Chicago-Kent Law Review

Volume 76
Issue 1 *Symposium on the Second Amendment: Fresh Looks*

Article 15

October 2000

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WHY SHOULD GANG MEMBERSHIP BE A "STATUS" SYMBOL? STATUS CRIMES AND *CITY OF CHICAGO V. YOUKHANA*

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INTRODUCTION

The Eighth Amendment commands that "[e]xcessive bail shall not be required . . . nor cruel and unusual punishment inflicted."[1] This principle, adopted with slight modification from the 1688 English Declaration of Rights,[2] although initially used in the United States to prohibit certain types of barbaric punishment, also acted as a judicial check on the legislature's "unfettered power to prescribe punishments for crimes."[3]

One such check the Supreme Court placed on state legislatures was to declare it unconstitutional to enact a law that criminalizes a party's status. In *Robinson v. California*,[4] the Court struck down a state statute making it a crime to be addicted to narcotics in California.[5] While *Robinson* prohibits the criminalization of mere status, it does not invalidate statutes that criminalize acts relating to status. In *Powell v. Texas*,[6] the Court held that, although the

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1. U.S. CONST. amend. VIII.

2. *See* Juliet Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the* Robinson *Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 306 (1996). James Madison replaced the English "ought not" with "shall not." *Id.*

3. *See id.* at 307.

4. 370 U.S. 660 (1962).

5. The Court held that "a state law which imprisons a person thus afflicted as a criminal, even though he has 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 Fourteenth Amendment." *Id.* at 667.

6. 392 U.S. 514 (1968).

defendant could not be prosecuted for his status as an alcoholic, he could be punished for the act of appearing drunk in a public place in violation of the Texas Penal Code.[7] While the Court has provided this status/act distinction for determining culpable conduct, it has left courts to grapple with the question of determining whether a particular status falls under the holding of *Robinson*.

In *City of Chicago v. Youkhana*,[8] the Illinois Court of Appeals struck down a city ordinance making it illegal for gang members to loiter.[9] The court found the statute both void for vagueness and violative of the Eighth Amendment's Cruel and Unusual Clause, because it criminalized the status of being a gang member.[10] It is important to note, however, that the Supreme Courts of both Illinois and the United States found the ordinance to be void for vagueness, thereby not reaching the question of whether the gang-loitering ordinance unconstitutionally criminalized a person's status in violation of the Eighth Amendment.[11]

Therefore, because the city will undoubtedly draft another ordinance, the status question will again be raised and ultimately need to be resolved. Accordingly, in order to establish its value as precedent, it is necessary to review the Illinois Appellate Court's finding that the gang-loitering ordinance in *Youkhana* violated the Cruel and Unusual Punishment Clause.

7. *See id.* at 532.

8. 660 N.E.2d 34 (Ill. App. Ct. 1995), *aff'd* City of Chicago v. Morales, 687 N.E.2d 53, 59 (Ill. 1997), *aff'd* City of Chicago v. Morales, 527 U.S. 41 (1999). The Illinois Supreme Court consolidated over 70 appeals, including *Youkhana*, under the name *Morales*. *See* 687 N.E.2d at 57.

9. *See* 660 N.E.2d at 36. The gang-loitering ordinance provides in pertinent part:

> (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.
>
> (b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.
>
> (c) As used in this Section:
>
> 'Loiter' means to remain in any one place with no apparent purpose.
>
> 'Criminal Street Gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having a one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.
>
> 'Public place' means the public way and any other location open to the public, whether publicly or privately owned.

Id. (quoting CHICAGO MUNICIPAL CODE § 8-4-015 (1992)).

10. *See id.* at 41-42.

11. *See Morales*, 687 N.E.2d at 59; *Morales*, 527 U.S. at 50-51.

In concluding that prosecution of the defendants in *Youkhana* violated the Eighth Amendment by criminalizing status, the Illinois Court of Appeals failed to apply the two-part test mandated by the United States Supreme Court: first, whether a particular status falls under the holding in *Robinson*; and second, whether such party's conduct is culpable under *Powell*. Although the Supreme Court has not articulated an exact test for determining whether these elements are satisfied, a review of *Robinson* and *Powell*, in addition to other status-related cases, reveals several factors that form the rubric under which *Youkhana* should be analyzed.

Part I of this Comment outlines the background necessary to develop the factors needed to analyze the question of gang-membership status in *Youkhana*. Part II considers the analysis employed by the Illinois Appellate Court in *Youkhana*. Finally, Part III proposes a model by which to properly analyze the question of gang-member status.

I. DEVELOPMENT OF FACTORS USED IN ANALYSIS

A. Status Crimes and Vagrancy

Due to the labor shortage caused by the Black Plague in England during the fourteenth century, vagrancy laws arose in order to prevent laborers from migrating from their respective feudal estates. This resulted in a fixed workforce and low wages.[12] As the feudal system crumbled, these vagrancy laws shifted from controlling labor to controlling the potentially criminal behavior of those "persons deemed to be suspicious or vaguely undesirable," including the poor and unemployed.[13] However, a differentiation between criminal and noncriminal vagrancy developed, and by 1744, while the status of a vagrant whose purpose was to engage in criminal conduct was illegal, the mere status of being poor was not.[14] Unlike England, American vagrancy laws that survived the end of English rule were used to punish both criminal and noncriminal undesirable behavior, such as loitering and being a vagabond.[15] Such vagrant or vagabond status amounted to a status crime because the party was not guilty of an

12. *See* Joel D. Berg, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 CHI.-KENT L. REV. 461, 462-63 (1993); *see also* Smith, *supra* note 2, at 301.

13. Smith, *supra* note 2, at 301.

14. *See* Berg, *supra* note 12, at 463-64.

15. *See id.*

illegal act, but merely an illegal status.[16]

Eventually, however, attitudes toward the poor and unemployed changed, and, in 1941, the Supreme Court stated: "We do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence,'" and that, "poverty and immorality are not synonymous."[17] Another blow to vagrancy laws came when the Supreme Court in *Papachristou v. City of Jacksonville*[18] struck down a Jacksonville, Florida vagrancy ordinance.[19] The Court held that, aside from being unconstitutionally vague, the ordinance also criminalized innocent behavior such as nightwalking and loafing.[20] Before *Papachristou* was decided, many lower state and federal courts were striking down vagrancy laws under a number of theories, including violation of the Eighth Amendment for punishing "economic status."[21] Therefore, just as had happened in England, American courts were now making a distinction between a party's status that, by definition, is criminal in nature and status that is innocent, such as being poor or strolling at night.

This criminal/noncriminal distinction is important in formulating an analytical model by which to analyze the gang-member status question. Thus, one factor to consider in determining whether a party's status would fall under the holding in *Robinson*, is the extent to which illegality or illegal purpose is built into the very definition of the party's status.[22]

16. *See* Smith, *supra* note 2, at 302.

17. Edwards v. California, 314 U.S. 160, 177 (1941).

18. 405 U.S. 156 (1972).

19. 405 U.S. at 172. The stuck-down Jacksonville ordinance provided:

> Rogues and Vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common nightwalkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton, and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gambling houses, or places where alcoholic beverages are sold or served, persons able to work but habitually aliving upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court, shall be punished as provided for Class D offenses.

Id. at 156-57 n.1 (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965)).

20. *See id.* at 170-71.

21. Smith, *supra* note 2, at 303 n.58.

22. On a continuum, "innocent" status at one end would weigh in favor of inclusion under *Robinson*, whereas "criminal" status at the other end would weigh against.

B. *Status, the Eighth Amendment, and* Robinson

In *Robinson*, the Supreme Court struck down an ordinance making it illegal to be addicted to narcotics in California.[23] There, the defendant was arrested for violating an ordinance prohibiting drug addiction after a police officer noticed "scar tissue and discoloration on the inside" of the defendant's right arm and "what appeared to be numerous needle marks" and a scab on his left arm three inches below the elbow.[24] The trial judge instructed the jury that they could convict if they found either that the defendant had the status of being addicted to drugs or had actually used drugs.[25] In reversing the conviction, the Court held that because the ordinance required no illegal act but only the status of being an addict, it violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[26]

It is important to note that the Court's reasoning lay in its finding that drug addiction is a disease that can be acquired innocently or involuntarily. Therefore, the crime could be committed without moral fault: "It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease."[27] The Court further noted, "[i]n this Court counsel for the state recognized that narcotic addiction is an illness.[28] Indeed, it is apparently an illness which may be contracted innocently or

23. *See* 370 U.S. at 667. The ordinance in question provided:

> No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail.

Id. at 661 (quoting CALIFORNIA HEALTH AND SAFETY CODE § 11721).

24. *Id.*

25. *See id.* at 662-63.

26. *See id.* at 666.

27. *Id.*

28. The Court stated in a footnote:

> In its brief the appellee stated: "Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic." Thirty-seven years ago this Court recognized that persons addicted to narcotics "are diseased and proper subjects for [medical treatment]."

Id. at 667 n.8 (citation omitted).

involuntarily."[29]

In his concurrence, Justice Douglas emphasized that not only is drug addiction a disease, but also that "[t]he addict is under compulsions not capable of management without outside help."[30] Therefore, "[w]e would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick."[31]

Thus, where a status is recognized as a sickness or disease, acquired innocently or involuntarily, and incapable of management without outside help, these factors weigh heavily in favor of inclusion under *Robinson.* Conversely, factors weighing against inclusion include voluntarily or recklessly acquiring a status not recognized as a disease and capable of change without outside help. Again, the notion of moral blameworthiness inherent in the status comes into play.

C. *Actus Reus, the Eighth Amendment, and* Powell

In *Powell,* the Court limited *Robinson* by holding that, although status cannot be criminalized, acts symptomatic of that status may be.[32] There, the defendant was arrested for appearing drunk in public in violation of the Texas Penal Code.[33] Although the defendant argued that his status as an alcoholic was being unconstitutionally punished because he was compelled to appear in public as a result of his drinking, a plurality of the Court rejected that argument, finding instead that *Robinson* does not extend to acts.

> The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus.[34]

The Court refused to accept the argument that the act of appearing in public while intoxicated was involuntary given the state

29. *Id.* at 666-67.

30. *Id.* at 668-72.

31. *Id.* at 678.

32. Powell v. Texas, 392 U.S. 514, 517 (1968).

33. *See id.* at 517. The code provides, "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." *Id.* at 516 (quoting VERNON'S ANN. TEXAS PENAL CODE art. 477 (1952)).

34. *Id.* at 533.

of disagreement among experts regarding the nature of alcoholism.[35] Indeed, expert testimony merely established that the defendant had a "'compulsion,' which was 'not completely overpowering,' but which was 'an exceedingly strong influence,'" to appear in public as a result of his alcoholism.[36] This, the Court found, was not enough on which to base a sweeping constitutional pronouncement that acts related to status are not subject to punishment.[37]

Furthermore, a key factor for the development of our analytical model is that the Court found the prohibited conduct to be, "public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community."[38] Therefore, another factor is the nature of the conduct undertaken by the party whose status is in question.

While Justice White's concurrence agreed with the plurality[39] that the record did not establish the involuntary nature of the defendant's conduct, he disagreed with drawing a line between involuntary conduct and status. Doing so "is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion."[40] In determining whether an act is involuntary, however, one must also consider factors such as whether the party knew of their condition and failed to take appropriate precautions.[41] Therefore, another factor to be weighed in the model is the extent to which conduct stemming from the status may be deterred. The four dissenting Justices, while disagreeing that the defendant's conduct was voluntary, agreed with Justice White's focus on the principle in

35. *See id.* at 520.

36. *Id.* at 518.

37. *See id.* at 536.

38. *Id.* at 532.

39. *See id.* at 532-33. Justice Marshall announced the judgment of the Court and wrote an opinion in which Chief Justice Warren, Justice Black, and Justice Harlan joined. Justice Black submitted a concurrence, in which Justice Harlan joined. Justice White concurred only in the judgment, and Justice Fortas wrote a dissenting opinion joined by Justices Douglas, Brennan, and Stewart.

40. *Id.* at 548 (White, J., concurring).

41. *See id.* at 550. As Justice White stated:

> I cannot say that the chronic alcoholic who proves his disease is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who would be punished for driving a car but not for his disease.

Id.

Robinson that, "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[42] While the plurality never explicitly rejected the notion that involuntary conduct stemming from status can be proven, it found that the record failed to establish such involuntary conduct at trial.[43]

D. Subsequent Interpretations of Robinson *and* Powell

Picking up on these principles, a federal court in Florida held that conduct inextricably related to involuntary status cannot be punished.[44] There, plaintiffs brought a class action on behalf of over 6,000 homeless persons to enjoin the City of Miami from arresting and harassing them for carrying on such essential life functions as sleeping and bathing in public areas.[45] Expert testimony established that homelessness is an involuntary status because people rarely choose to become homeless.[46] Furthermore, evidence presented established that the homeless had no choice but to perform certain life-sustaining activities in public due to lack of shelter space in Miami.[47] The court held that because the homeless were engaged in innocent conduct not harmful to themselves or others, and such conduct could not be severed from their status, the defendant's conduct amounted to a violation of the Eighth Amendment's ban on cruel and unusual punishment.[48] This conclusion makes sense because conduct so connected to status ceases to be conduct as such, and instead becomes implicit in the status itself. Therefore, in analyzing the status question in *Youkhana*, another factor to consider is not only the extent to which the conduct is innocent or voluntary, but also whether the conduct merges with the status.

A federal court in Illinois focused on the nature of the conduct being performed by the parties having a particular status, as the Court

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

43. *See id.* at 521-22. Justice Marshall stated:

> In the first place, the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide ranging new constitutional principle. We know very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself.

Id.

44. Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

45. *See id.* at 1553-54.

46. *See id.* at 1563.

47. *See id.*

48. *See id.* at 1565.

did in *Powell.* In *Farber v. Rockford,*[49] the court struck down an ordinance[50] prohibiting parties with a particular status from conducting otherwise innocent activities.[51] The court distinguished *Powell,* noting that appearing drunk in public was a harmful activity, unlike innocuous activities such as loitering, strolling, or appearing in public places where liquor is sold.[52] Therefore, in analyzing not only status, but also the conduct that results therefrom, it is important to consider the nature of the activity undertaken. Thus, even if the nature of the party's status is criminal—weighing against inclusion under *Robinson*—the innocent or harmful nature of the conduct will help tip the scale in either direction.

II. THE COURT'S APPLICATION OF *ROBINSON* AND *POWELL* IN *YOUKHANA*

Although the court in *Youkhana* found that the gang-loitering ordinance criminalized the status of being a gang member, it failed to analyze, given the factors developed in Part I, whether "gang member" qualifies as a status under *Robinson.* Furthermore, the court did not consider whether the gang members' conduct is nevertheless punishable under *Powell.* The court merely reiterated the Supreme Court's ruling that status cannot be punished without some actus reus.[53] The court also focused on *Farber* for the proposition that innocent behavior connected to status may not be punished.[54]

III. A PROPOSED MODEL FOR ANALYZING GANG STATUS

I propose the following model, incorporating the factors developed above, as a methodology for analyzing whether being a gang member should be considered a status that falls under the

49. 407 F. Supp. 529 (N.D. Ill. 1975).

50. The questioned ordinance provided:

> It shall be unlawful for any habitual drunkard, any person known to be a prostitute, or any person who aids or abets prostitution, or for any person previously convicted of a felony, of prostitution, or of aiding and abetting prostitution, to assemble or congregate with other persons of any of the foregoing classes in or upon the public ways or other public places in the city or to loaf or loiter in or about or frequent the premises of any place where intoxicating liquors are sold.

MUNICIPAL CODE OF THE CITY OF CHICAGO § 192-6.

51. *See id.* at 533.

52. *See id.*

53. *See* City of Chicago v. Youkhana, 660 N.E.2d 34, 41-42 (Ill. App. Ct. 1995).

54. *See id.* at 42.

holding in *Robinson*:

> (A) No state statute may criminalize a party's status or condition under the Eighth Amendment, thereby subjecting the party to arrest. Factors the court should weigh in determining whether a party's status or condition is entitled to such protection include:
>
> (1) extent to which the status or condition is recognized by the medical or other relevant community as a sickness or disease;
>
> (2) extent to which offering party shows, through use of expert testimony or otherwise, that the status or condition is voluntary;
>
> (3) extent to which party is powerless to change status or condition without outside assistance;
>
> (4) where the status or condition was acquired voluntarily, the legality of the purpose for which the status or condition was acquired; and
>
> (5) extent to which the status or condition may be deterred by the criminal law.
>
> (B) If a party's status qualifies under Section (A), the party's acts or conduct may be culpable under state criminal law. Factors the court should weigh in determining culpable conduct include:
>
> (1) extent to which the act or conduct is deemed harmful to society for health, safety, moral, or aesthetic reasons;
>
> (2) extent to which the act or conduct is inextricably related to the status or condition;
>
> (3) context of the act or conduct at the time of arrest; and
>
> (4) extent to which such act or conduct may be deterred by the criminal law.

Beginning with section (A) of the proposed model, while gang membership may be considered a disease or illness in the colloquial sense, it is unlikely that the medical community would consider it as such. Therefore, this factor would weigh against inclusion under *Robinson*. A more difficult question, however, concerns the extent to which gang membership is voluntary. In *Youkhana*, no expert testimony was given regarding the voluntary nature of gang membership. Indeed, there is disagreement over whether gangs are formed as the result of social and economic factors that leave the person with no other viable option, or whether formation is the result of individual choice.[55] Because there is a presumption in criminal law

55. *See, e.g.*, Thomas L. Doerr, Jr., *A Failed Attempt to Take Back Our Streets—A Constitutional Triumph for Gangs:* City of Chicago v. Morales, 82 MARQ. L. REV. 447, 467 nn.140-41 (citing JOHN HAGEEDORN & PERRY MACON, PEOPLE AND FOLKS, GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY 112-13 (1988)).

that social and economic factors do not negate voluntary choice, it would be difficult to prove that joining a gang is involuntary. Related to this question is the extent to which the status can be changed. Again, expert testimony would need to be introduced, as in *Pottinger*, to show whether, like homelessness, the individual is powerless to change without outside help.

Focusing next on the criminal/noncriminal nature of the status, the gang-loitering ordinance[56] states that a "criminal street gang" has "as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3)."[57] Therefore, by definition, the status of gang member is criminal in nature. Such criminal status, as opposed to economic or other innocent status, weighs against inclusion. The ordinance further states that gangs undertake the "commission, attempted commission, or solicitation" of criminal offenses.[58] Arguably, gang membership is not a status at all, but rather a continual state of conspiracy to engage in illegal activity. Therefore, it is possible to equate gang membership to conduct.

Another factor to consider is the extent to which the status can be deterred. Gang membership is unlike homelessness or drug addiction because parties typically do not voluntarily become homeless or addicts. Because gang membership can be deterred by the criminal law, this factor weighs against inclusion under *Robinson.*

On first glance, gang membership appears to be a status acquired voluntarily, not the result of sickness or disease, and criminal in nature. In this way, *Youkhana* seems strongly distinguishable from other relevant cases, thus making the holding of *Robinson* inapplicable. It is possible, albeit unlikely, that testimony introduced at trial could establish that participating in a criminal gang is equivalent to suffering from drug addiction.

However, even if "gang member" is found to be a recognized status, the analysis must still continue under section (B) in order to satisfy the mandate in *Powell.* First, a defendant is punishable if he partakes in conduct deemed to be harmful to society, such as public drunkenness. In hearings held on the subject of criminal street gangs in Chicago, the city determined that "the presence of gang members

56. Although the ordinance was struck down by the court, the definitions incorporated therein were not disputed, and therefore I rely on them here.

57. CHICAGO MUNICIPAL CODE § 8-4-015 (1992).

58. *Id.*

in public areas is intimidating to law-abiding citizens," and that "gangs operate by establishing control over identifiable areas, by loitering and intimidating others from entering those areas."[59] These hearings further found that "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area."[60] Clearly, this conduct is analogous to the defendant's conduct in *Powell*, which the Court "deemed harmful to society for health, safety, moral, or esthetic reasons."[61] Thus, such conduct would be punishable.

Next, although such conduct may be inextricably tied to the status of being a gang member, this is quite distinguishable from a homeless person needing to sleep and bathe in public. Indeed, the criminal must do criminal acts in order to survive as a criminal, but this would hardly offer a justification for the conduct. Therefore, *Pottinger* is inapplicable here. However, under the factor (B)(3), it would be necessary to establish at trial whether such conduct was actually taking place at the time of arrest in order to satisfy the actus reus requirement.

Another factor the court must weigh is the extent to which the conduct may be deterred. As previously noted, Justice White argued in *Powell* that a party compelled to act as a result of their status should not be punished. There, however, neither Justice White nor the plurality was convinced that the defendant's behavior was so compelled, and therefore, it could be deterred. Furthermore, the extent to which it is feasible to guard against the conduct weighs into the equation.

Here, if the conduct by the gang members is voluntary, then it may be deterred by the criminal law. Therefore, absent expert testimony proving that gang membership is involuntary and its resulting conduct compelled, thus rendering deterrence ineffective, such conduct is punishable.

CONCLUSION

While this Comment lacks empirical data and therefore cannot establish whether gang status does in fact fall under the holding in *Robinson*, it does provide an analytical model that a court may use to determine whether such a finding of status is appropriate. While it

59. *Youkhana*, 660 N.E.2d at 35.
60. City of Chicago v. Morales, 527 U.S. 41, 46 (1999).
61. Powell v. Texas, 392 U.S. 514, 532 (1968).

appears that gang membership does not fall under *Robinson* and other relevant case law, evidence introduced at trial may prove otherwise.