricably tied to "status" constructively criminalizes "status" in violation of the Eighth Amendment. This section will explore how various policies and legal standards criminalize conduct as a pretext for criminalizing racial "status."

A. "Status" and Conduct Are Sometimes Inextricably Tied.

While race clearly qualifies as "status" and not "conduct," understanding where the Supreme Court drew the line between "status" and "conduct" is vital to understanding that criminalizing conduct that is inextricably tied to "status" constructively criminalizes "status."

Six years after *Robinson*, the Supreme Court refined and clarified the *Robinson* doctrine's boundaries in *Powell*, holding that while criminalizing "status" violates the Cruel and Unusual Punishment Clause, criminalizing an individual's conduct that "may be symptomatic of 'status'" does not.[64] In *Powell*, the petitioner contended that criminalizing his public intoxication effectively criminalized his "status" as an alcoholic, in violation of the precedent set in *Robinson*.[65] The Supreme Court held that the *Powell* petitioner could be criminally charged because arresting him for public intoxication punished his conduct, not his mere "status" as an alcoholic.[66] Importantly, the Supreme Court rejected Powell's contention that public intoxication was inextricably tied to *his* "status" as an alcoholic, but did not explicitly reject the overarching premise that criminalizing conduct inextricably tied to "status" constructively criminalizes "status."[67] Notably, the *Powell* Court held that criminalizing conduct that "may be symptomatic of status" does not criminalize status but did not address whether conduct that is inextricably tied to "status" does. This nuance left the door open for plaintiffs in lower courts to continue testing the boundaries of the *Robinson* doctrine.

The Court's *Powell* decision failed to consider that some "behaviors" or "actions" are inextricably linked to "status," and that criminalizing these acts or behaviors may be a pretext for unconstitutionally criminalizing "status." Using this logic, the *Robinson* doctrine has been extended to protect litigants criminalized based on homelessness and alcohol and drug dependencies.[68] While many of the challenged ordinances do not explicitly criminalize being an alcoholic or being homeless, their effect is to singularly punish people who hold those identities. For example, while the text of an anti-camping ordinance may not explicitly criminalize being unhoused, most (if not all) individuals arrested and convicted under that ordinance will be homeless.

64. 392 U.S. at 533.
65. *Id.*
66. *Id.* at 533.
67. *Id.*
68. Weisberg, *supra* note 2, at 330.

Similarly, while the text of an ordinance criminalizing public intoxication may not explicitly criminalize unhoused alcoholics, housed alcoholics can avoid violating the statute while unhoused alcoholics cannot. What the challenged laws have in common is that they criminalize actions that are unavoidable for individuals holding specific identities, or "statuses."[69]

For example, in *Jones v. City of Los Angeles*, unhoused plaintiffs sued the City of Los Angeles challenging enforcement of an ordinance criminalizing "sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within Los Angeles's city limits."[70] In *Martin v. City of Boise*, unhoused plaintiffs challenged two ordinances.[71] The first ordinance made it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time."[72] The second banned "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof."[73]

In both cases, the Ninth Circuit held that the ordinances were unconstitutional.[74] The court reasoned in both cases that just as the State may not criminalize unhoused "status," it may not criminalize conduct that is an "unavoidable consequence" of being unhoused.[75] That is, if conduct is the "unavoidable consequence" of—or is effectively inextricably tied to—one's "status," criminalizing that conduct effectively criminalizes "status" in violation of the Eighth Amendment. Although these Ninth Circuit cases are not binding Supreme Court precedent, they illustrate how modern courts have interpreted the *Robinson* doctrine.

B. Criminalizing Activity that is Inextricably Tied to Race Constructively Criminalizes People of Color's Racial "Status."

There are many policies and legal standards that criminalize conduct as a pretext for unconstitutionally criminalizing "status." This section will examine conduct and behavior that police officers frequently cite to establish "reasonable suspicion," such as "flight" and "presence in high crime neighborhoods." Because these behaviors are often inextricably tied to racial "status," using them to build criminal cases unconstitutionally criminalizes conduct that is inextricably tied to racial "status." This section will also

69. *Id.*

70. 444 F.3d 1118, 1120 (9th Cir. 2006).

71. 902 F.3d 1031, 1035 (9th Cir. 2018), opinion amended and superseded on denial of reh'g, 920 F.3d 584 (9th Cir. 2019).

72. *Id.*

73. *Id.*

74. *Jones*, 444 F.3d at 1132; *Martin*, 902 F.3d at 1031.

75. *Id.*

analyze the "consent" search doctrine and argue that these searches are not constructively consensual given the fraught relationship between law enforcement and communities of color. Finally, this section will analyze the *Mendenhall* seizure standard and argue that it does not account for subjective racial experiences, thus constructively criminalizing racial "status."

1. The "reasonable suspicion" standard indirectly criminalizes racial "status."

The "reasonable suspicion" legal standard, discussed in Part I of this paper in the context of racial profiling, directly criminalizes people of color based on their racial "status." However, the reasonable suspicion standard is also used to indirectly criminalize people of color based on racial "status." As discussed in the previous section, race is sometimes the "but-for" cause of police officers' suspicion. Other times, officers may articulate conduct or behavior they perceive as suspicious to establish reasonable suspicion. If this behavior or conduct is the "unavoidable consequence" of race, criminalizing that conduct constructively criminalizes their racial "status."

For example, in *Illinois v. Wardlow*, the Supreme Court held that presence in a "high crime neighborhood" coupled with flight from police officers constituted grounds for reasonable suspicion.[76] Each of these two factors will be analyzed separately. First, "presence in a high crime neighborhood" could arguably be the "unavoidable consequence" of "status" as a racialized minority. People of color are overrepresented in neighborhoods with high poverty rates due to a variety of socioeconomic factors and notably, structural racism. According to the *National Equity Atlas*, in 2020, 14.3% of people of color lived in high-poverty neighborhoods compared to just 3.9% of the White population.[77] Under-resourced neighborhoods typically have higher crime rates.[78] Thus, people of color are more likely to be "present in a high crime neighborhood." This means that presence in high crime neighborhoods is often inextricably tied to racial "status." If this mere presence is the basis for establishing reasonable suspicion, people of color may be criminalized based on racial "status."

Second, "flight" from police is more common among Black individuals, because of the Black community's fraught relationship with the police.[79] Acknowledging this fact, the Massachusetts Supreme Judicial Court concluded in *Commonwealth v. Warren*, that a suspect's unprovoked flight

76. 528 U.S. 119, 124 (2000).

77. *Percent living in high-poverty neighborhoods by race/ethnicity: United States; Year: 2020*, NAT'L EQUITY ATLAS, https://nationalequityatlas.org/indicators/Neighborhood_poverty (last visited Apr. 2, 2023).

78. *Neighborhoods and Violent Crime*, U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html (last visited Mar. 31, 2023).

79. Commonwealth v. Warren, 58 N.E.3d 333, 337 (Mass. 2016).

was not sufficient to justify police officers' stop of the plaintiff.[80] "Flight" from police officers is seemingly inextricably tied to racial "status." If flight is the basis for establishing reasonable suspicion, people of color may again be criminalized based on racial "status."

2. Facially "objective" standards indirectly criminalize racial "status."

a. "Consent" searches indirectly criminalize racial "status."

Another way in which law enforcement officials may routinely circumvent people of color's Fourth Amendment protections against warrantless searches is by using the "consent" doctrine. This doctrine provides that if an individual "consents" to being searched, a warrant is not needed.[81] Specifically, in *Schneckloth v. Bustamonte*, the Supreme Court held that a warrantless search pursuant to consent is valid if the consent was "voluntarily granted" and invalid if it was the "product of coercion."[82] In making this determination, the "totality of the circumstances" is supposed to be considered.[83] However, "consent" is a complicated concept because of the charged relationship between police officers and communities of color.

In Beau Tremitiere's article, *The Fallacy of a Colorblind Consent Search Doctrine*, Tremitiere discusses the coercive effects of distrust and fear on people of color interacting with police officers.[84] Specifically, Tremitiere pointed out that "whether operating through fear or

calculated risk, such pervasive distrust has influenced the manner in which persons of color relate to and engage with law enforcement."[85] This distrust may sometimes result in resistance to police commands or flight, or may have the opposite effect—"inducing compliance with police requests that, absent the coercive effect of the perceived danger, would otherwise be refused."[86] If people of color are influenced by distrust and fear, their "consent" to warrantless searches should not be considered valid under *Schneckloth*, as it is necessarily the "product of coercion."[87]

However, Tremitiere noted that courts have increasingly framed the coercion inquiry as "whether it was objectively reasonable for an officer to believe that consent was voluntary given the totality of the circumstances known to the officer at the time of the request," meaning that "heightened

80. *Id.*
81. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).
82. *Id.*
83. *Id.*
84. Beau C. Tremitiere, *The Fallacy of a Colorblind Search Doctrine*, 112 NW. L. REV. 527, 527 (2017).
85. *Id.* at 531.
86. *Id.*
87. 412 U.S. at 227.

distrust may only be considered if a reasonable officer in the position of the arresting officer would have known about it."[88] This makes it more challenging for consent searches to be invalidated under *Schneckloth*, since police officers can claim they were unaware of heightened distrust, and more importantly, that the "reasonable officer" would not have been aware of it. While this legal standard may facially appear to protect against coercion, in effect it does not. Distrust and fear based on the fraught relationship between police officers and communities of color has not been explicitly found by courts to amount to coercion, so the "consent" search doctrine stands.

This standard may seem fair because it is considered "objective." However, like many "objective" standards, it presumes a dynamic that is not consistent among individuals with varying identities and lived experiences. Presuming that people of color will feel free to decline when a police officer asks to search them presumes that they feel safe in doing so. It fails to account for the disproportionate violence and police brutality perpetrated against the Black community and communities of color more generally. According to *Mapping Police Violence*, a nonprofit organization that tracks police violence, Black people are currently 2.9 times more likely to be killed by police in the United States than are their White counterparts.[89] This should be a consideration in the "consent" search analysis, but it simply is not, leaving people of color vulnerable to higher rates of criminalization resulting from these warrantless searches. This is an example of criminalization of conduct that is inextricably tied to status – criminalizing people of color for their behavior in engaging with police officers that is inherently tied to their racial "status" constructively criminalizes their "status" as people of color.

b. The Mendenhall seizure standard indirectly criminalizes racial "status."

Similarly, under *United States v. Mendenhall*, "a person is 'seized' only when, by means of physical force or a show of authority, [their] freedom of movement is restrained."[90] The legal test employed to determine whether an individual has been "seized" within the Fourth Amendment's meaning is an "objective" one, but perhaps should be subjective given that identity—such as race—plays an important role in individuals' comfort around police officers and specifically individuals' comfort in disobeying police officers' requests and demands.

Under *Mendenhall*, the legal test used to determine whether an individual has been seized is whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that [they

88. *Id.*

89. MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/ (last updated Oct. 15, 2023).

90. United States v. Mendenhall, 446 U.S. 544, 553 (1980).

were] not free to leave."[91] However, as Edwin Butterfoss noted in *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, this standard affords police officers substantial leeway in questioning individuals without providing an objective justification for doing so.[92] Butterfoss noted that the judiciary has constructed "a highly artificial 'reasonable person,' who is much more assertive in encounters with police officers than is the average citizen."[93] Coupling this unrealistically assertive "reasonable person" standard with the pervasiveness of police brutality perpetrated against communities of color, it seems fundamentally unreasonable to expect people of color to assertively terminate interactions with police officers. There is an inherent power dynamic at play that remains absent from this "reasonable person" inquiry. Simply put, if people of color fear for their lives in the presence of police officers, they likely will not "feel free" to terminate police encounters in the same way that others might. Thus, the "objective" test for determining whether a person is seized is still inherently subjective, as it relies on unrealistic assumptions about identity and community relationships with policing. As with "consent" searches, expecting people of color to terminate police encounters and criminalizing them when they do not criminalizes conduct that is inextricably tied to racial "status."

III. Recriminalization of "Felons" Consitutes Criminalization Based On Criminal "Status" and Disproportionately Impacts People of Color.

As discussed throughout this paper, people of color are disproportionately stopped, searched, seized, arrested and convicted. As if it were not enough to directly criminalize people of color using racial profiling and indirectly criminalizing them based on conduct that is inextricably tied to racial "status," people of color are also often recriminalized after they have already been convicted and served their sentences. There are many laws that specifically target people who have been convicted of felonies, or "felons." These laws disproportionately harm people of color, who are more likely to be convicted of felonies in the first place.

This brief section will first establish that laws criminalizing "felons" unconstitutionally criminalize "status:" "felon" is a "status" within the *Robinson* doctrine definition articulated early in this paper. "Felon," like "person of color," is an "ongoing state of being," placing it within the *Robinson* doctrine's definition of "status." Next, this section will argue that since people of color are disproportionately criminalized, placing restrictions

91. *Id.* at 554.

92. Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 439–40 (1988).

93. *Id.*

on felons recriminalizes them. While this section will not argue that criminalization of felons directly criminalizes racial "status," it will argue that criminalization of felons directly criminalizes the "status" of "felon," which is a "status" that people of color are disproportionately more likely to hold.

A. "Felon In Possession" Laws Criminalize "Felon" "Status."

While laws like "felon in possession" laws are facially neutral, they disparately impact communities of color. First, it is important to note that "felons" are disproportionately Black.[94] In fact, in 1923, just before the federal "felon in possession" law took effect, Black people comprised only 10 percent of the United States population, but 31% of the national prison population.[95] That same year, White people comprised almost 90% of the general population, but only 68% of the national prison population. Proportionately, that means Black people were (and still are) overrepresented in the prison population while White people were (and are) underrepresented relative to their proportion in the genral population.

The "felon in possession" federal law has two elements: that the individual first possess a firearm, and second that they are a "felon." Since Black people in the United States are more likely to be convicted of a felony than their White counterparts, one of the two elements of this law disparately impacts Black communities. As if that were not enough, "felon in possession" laws are seemingly also enforced unequally. In 2015, 51% of individuals convicted under the federal "felon in possession" law were Black, while only 26.1% were White.[96]

B. Disenfranchising "Felons" Criminalizes "Felon" "Status."

"Felons" are also continuously punished based on "status" by being deprived of their right to vote. Notably, the right to vote was a centerpiece of the Reconstruction Amendments, designed to extend civil rights and liberties to formally disenfranchised enslaved Black Americans. Historian Eric Foner explained how, "the Reconstruction Amendments transformed the Constitution from a document primarily concerned with federal-state relations and the rights of property into a vehicle through which members of vulnerable minorities could stake a claim to freedom and protection against misconduct by all levels of government."[97] However, one of those

94. Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 157–158 (2018).

95. *Id.*

96. *Id.*

97. ERIC FONER, GIVE ME LIBERTY!: AN AMERICAN HISTORY VOL. II 535 (2nd ed. 2008).

fundamental rights guaranteed during the Reconstruction era has been stripped away from many Black individuals as a result of their disproportionate felony convictions.[98] Disallowing Black felons from voting is just another way of punishing individuals based on "status." While here, the "status" being punished is "felon," the Black community is disproportionately harmed by the criminalization of "felon" "status."

"Felon in possession" laws and "felon" disenfranchisement are just two examples of the ways in which American law continuously punishes "felons" who have already served their sentences for their convictions. An analysis of unconstitutional criminalization of "status" would be incomplete without noting the disparate impact of recriminalizing "felons" on communities of color, specifically the Black community.

CONCLUSION

Eighth Amendment jurisprudence proscribes punishing individuals based on "status" rather than "conduct." In 1962, the Supreme Court held that while individuals may be punished for actions they take, the Eighth Amendment prohibits criminalizing individuals based on *who they are*.[99] Using the Court's language and reasoning from *Robinson*, this paper has defined "status" as an "ongoing state of being" and "not an act."

Racial profiling directly criminalizes racial "status," because when racial profiling occurs, race is the "but-for" cause of people of color being suspected of committing crimes and subsequently being arrested and/or convicted. Three types of racial profiling that unconstitutionally criminalize racial status are *Terry* stops, pretextual traffic stops, and border searches.

Additionally, while race clearly qualifies as "status" and not "conduct," criminalizing conduct that is inextricably tied to "status" constructively criminalizes "status." The "reasonable suspicion" standard and other facially "objective" legal standards such as the "consent" search doctrine and the *Mendenhall* seizure standard indirectly criminalize racial "status" by criminalizing conduct that is inextricably tied to racial "status."

Finally, "felon in possession" laws and the disenfranchisement of "felons" recriminalizes people who have been convicted of felonies based on their "felon" status. These laws disproportionately harm people of color after they have already been convicted and served their sentences.

98. Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 361–62 (2012).

99. *Robinson*, 370 U.S. at 666–67.

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