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Revisiting Robinson: The Eighth Amendment as Constitutional Support for Theories of Criminal Responsibility

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REVISITING *ROBINSON*: THE EIGHTH AMENDMENT AS CONSTITUTIONAL SUPPORT FOR THEORIES OF CRIMINAL RESPONSIBILITY

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I. INTRODUCTION

Powell v. Texas[1] teaches us that the United States Supreme Court will not interject itself into theoretical debates regarding criminal responsibility via the Eighth Amendment[2] as it once had done in *Robinson v. California*.[3,4] Nevertheless, the Court has shown that it will interject itself into exactly this sort of debate when capital punishment is involved,[5] perhaps comforted by the fact that the discussion will go no further than the death penalty because "death is different."[6] Despite the Court's involvement in issues of capital punishment, since *Robinson* was decided there have been very few signs that the Court would even consider addressing the idea of a substantive Eighth Amendment outside of the death penalty context.[7]

In fact, the Court has said that the idea that the Eighth Amendment has a general substantive component is "elemental[ly] appeal[ling]," but cannot overcome the Court's increasing focus on the actual process of criminal proceedings.[8] If the possibilities of

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1. 392 U.S. 514 (1968).

2. U.S. CONST. amend. VIII reads, in relevant part, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. 370 U.S. 660 (1962).

4. David Robinson, Jr., *Powell v. Texas: The Case of the Intoxicated Shoeshine Man. Some Reflections a Generation Later by a Participant*, 26 AM. J. CRIM. L. 401, 437 (1999).

5. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (the mentally retarded cannot receive the death penalty); Thompson v. Oklahoma, 487 U.S. 815 (1988) (no child under 16 is eligible for the death penalty); Enmund v. Florida, 458 U.S. 782 (1982) (a non-triggerman who did not attempt or intend to kill cannot be put to death); Coker v. Georgia, 433 U.S. 584 (1977) (a rapist who does not murder his victim cannot be executed).

6. Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

7. *See*, Herrera v. Collins, 506 U.S. 390 (1993) (claims of actual innocence are not sufficient grounds for writ of habeas corpus); Harmelin v. Michigan, 501 U.S. 957 (1991). *But see*, Ingraham v. Wright, 430 U.S. 651 (1977) and *infra* text accompanying notes 62-77.

8. *Herrera*, 506 U.S. at 398 (holding that evidence of "innocence" or "guilt" must be reviewed in a judicial proceeding).

Robinson[9] are resurrected, the Court would not be able to dismiss these arguments with such little fanfare. Strengthening the substantive theory put forth in *Robinson* could affect various aspects of our current criminal law—which acts legislatures may choose to punish criminally; whether presumptions, both rebuttable and irrebutable, are constitutionally permissible; which of the Model Penal Code's mental states are constitutionally acceptable; whether strict liability offenses are constitutionally permissible; whether the felony-murder doctrine and the misdemeanor-manslaughter doctrine will withstand Eighth Amendment scrutiny; and whether some form of the insanity defense is constitutionally protected.

This article will attempt to meet the challenge set out in *Powell* by Justice Fortas, who wrote: "Our task is to determine whether the principles embodied in the Constitution of the United States place any limitations upon the circumstances under which punishment may be inflicted."[10] It will examine the possibilities of *Robinson* and show that *Powell* did not completely foreclose the constitutional theory with which *Robinson* tantalized scholars so many years ago. This paper will then explain why courts should intervene into theoretical debates over criminal responsibility and why the Eighth Amendment is a more appropriate instrument to use than the Due Process Clause.[11] It will describe how the Eighth Amendment should operate and suggest three methods for constitutionalizing that approach. Next, it will examine how the suggested approach would impact certain aspects of the current criminal law by discussing how the suggested approach would affect the use of presumptions and how the Model Penal Code's culpability standards could be utilized. Finally, it will address the concern that some form of the insanity defense would be constitutionally required[12] and examine how Idaho and Montana have addressed this issue under their respective state constitutions.

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9. For a description of the possibilities of *Robinson* see *infra* Part III.
10. Powell v. Texas, 392 U.S. 514, 565-66 (1968) (Fortas, J. dissenting).
11. U.S. CONST. amend. XIV, § 1 reads, in relevant part:
    All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
12. ... [A] form of the insanity defense would be made a constitutional requirement throughout the Nation, should the Court now hold it cruel and unusual to punish a person afflicted with any mental disease whenever his

II. TEMPTATION & UNFULFILLED PROMISE

A. Why Robinson *Was Promising*

In *Robinson*, the United States Supreme Court held that a state may not impose criminal punishment upon an addict for merely being an addict as the Eighth Amendment requires that some act must have been committed for the accused to be convicted.[13] The Eighth Amendment was violated not because of the punishment rendered, but because the "crime" was not deserving of punishment.[14] In other words, *Robinson* implied that legislatures could violate the Eighth Amendment in one of two ways: (1) by criminalizing certain conduct, or (2) by criminalizing non-conduct.

What made the *Robinson* decision so tempting to criminal law theorists was that it was widely regarded as an omen—the Court was about to define substantive criminal law more clearly, much in the same way as it had recently begun to do with criminal procedure.[15] Specifically, scholars believed that *Robinson* was the Court's first step toward holding that the Eighth Amendment prohibits the punishment of morally blameless offenders.[16] Additionally, given the Warren Court's then-recent expansion of the Due Process Clause,[17] there was some speculation that the Due Process Clause would be used to further the constitutionalization of retributive principles of criminal responsibility theory as well.[18] Finally, the Court's previous holding in *Lambert v. California*[19]—that punishment resulting from insufficient notice of an affirmative duty to register as a felon violated Due Process[20]—gave scholars another reason to believe that a relationship between the Constitution and substantive criminal law was about to develop.[21]

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conduct was part of the pattern of his disease and occasioned by a compulsion symptomatic of the disease.

Powell, 392 U.S. at 545 (1968) (Black, J. dissenting).

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

14. *Id.*

15. Joshua Dressler, Kent Greenawalt, *Criminal Responsibility, and the Supreme Court: How a Moderate Scholar Can Appear Immoderate Thirty Years Later*, 74 NOTRE DAME L. REV. 1507, 1509 (June, 1999).

16. *Id.* at 1510.

17. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

18. Dressler, *supra* note 15, at 1527.

19. 355 U.S. 225 (1957).

20. *Id.* at 227.

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

The end result, of course, would be that a morally blameless offender could not be criminally punished at all.[22] Therefore, society would be forced to find another way to handle the juvenile, mentally ill, mentally retarded, and/or chronically addicted offenders who occupied, and continue to occupy, much of the Court's time and much of the correctional system's space. The ultimate goal of this anticipated reconstruction was to create a "more human, moral, and altogether sounder substantive penal law."[23]

B. Unfulfilled Promise

These lofty goals, however, remain unfulfilled. It is widely accepted that *Powell* foreclosed what could have been a fascinating line of constitutional jurisprudence merely six years after *Robinson* was decided.[24] Accordingly, most scholars believe *Robinson* has little practical importance.[25] As David Robinson, a participant in *Powell*,[26] wrote:

> The *Robinson* decision could plausibly have been seen as a vital opening toward establishing lack of self-control as a constitutional bar to punishment. But not for long. Just a half dozen years later the Court closed the door, holding in *Powell v. Texas* that it was not cruel and unusual punishment to convict an alcoholic for the crime of public drunkenness.[27]

Since *Lambert* and *Robinson*, the Court has not come close to finding that the Eighth Amendment requires an offender to commit a voluntary act before he or she may be punished.[28] Modern scholarly literature largely ignores the possibilities of *Robinson*[29] and seems to be content debating the Eighth Amendment's theoretical possibilities in the capital punishment context.

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22. *Id.* at 1283.
23. *Id.* at 1270.
24. Robinson, Jr., *supra* note 4, at 435.
25. *Id.*
26. Mr. Robinson argued the case for Texas in front of the U.S. Supreme Court.
27. Robinson, Jr., *supra* note 4, at 436.
28. *Id. But see*, Ingraham v. Wright, 430 U.S. 651 (1977) and text accompanying footnotes 62-77.
29. Bilionis, *supra* note 21, at 1299.

Perhaps one reason for this widespread conclusion is the Eighth Amendment's popularly accepted history.[30] Although the extent of the Framers' intentions is often debated, one thing scholars agree upon is that the Eighth Amendment was intended to prohibit certain draconian methods of punishment.[31] It is, however, far from agreed upon that the Framers intended that certain moral theories of punishment be adopted over others, if at all.[32] The promises of *Robinson*, therefore, were discarded with little fanfare.

III. POSSIBILITIES OF *ROBINSON*

As discussed previously, the *Robinson* Court held that the Eighth Amendment is violated when a state imprisons an individual for a status offense that does not require the state to prove a specific act.[33] If the case is to have any meaningful precedential value, one must engage in a little bit of vote-counting. Only eight Justices participated in the case and the plurality opinion was signed by only four Justices. Of the two concurring opinions, one focused on the *actus reus* requirement,[34] and the other was concerned with the status prong.[35]

Since each prong received the assent of five justices, *Robinson* can be read to mandate two requirements. First, although the proposition may seem fairly obvious, it can be inferred that the Eighth Amendment requires an *actus reus* in order to impose punishment. Second, legislatures cannot criminalize "status" offenses such as illness or mental deficiency. Each requirement should be examined separately in order to fully realize what *Robinson* stands for and where it could lead us.

Regarding the *actus reus* prong, perhaps the aspect of Robinson's conviction that most disturbed the plurality was the fact that California did not actually have to prove that he had used,

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30. The Supreme Court has also acknowledged a second, theoretical history that is lesser-known, but on which the logic of *Robinson* relies. *See* notes 62-72.

31. Dressler, *supra* note 15, at 1516. *But see*, Trop v. Dulles, 356 U.S. 86 (1958); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Weems v. U.S., 217 U.S. 349 (1910).

32. Dressler, *supra* note 15, at 1516.

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

34. *Id.* at 679 (Harlan, J., concurring).

35. "Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime." *Id.* at 676 (Douglas, J., concurring).

possessed, or attempted to possess narcotics while in the state.[36] The trial judge even instructed the jury to base their verdict on whether they believed that the defendant was addicted, not on whether he committed any act.[37] Justice Harlan's concurring opinion shows that he also was concerned with the lack of affirmative action from the defendant.[38] Harlan stated that evidence of the defendant's addiction at most showed a propensity to aspire to commit an illegal act, but an act was still necessary in order for Robinson to be punished criminally.[39]

Regarding the status prong, the plurality, along with Justice Douglas, the author of the other concurring opinion, could not fathom how those who have a disease or an addiction could be punished simply for that status.[40] Douglas compared drug addiction to insanity.[41] While he assented to confining citizens so afflicted for treatment or societal protection, for him the criminal classification was more than the Eighth Amendment could tolerate.[42] The majority, although not analogizing to insanity, agreed that imposing criminal punishment on a diseased individual would be cruel and unusual.[43] Douglas eloquently summarized this prong of *Robinson* when he wrote, "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action."[44]

IV. THE DOOR IS STILL OPEN: BUILDING UPON *ROBINSON*

Powell itself leaves room for the lessons of *Robinson* to be invoked and expanded upon. The *Powell* majority cites the cases widely regarded as the basis for proportionality analysis[45] to state that

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36. *Id.* at 666.
37. *Id.* at 662.
38. *Id.* at 678-79. (Harlan, J., concurring).
39. *Id.* at 679 (Harlan, J., concurring).
40. *Robinson*, 370 U.S. at 674.
41. *Id.* at 668-78 (Douglas, J., concurring).
42. *Id.* at 668-69 (Douglas, J., concurring).
43. *Id.* at 666.
44. *Id.* at 678 (Douglas, J. concurring).
45. *See, e.g.*, Trop v. Dulles, 356 U.S. 86 (1958); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Weems v. U.S., 217 U.S. 349 (1910). Ironically, these are the same cases cited in *Ingraham* for the proposition that the Eighth Amendment imposes substantive limits on what actions legislatures can punish criminally.

the cruel and unusual punishment clause applies more to the method of punishment than to the reason for which the punishment is rendered.[46] This view, however, ignores the underlying foundation for proportionality—the punishment must be proportionate to the *crime*. It should be noted that the vast majority of the Court's proportionality discussion has taken place in the death penalty context, where moral blameworthiness is conceded. It seems rather odd that the *Powell* majority would cite cases where moral blameworthiness is assumed, for the proposition that the Eighth Amendment focuses on methodology rather than the acts that trigger the punishment.

At the very least, *Robinson* requires an act before it can be deemed that a crime occurred.[47] While the Court has not explicitly announced a voluntary act requirement,[48] one can be inferred, either from *Lambert*, where the Court invalidated a statute containing "no element of willfulness,"[49] or from centuries of common law development.[50]

A. Powell Committed a Voluntary Act

Other than this theoretical inconsistency discussed above, perhaps the most obvious point in arguing that *Powell* did not foreclose an expansive reading of *Robinson* is that Mr. Powell, unlike Mr. Robinson, did commit an act. Without discussing the issue of whether to recognize drunkenness as an excusable form of diminished capacity—which also troubled the *Powell* plurality—Justice Marshall treated Powell's public appearance as a voluntary act that satisfied the act component in the crime of public intoxication.[51] As noted by

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46. Powell v. Texas, 392 U.S. 514, 531-32 (1968).

47. *Robinson*, 370 U.S. at 679 (Harlan, J., concurring).

48. "... nor was there any exploration of the meaning or purposes of a volitional action requirement being imposed by the Constitution." Robinson, Jr., *supra* note 4, at 408.

49. *Lambert*, 355 U.S. 227.

50. *See infra* text accompanying notes 106-16 for a discussion of common law development. Regarding *Lambert*, it has been read narrowly as requiring notice of an affirmative duty before someone can be punished criminally for breaching that duty. Proponents of a substantive Eighth Amendment would argue that notice is merely a prerequisite to forming intent. In other words, one cannot intend to violate the law without knowing that he or she has such an opportunity. It should be noted that adoption of this notice theory logically requires that the Court have adopted Natural Law theory – notice is not required for those offenses that are either (a) morally wrong per se, or (b) commonly known to be illegal. This theory does not comport with the common law notion that ignorance is not an excuse for violating the law. Since the Court has not overtly adopted such a theory, it is presumed that *Lambert* must be read as applying to more than just those few circumstances where an offender violates an affirmative duty.

51. *Powell*, 392 U.S. at 532.

Justice Black, *Robinson* applies only when the conviction does not require conduct to be proven;[52] therefore, the Court correctly decided that the act prong of *Robinson* should not be extended.

Furthermore, as the plurality opinion accurately notes, *Powell* does not fall within the reach of *Robinson* because Powell was not convicted for the "status" of being a chronic alcoholic.[53] Rather than punishing a status or a non-act, Texas "has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public."[54] An extension of the status prong of *Robinson*, therefore, was inappropriate.[55]

B. Focus on Defining Disease

The *Powell* court centered most of its efforts on addressing the definitional concern associated with the status prong of *Robinson*. This concern was well-founded given the fact that the *Robinson* court made no attempt to define the specific qualifications for an addiction or disease for constitutional purposes.[56] Based on the testimony of Powell's expert, it is unclear whether even one member of the medical profession was comfortable anointing alcoholism a disease.[57] Dr. Wade testified that Powell's alcoholism was an "exceedingly strong influence" on his behavior, but did not "complete[ly] overpower" his free will.[58] Accordingly, the Court did not feel that it was appropriate to classify alcoholism as a status under *Robinson* when medical professionals were not willing to substantiate that leap.[59]

In sum, the plurality's unwillingness to adopt the dissenters' suggested holding, that a person cannot be punished for acting in a way consistent with a disease from which he is suffering,[60] takes nothing away from *Robinson*. First, Powell committed an act, appearing in public while intoxicated, which the state had ample reason to punish criminally.[61] Second, the *Robinson* majority did not fully enumerate what qualifies as a "disease." A more detailed,

52. *Powell*, 392 U.S. at 542 (Black, J. concurring).
53. *Id.* at 532.
54. *Id.* at 532.
55. *Id.* at 521.
56. Robinson, Jr., *supra* note 4, at 408.
57. *Powell*, 392 U.S. at 524.
58. *Id.*
59. *Id.* at 537.
60. *Id.* at 521.
61. *Id.* at 532.

expert-informed analysis in *Powell* led the Court to conclude that alcoholism did not satisfy the still unstated legal definition of "disease."

The *Powell* analysis can most accurately be described as an attempt to reign in the status prong of *Robinson*. The Court astutely recognized that "disease" was not clearly defined and took logical steps to prevent this prong from expanding into areas in which it might not be appropriate. What is clear, however, is that *Powell* did not attempt to restrain *Robinson*'s act prong; rather, *Powell* reinforced the act requirement by showing how it is satisfied. In sum, *Powell* merely thwarted the unwise, unclear expansion of *Robinson*'s status prong.

C. *The Lesson from* Ingraham *and* Weems

The Court provided some indication that *Robinson* was still alive and well when it decided *Ingraham v. Wright*.[62] The *Ingraham* court discussed an alternate history of the Eighth Amendment, one that made the logical connection between methods of punishment and reasons for punishment.[63] Citing *Weems v. U.S.*,[64] which, ironically, was cited by the *Powell* majority for the opposite proposition, the *Ingraham* court stated that the Framers were not only troubled by the rack and the iron maiden, but were also concerned with limiting the grounds for which the legislature could impose punishment.[65] The Court went even further by stating that the Framers' principal concern was how legislatures would define crimes and punishments.[66]

These concerns were discussed at length in Justice McKenna's majority opinion in *Weems*.[67] McKenna noted that the Framers, in writing a document that they hoped would be the foundation of a long-lasting governmental structure, intended the Constitution to enforce broader principles, as opposed to narrow prohibitions.[68] While the Framers undoubtedly were concerned with the methods used to punish convicts, they must have realized that, over time, legislatures would

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62. Ingraham v. Wright, 430 U.S. 651 (1977).

63. It is an alternate history as opposed to the "methods of punishment" history discussed *supra* in the text accompanying notes 30-32.

64. Weems v. United States, 217 U.S. 349 (1910).

65. Ingraham v. Wright, 430 U.S. 651, 665 (1977) (citing *Weems*, 217 U.S. at 371-73).

66. *Id.* at 665 (citing *In re: Kemmler*, 136 U.S. at 446-47).

67. *See Weems*, 217 U.S. at 357-82.

68. *Weems*, 217 U.S. at 373. While Justice McKenna's belief is certainly logical, one must wonder how it would apply in the context of the Third Amendment, which has been largely dormant since its ratification.

find other ways to violate the principles behind the Eighth Amendment.[69]

> With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts', or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked.[70]

Constitutions are meant to establish principles to be used through the ages.[71] Justice McKenna feared that if this basic tenet of constitutional drafting was forgotten, then, "general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."[72]

With this historical and precedential perspective as a springboard, the *Ingraham* court stated that one way in which the Eighth Amendment affects the criminal process is through the act requirement of *Robinson*.[73] More specifically, the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such."[74] This statement, when combined with the Court's reasoning in *Weems*, proves that the Court, as recently as 1977, did not hold *Robinson* to the narrow reading that many often attribute to it—that the act and status requirements are inseparable. The *Ingraham* court believed not only that the requirements were independent of one another, but that the act requirement still plays a crucial role in the Court's Eighth Amendment jurisprudence.[75]

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69. *Id.* at 372-73.
70. *Id.*
71. *Id.* at 373.
72. *Id.*
73. *Ingraham*, 430 U.S. at 667.
74. *Id.*
75. It should be noted that the issue before the Court in *Ingraham* was whether the Eighth Amendment prevented public school employees from utilizing corporal punishment.

The Eighth Amendment summary given by the *Ingraham* court also alludes to quasi-textual support for a substantive Eighth Amendment.[76] The amendment states that, "cruel and unusual punishments [shall not be] inflicted."[77] A logical premise of that assertion is that it would be cruel and unusual to inflict punishment for certain acts. This is the premise on which the act prong of *Robinson* relies, and the premise that is reaffirmed via application in *Powell* and via summary in *Ingraham*.

V. WHY COURTS SHOULD INTERVENE

Perhaps the most obvious objection to the suggested reading of *Robinson*, and the expansion of that principle, is that defining criminal acts is a task that should be left to the legislature. Answering the question of why the courts should infringe upon what is widely perceived to be a realm of legislative primacy is the next hurdle for anyone hoping to advance a constitutionally based theory of criminal responsibility. The simple answer is that: (1) the common law tradition has always entrusted courts with developing the law; and (2) it is the nature of constitutional law that the Court, under the authority granted by the U.S. Constitution, restrain the various legislatures from violating that document. These traditions have continued through the current age where courts have the responsibility not only to fill in gaps that the legislature may not have anticipated, but also to prevent the legislature from abusing its broad definitional powers.[78]

A. Legislative Inaction & Insular Minorities

At least one scholar has expressed disappointment at how little the various legislatures have done to address the *Robinson* court's concerns in the decades since that decision,[79] especially considering that *Robinson* should have served as a warning to legislatures that the Court would soon invade their legislative province. This legislative

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The Court did not spend much time on this issue before dismissing it and moving on to others, but did take the time to offer the brief summary discussed here.

76. *See Ingraham*, 430 U.S. at 664-66.

77. U.S. CONST. amend. VIII.

78. Other aspects of the counter-majoritarian difficulty that arise in a substantial proportion of constitutional cases are beyond the scope of this paper as the topic has been more than adequately addressed by other authors.

79. Dressler, *supra* note 15, at 1508.

void can be explained by the fact that deciding which offenders should be held criminally responsible is not the kind of task with which legislatures usually occupy themselves.[80] Deciding which acts should be punished within an existing system is a far lesser task than defining the juridical limits of that system. The latter is the essence of constitutional law, not everyday legislative action.

This history of legislative inaction shows that legislatures are unlikely to devote the necessary time and effort to make the distinctions necessary to administer a principled system of criminal responsibility.[81] Henry Hart was also concerned with the degree to which political pandering may affect the legislature's sense of justice.[82] After all, it would be foolish for any prospective legislator to campaign on promises that she will strive to develop a justice system that will most likely result in placing limits on ways the legislature can deal with future societal problems. Both of these concerns are grounds for establishing constitutional boundaries for legislatures, thereby permitting the judiciary to use the Eighth Amendment as a check for legislative action.[83]

One way to limit legislative power is to take an approach similar to the one advocated in *Carolene Products*[84] regarding "discrete and insular minorities."[85] Discrete and insular minorities—groups identifiable by an immutable characteristic and with little political clout—require special protection because of the prejudice from which they frequently suffer and their inability to utilize the political system to level the playing field through legislative means.[86] The political process may even systematically disadvantage such groups to appease a dominant majority.[87] This concern can be seen in the status prong of *Robinson*—the Court's condemnation of status offenses can theoretically be extended to groups of discrete and insular minorities (the mentally retarded, the insane, the addicted, etc.).

The approach laid out in *Carolene Products* was utilized later in *Thompson v. Oklahoma,*[88] where the Court intervened on behalf of juvenile offenders to hold that juveniles who were under the age of

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80. Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of Powell v. Texas*, 69 COLUM. L. REV. 927, 974 (1969).
81. *Id.* at 976.
82. Bilionis, *supra* note 21, at 1276 (discussing Hart).
83. *Id.*
84. U.S. v. Carolene Products, 304 U.S. 144, 153 (1938).
85. Bilionis, *supra* note 21, at 1328.
86. *Id.*
87. *Id.*
88. Thompson v. Oklahoma, 487 U.S. 815 (1988).

sixteen when they committed murder cannot be executed.[89] Regarding criminal responsibility, the Court found that juveniles are not capable of appreciating the full consequences of their actions; therefore, juveniles should not be punished on a par with adults who have fully developed this capacity.[90] In other words, the Court, acting on behalf of a group with little political clout (juveniles), invalidated a legislative enactment in spite of great public support for the law.[91]

The Court in *Thompson* also identified how one of Hart's concerns had come to fruition—legislative inconsistency creating a seemingly unprincipled punishment system.[92] The Court discussed how the law has historically subjected juveniles to lesser punishment because of their imperfect decision-making skills.[93] Previously, that reasoning had been ignored in the death penalty context. Therefore, the Court intervened by making a distinction symbolic of a well-reasoned, consistent constitutional theory of criminal responsibility.

B. Why the Eighth Amendment is Preferable to the Due Process Clause

Of course, the *Carolene Products* doctrine, while tangentially applicable to Eighth Amendment analysis, was developed in the substantive due process context. The logical question is why the Eighth Amendment should be used to limit the various legislatures instead of the Fourteenth Amendment's Due Process Clause.[94] The simple answer is that the text of the Eighth Amendment, and the

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89. *Id.* at 838. Recently, the Supreme Court has held that the Eighth Amendment prohibits the execution of convicted murderers who were under the age of eighteen when the crime was committed. *See* Roper v. Simmons, 125 S.Ct. 1183 (2005).

90. Thompson v. Oklahoma, 487 U.S. 815, 838 n.23. (1988).

91. It should be noted that the Court based its holding, in part, on the existence of a "national consensus" against executing juveniles. *Id.* at 823-31. However, this issue is one where public opinion was not reflected in the statutes. Therefore, the Court's ruling in *Thompson* could be characterized accurately as a preemptive use of the *Carolene Products* doctrine since a revision of the states' respective juvenile execution laws was, given overwhelming public opinion, a distinct possibility.

92. *Thompson*, 487 U.S. at 824-31.

93. *Id.* at 823-31.

94. U.S. CONST. amend. XIV, § 1 reads, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

underlying logical premises that were addressed earlier,[95] provide more textual restraint than the oft-criticized Due Process Clause.[96] As Justice Blackmun once stated, "[The] Due Process Clause ... is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[97] In light of this broad standard, any court is more likely to find the language of the Eighth Amendment—which is topically restricted—to be a more attractive means of addressing moral blameworthiness and other theories.

Hart believed that a doctrine of criminal responsibility lies within the framework of the various constitutional amendments.[98] In Hart's view, the Constitution takes the word "crime" seriously. He believed that a *Griswold*-like penumbra argument could be made to support such a theory.[99] Hart asserted that the Constitution's various mentions of "crime" in the Fourth, Fifth, Sixth, and Eighth Amendments were indicative of a greater idea of constitutional substantive criminal law that relied on individual blameworthiness.[100] The rational extension of this idea is to provide the Supreme Court with an obligation to enforce the substantive criminal framework that underlies the Constitution.[101]

Professor Bilionis explains the various deficiencies involved in Hart's proposed use of the Due Process Clause.[102] First, Hart has stretched the "unmistakable indications" too far; the amendments establish procedural safeguards and do not even allude to substantive limitations.[103] Second, decisions made on grounds of substantive due process are frequently criticized because of the exacerbated counter-majoritarian difficulty inherent in all decisions made with little textual support.[104] Third, such an approach completely ignores the process-based relationship between the Constitution and the criminal law to

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95. *See supra* text accompanying notes 62-72.

96. Of course, the Eighth Amendment applies to the states by virtue of incorporation through the Fourteenth Amendment. For simplicity's sake, this article will speak in terms of the Eighth Amendment applying to the states directly.

97. Herrera v. Collins, 506 U.S. 390, 436 (1993) (Blackmun, J. dissenting) (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

98. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 431 (1958).

99. *Id.* at 431-435.

100. *Id.*

101. *Id.*

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

103. *Id.* at 1284.

104. *Id.* at 1318.

which the Court has clung so tightly in recent years.[105] In sum, use of the Due Process Clause is less likely to garner significant support than the comparatively textually-appealing Cruel and Unusual Punishment Clause.

VI. A PROPOSAL: HOW THE EIGHTH AMENDMENT SHOULD BE USED

Professor Bilionis notes that in order to be successful, a constitutional theory of criminal responsibility must be based on some fundamental principle from which doctrine can develop.[106] Moral blameworthiness, as espoused by Hart, is a logical place to start given its centuries-long development in the common law, the Court's allusions to it in *Robinson* and *Lambert*, and its ability to comport with the logical premise underlying the Eighth Amendment. Such a system can be established by extending these decisions, which must be done in order to refute the *Powell* majority's assertion that, "this Court has never articulated a general constitutional doctrine of *mens rea*."[107] Since *Powell* restrained only the status prong of *Robinson*, the Court is not otherwise precluded from adding a *mens rea* component to *Robinson*'s act requirement.

Hart suggests that moral blameworthiness is what separates criminal sanctions from civil sanctions.[108] Only those actions that trigger the moral condemnation of the community can be designated as "crimes" and punished criminally.[109] In other words, conduct is not a crime merely because a legislature says it is or because public officials feel a duty to suppress it; it is a crime when the community feels so morally repulsed by the act that it feels the need to formally condemn it.[110] An offender who commits such an act, therefore, is morally blameworthy and can be punished criminally for her actions after it is proven that she (1) committed such an act and (2) is punishable.[111]

Moral blameworthiness, therefore, "can be argued to be a necessary condition, although not a sufficient one, for punishment."[112]

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105. *Id. See generally*, Herrera v. Collins, 506 U.S. 390 (1993).

106. Bilionis, *supra* note 21, at 1308.

107. Powell v. Texas, 392 U.S. 514, 535 (1968).

108. Hart, *supra* note 98, at 404.

109. Dressler, *supra* note 15, at 1511-12.

110. Hart, *supra* note 98, at 406.

111. IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie translation 1887) 194-95. By "punishable," Kant means that the offender would be able to appreciate the reason for, and nature of, her punishment.

112. Greenawalt, *supra* note 80, at 940.

This principle certainly cannot be criticized for lacking common sense. Those who cannot conform their conduct to the law are not morally blameworthy and, therefore, should not be condemned; those who can, should.[113] Such an approach serves as a constitutional limitation on legislatures, but still allows the Court to keep its distance and refrain from broadly rewriting the law.[114]

Herbert Packer once remarked that the Court thought that, "*mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes."[115] This inconsistency could be remedied rather easily. *Powell* does not prevent *Robinson* from being extended in this manner. Furthermore, the Court can use the "centuries-long evolution" of the doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress to guide them in the constitutionalization of substantive criminal law.[116]

A. Actus Reus *and* Mens Rea *as Instruments of Moral Blameworthiness*

As was mentioned previously, *Robinson* created an *actus reus* requirement that was reaffirmed in *Powell* and again in *Ingraham*. The theoretical basis for this requirement has been aptly described by Glanville Williams, who wrote: "[that] crime requires an act is invariably true if the proposition be read as meaning that a private thought is not sufficient to found responsibility."[117] The Supreme Court has shown no signs of backtracking on this prong, but the recognition of a *mens rea* element is a greater battle.

Historically, the common law has recognized the crucial role that *mens rea* plays in criminal responsibility and moral blameworthiness. The idea that a crime has not been committed unless the offender willfully desired to cause harm has long played a role in the development of the criminal law.[118] Justice Holmes acknowledged this fact when he wrote that the intention was not "to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community

113. Dressler, *supra* note 15, at 1528.
114. *Id.*
115. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107.
116. *Powell*, 392 U.S. at 535-36.
117. WILLIAMS, CRIMINAL LAW – THE GENERAL PART 1 (1961) as excerpted in *Powell*, 392 U.S. at 543 n.4 (Black, J. concurring).
118. State v. Korell, 213 Mont. 316, 328-29 (1984).

...."[119] Historically, the *mens rea* element has served as the means by which the legal system recognizes moral blameworthiness.[120] Despite this statement by one of its most lauded members, and the role that *mens rea* has historically played as the embodiment of blameworthiness in the criminal context, the Court has never held *mens rea* to be a hard and fast constitutional requirement.[121]

Lambert is as close as the Court has ever come to deeming *mens rea* a constitutional requirement. *Lambert's* holding, however, is more accurately read as requiring the offender to act affirmatively or in open defiance of a statutorily imposed duty.[122] Of course, an offender must have some intent to openly defy a statutorily imposed duty; therefore, intent could be viewed as an underlying requirement to the *Lambert* court's notice-based holding. In sum, the Court has come close to establishing a *mens rea* requirement, but has never taken the final step.

B. Benefits of Utilizing the Eighth Amendment in This Manner

Determining what makes an act a crime is a fundamental part of criminal law. The advent of strict liability offenses has demonstrated the truth of the sarcastic answer offered by many wag professors—whatever the legislature says is a crime. To most criminal theorists, including Henry Hart, "so vacant a concept is a betrayal of intellectual bankruptcy."[123] Adopting the *mens rea* and *actus reus* requirements via the Eighth Amendment would give criminal law the substantive background that Hart desired. It would also help to restore the notion that criminal convictions should result only from conduct that society condemns on moral grounds.[124]

As Justice Black noted in his *Powell* concurrence, the main benefit of an act requirement is to protect against false charges.[125] For instance, the fear of false charges is exhibited in evidence law's

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119. Lambert v. California, 355 U.S. 225, 231 (1957) (quoting HOLMES, THE COMMON LAW, at 49-50).

120. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 102 (1995). *Mens rea* "suggests a general notion of moral blameworthiness, i.e. that the defendant committed the *actus reus* of an offense with a moral blameworthy state of mind." *Id.*

121. *Powell*, 392 U.S. at 535.

122. *Lambert*, 355 U.S. at 229.

123. Hart, *supra* note 98, at 404.

124. *Id.*

125. *Powell*, 392 U.S. at 543 (Black, J. concurring) (citing 4 BLACKSTONE, COMMENTARIES 21).

distrust of propensity evidence.[126] Evidence law acknowledges that people do not always repeat their past conduct, let alone consistently take advantage of certain opportunities that a person of their alleged character would find attractive.[127] Additionally, it would be exceedingly difficult to defend charges that are not based on an act.[128] Defendants would be limited to refuting behavior patterns and personality traits. The act requirement prohibits propensity-based crimes, thereby easing the burdens of both prosecutors and defense attorneys.[129]

Justice Black also addresses the act requirement's function of shielding unfulfilled thoughts and desires from being the basis of criminal prosecution.[130] Conduct serves as an objective manifestation of intent; it differentiates between actual intention and daydreams or passing thoughts. In other words, a constitutional requirement of conduct would prohibit propensity-based statutes, as well as bar legislation attempting to punish those who have criminal thoughts, but do not act upon them.[131]

VII. THREE METHODS FOR CONSTITUTIONALIZING SUBSTANTIVE THEORY VIA THE EIGHTH AMENDMENT

A. An Activist Approach

Kent Greenawalt has proposed an activist approach that would enable courts to take the principle of blameworthiness and cut wide swaths into existing law.[132] This incarnation would hold

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126. *Id.*

127. *See* FED. R. EVID. 404(b) which reads, in relevant part:
> Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

128. *Powell*, 392 U.S. at 543 (1968) (Black, J. concurring) (citing 4 BLACKSTONE, COMMENTARIES 21).

129. *Id.* at 544.

130. *Id.*

131. *Id.* at 543 (citing WILLIAMS, CRIMINAL LAW – THE GENERAL PART 1 (1961)).

132. Dressler, *supra* note 15, at 1529.

blameworthiness above all other policy concerns by constitutionalizing various defenses. "Any defendant would have a constitutional right to show that he either had no reason to suppose he was doing wrong or lacked the power to avoid doing wrong, or that punishment of him would serve no useful purpose."[133] Defendants would have a constitutional right to make a narrow ignorance of law argument, somewhat along the lines of *Lambert*, as well as arguments based on mistake of law.[134] Additionally, strict liability offenses would never result in incarceration.[135]

Such a role, however, does not seem justified given the relative vagueness of the Eighth Amendment's language.[136] As mentioned previously, the counter-majoritarian difficulty would require the Court to create a standard to limit itself. The Court has struggled to create such a limiting standard in its substantive due process jurisprudence due to the broad manner in which that clause has been interpreted.[137] The Eighth Amendment's language is substantially more specific than the language in the Due Process Clause, but the absence of a textually-based limiting principle is no less troubling.

B. Focus on Proportionality

A second option would be to extend the Court's proportionality jurisprudence beyond the death penalty context. Although the Court has not explicitly used the term, Kantian retributive theory (also known as "just deserts" theory) has provided the framework for this line of case law; therefore, moral blameworthiness is inherent in the Court's proportionality jurisprudence.[138] The theory is based on the idea that, "[p]unishment should be directly related to the personal culpability of the criminal defendant."[139] Put differently, the offender should get the punishment he deserves—no more, no less. This

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133. Greenawalt, *supra* note 80, at 975.

134. Dressler, *supra* note 15, at 1530.

135. *Id.*

136. Dressler, *supra* note 15, at 1529.

137. The Court has attempted to limit its due process jurisprudence through an analysis of "history and tradition," but this standard has proven to be too malleable to serve as a true limiting principle.

138. For example, "[t]hose mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Atkins v. Virginia, 536 U.S. 304, 306 (2002).

139. *Id.* at 319; California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

concept is the heart of the Court's proportionality analysis and is inherently retributive in nature. It has been used to invalidate the death sentence of a getaway driver because he had no involvement in the actual murder of the victims,[140] to strike the death sentence of a 15-year-old offender because of his lesser ability to control and appreciate his conduct,[141] and to prohibit the execution of the mentally retarded due to their deficient reasoning, judgment, and ability to control their conduct.[142] Such an approach would not require the Court to explicitly adopt a *mens rea* requirement or reinforce the act requirement of *Robinson*.

It is highly doubtful that the Court would extend the proportionality doctrine to non-capital cases in a meaningful manner.[143] If the Court were to utilize proportionality in a broader context, some substantive theory would sneak into the Constitution, similar to the way that the substantive theories of retribution and deterrence have openly emerged in the Court's capital punishment jurisprudence.[144] However, the counter-majoritarian difficulty is problematic once again; it is unclear how the Court would limit itself once it invokes proportionality outside of the death penalty context.

C. The Seventh Amendment Model

One possible approach to utilizing the Eighth Amendment substantively, is to tailor the limitation in a fashion similar to the manner in which the Seventh Amendment has been limited.[145] The Supreme Court has limited the Seventh Amendment by holding that a civil jury is guaranteed only in causes of action that were either recognized at the time the amendment was ratified or causes of action substantially similar to those recognized when the amendment was ratified.[146] Interpreting the Eighth Amendment in a similar fashion would result in the Court setting constitutional limits in accordance

140. Enmund v. Florida, 458 U.S. 782, 801 (1982).

141. Thompson v. Oklahoma, 487 U.S. 815, 834 (1988).

142. Atkins v. Virginia, 536 U.S. 304 (2002).

143. *See*, Harmelin v. Michigan, 501 U.S. 957 (1991) (sentence of life without parole for possession of a large amount of narcotics with intent to distribute is not disproportionate). *But see*, Solem v. Helm, 463 U.S. 277 (1983) (sentence of over twenty years for possession of a relatively small amount of marijuana is unconstitutionally disproportionate).

144. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11 (2003); Buchanan v. Angelone, 522 U.S. 269 (1998); Payne v. Tennessee, 501 U.S. 808 (1991); Stanford v. Kentucky, 492 U.S. 361 (1989); Tison v. Arizona, 481 U.S. 137 (1987).

145. Greenawalt, *supra* note 80, at 974-75.

146. Parsons v. Bedford, 3 Pet. 433, 446-47 (1830).

with rules that were accepted by the common law at the time the Constitution was founded.[147] This approach would require very little judicial involvement, perhaps no more than formally adopting *actus reus* and *mens rea*, and would likely be favored by even the more conservative justices who have espoused an affinity for retributive theory and historically-founded jurisprudence.[148]

Although debatable, it is not likely that the adoption of this formulation of the Eighth Amendment would mandate constitutionalizing the insanity defense.[149] There is little doubt that a *mens rea* requirement would permit the admission of any evidence tending to prove that a defendant did not or could not have met that requirement. For centuries, evidence of mental illness has been admitted for exactly this purpose.[150]

VIII. REMEDYING LIMITATION CONCERNS

Before *Powell,* many scholars believed that *Robinson* supported a broad reading of the Eighth Amendment that would result in the Court announcing substantive constitutional limitations for criminal law.[151] This proposition did not sit well in many circles, including the Supreme Court itself.[152] The *Powell* majority made this clear when they noted that if *Robinson* were so viewed, the doctrine would be limitless; there would be no end to the Court's power to constitutionalize theories of criminal responsibility.[153] In other words, if the Eighth Amendment were to be used as a vehicle to establish substantive requirements, the Court would need a brake to compliment the acceleration provided by *Robinson.*[154]

The Court voiced these limitation concerns using the language of federalism[155]—criminal law is an area that has largely been left to

147. *Id.*

148. Dressler, *supra* note 15, at 1528-29.

149. *See infra* text accompanying notes 203-19 for a more detailed discussion of this issue.

150. State v. Korell, 213 Mont. 316, 329 (1984).

151. Dressler, *supra* note 15, at 1527.

152. Powell v. Texas, 392 U.S. 514, 533 (1968).

153. *Id.* at 533-34. Justice Black also voiced limitation concerns: "The criminal law is a social tool that is employed in seeking a wide variety of goals, and I cannot say the Eighth Amendment's limits on the use of criminal sanctions extend as far as this viewpoint would inevitably carry them." *Powell,* 392 U.S. at 545 (Black, J., concurring).

154. Dressler, *supra* note 15, at 1516-17.

155. *Powell,* 392 U.S. at 535.

the states.[156] It was not until the 1960s, when the Court decided a significant number of criminal procedure cases, that the Court substantially involved itself in the area of criminal justice administration using something other than the Due Process Clause.[157] As a result of the Court's restraint, states have developed all of the various principles within the criminal law in accordance with the "constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man."[158] It is only natural that the Supreme Court should be leery of involving itself in an area that the states have developed for over two-hundred years.

However, these federalism-based concerns did not prevent the Court from intervening in matters of criminal procedure. The Court recognized a need to establish constitutional minimums and did so, even after 150 years of non-intervention. Limitation concerns were minimal, perhaps because of the language of the Fourth,[159] Fifth,[160] and Sixth amendments.[161] These amendments were written with relatively specific language that clearly showed the Framers' intention

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156. Bilionis, *supra* note 21, at 1315.

157. *Id.* (discussing Justice White's opinion in Patterson). *See also*, Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainright, 372 U.S. 335 (1963); Robinson v. California, 370 U.S. 660 (1962); Mapp v. Ohio, 367 U.S. 643 (1961); Rochin v. California, 342 U.S. 165 (1952).

158. *Powell*, 392 U.S. at 535-36 (1968).

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

160. U.S. CONST. amend. V reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

161. U.S. CONST. amend. VI reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

to establish constitutional minimums; the Constitution clearly provided limits for judicial intervention.[162]

The principle being espoused here, that the Eighth Amendment implies that the legislature cannot criminalize certain activities, is not explicitly limited by the Amendment's text. When considering this implied understanding, the Eighth Amendment is more comparable to the Seventh Amendment,[163] which also lacks any sort of limiting language. The Court has limited the Seventh Amendment by holding that a jury trial is only required for claims recognized at common law, or similar to those recognized at common law, when the Bill of Rights was ratified.[164] Because of the Court's federalism-based concerns, the concerns regarding limiting judicial law-making generally, and the practical similarities to the Seventh Amendment, the Court would be wise to limit the Eighth Amendment in a similar manner. This approach would allow the Court to set a constitutional floor for criminal responsibility, yet still permit the states to exceed these minimum standards and continue developing the vast majority of criminal responsibility doctrine.[165]

IX. APPLICATION OF THE SEVENTH AMENDMENT-LIKE SOLUTION

As was discussed previously, the quasi-Seventh Amendment approach would require the Court to hold *mens rea* and *actus reus* as formal requirements under the Eighth Amendment.[166] Again, the Court has already addressed *actus reus* in *Robinson*, *Powell*, and *Ingraham*, and has alluded to a *mens rea* requirement in its capital punishment decisions.[167] Most recently in *Atkins v. Virginia*, the Court reinforced this requirement by holding that mentally retarded persons

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162. These types of federalism arguments became significant only after the Court began incorporating the Fourth, Fifth, and Sixth amendments. The larger debate of incorporation's impact on federalist theory is well beyond the scope of this paper.

163. U.S. CONST. amend. VII reads, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

164. Bank of Columbia v. Okely, 17 U.S. 235 (1819).

165. *See generally*, Harmelin v. Michigan 501 U.S. 957 (1991) (holding that a life sentence for possession of a large quantity of narcotics with intent to distribute is not constitutionally disproportionate). *See also* People v. Bullock, 485 N.W.2d 866 (1992) (holding that the sentencing scheme examined in *Harmelin* violates the Michigan Constitution).

166. See *supra* text accompanying note 148.

167. See *supra* text accompanying notes 60-61, 117-22, 138-42.

cannot be put to death due to their inability to "act with the level of moral culpability that characterizes the most serious adult criminal conduct."[168]

Atkins, as well as the other cases within the Court's proportionality jurisprudence,[169] suggests a more strategic advantage to advocating the quasi-Seventh Amendment approach. The Court has made no attempt to hide its affinity for retributive theory in its Eighth Amendment jurisprudence.[170] Many commentators have also noted the Rehnquist Court's overt championing of federalism and non-intervention policy when states' rights are concerned.[171] Given this background, it would be strategically sound for substantive Eighth Amendment advocates to encourage an approach that requires minimal judicial intervention, preserves state control of substantive law development, and at the same time appeals to a theory in which the Court obviously finds merit.

U.S. v. McLamb is an example of how this approach would appeal to the Court's existing tendencies.[172] Mr. McLamb was convicted of structuring a transaction to avoid federal reporting requirements.[173] Specifically, he allowed automobile buyers to make several payments under $10,000 at the time of purchase in order to avoid having to notify the IRS of the transaction.[174] The Court of Appeals for the Fourth Circuit rejected his argument that the Eighth

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168. Atkins v. Virginia, 536 U.S. 304, 306 (2002).

169. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11 (2003); Buchanan v. Angelone, 522 U.S. 269 (1998); Payne v. Tennessee, 501 U.S. 808 (1991); Stanford v. Kentucky, 492 U.S. 361 (1989); Tison v. Arizona, 481 U.S. 137 (1987).

170. *See, e.g., Atkins*, 536 U.S. at 319. "With respect to retribution—the interest in seeing that the offender gets his "just deserts"—the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Id.*

171. *See generally*, JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (University of California Press, Ltd., 2002).

172. 985 F.2d 1284 (4th Cir. 1993).

173. 18 U.S.C. § 1956(a)(3), which reads, in relevant part:

> [W]hoever, with the intent –
>
> (A) to promote the carrying on of specified unlawful activity;
>
> (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or
>
> (C) to avoid a transaction reporting requirement under State or Federal law, conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both.

174. *McLamb*, 985 F.2d at 1287.

Amendment prohibits punishment of harmless behavior.[175] The court, citing *Powell*, explained that as long as the crime involves an act and some level of intent, and does not depend on the accused's status, the conviction does not constitute cruel and unusual punishment.[176] The court explicitly stated that they would not question the legislature's judgment that the conduct was harmful as long as (1) the act and intent elements were satisfied, and (2) the law was rationally related to the furtherance of a legitimate state interest.[177] In other words, McLamb's actions, committed with a guilty mind, properly invoke the moral condemnation of the community; therefore, his punishment did not violate the Eighth Amendment. Regardless of whether McLamb's claim that his conduct was harmless and, therefore, unpunishable, is true, the Seventh Amendment approach has been satisfied, thus preventing the courts from invading the legislature's territory.

A. Presumptions Flowing from Acts

In *Brinkley v. State*, the Supreme Court of Tennessee affirmed the appellant's conviction for selling liquor within four miles of an operating school.[178] The fact that the defendant obtained a federal license to sell alcohol was the key to his conviction because it established a presumption that he, in fact, sold alcohol.[179] Furthermore, Brinkley was legally prevented from rebutting that presumption by asserting that the prosecution should have been compelled to prove that an actual sale occurred.[180] At first blush, it appears that this case would violate the requirements advocated in this article. However, this case serves as an excellent example of how unobtrusive this doctrine could be.

Cases like *Brinkley* illustrate that the law has long recognized two types of *mens rea*. Specific intent is the most well-known and least controversial. The second type is closely intertwined with the act requirement—it is the foreseeability-based intent that has been recognized for centuries by the felony-murder doctrine and is currently recognized as recklessness in the Model Penal Code.[181] Since the felony-murder doctrine was recognized long before the Bill of Rights

175. *Id.* at 1291-92.
176. *Id.*
177. *Id.* at 1292.
178. Brinkley v. State, 125 Tenn. 371 (1911).
179. *Id.* at 383.
180. *Id.* at 383-84.
181. MODEL PENAL CODE § 2.02(2)(c) (1962).

was ratified,[182] reckless intent must be held to satisfy the *mens rea* requirement if the quasi-Seventh Amendment approach is adopted.

The *Brinkley* court clarified its holding by placing the defendant's act and the statute in proper perspective. Such a law, having for its effect a denial of the party charged of the right to rebut and overcome the presumption created by it, would be void. So would a law which made an act *prima facie* evidence of crime over which the party charged had no control, and with which he had no connection; or which made an act *prima facie* evidence of crime which had no relation to a criminal act, and no tendency of itself to prove the ultimate fact of guilt.[183]

None of these deficiencies applied to the Tennessee statute. Granted, it is difficult to rebut the presumption created by obtaining the license—Brinkley would be limited to arguing either that he did not obtain a license or that his home was not actually within four miles of a school—but rebuttal is possible. Also, there is no doubt that the defendant had total control over obtaining the license or that the license bore a reasonable connection to a criminal act. As the *Brinkley* court noted, the presumption of guilt was created by the defendant's act of obtaining the license, not by any status or mere circumstance.[184] Any punishment, therefore, was not cruel and unusual, and did not violate the state constitution.[185, 186] In sum, the conviction relied on an intentional act that was completely within the defendant's discretion. Just like a felony-murder scenario, the ultimate crime may not have been intended, but it was reasonably foreseeable; therefore, imposing criminal liability was appropriate.

B. The Model Penal Code's Mental States Satisfy the Mens Rea Requirement

The proposed approach to Eighth Amendment limitations respects federalism concerns by allowing the states to continue to develop substantive law as long as the intent and act requirements are satisfied. Choosing to adopt the Model Penal Code's mental states

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182. Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58 (1956). Morris cites Lord Dacre's case, *Moore 86*, 72 Eng. Rep. 458 (K.B. 1535), to show that the felony-murder doctrine was first used in the Sixteenth Century.

183. *Brinkley*, 125 Tenn. at 385.

184. *Id.* at 383-84.

185. *Id.* at 384.

186. TENN. CONST. art. I, § 16 reads, "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

would be part of this process and, therefore, is constitutionally permissible, but not required, under the quasi-Seventh Amendment approach.[187] After all, the Model Penal Code is merely a reconfiguration of the common law standards recognized by the Eighth Amendment.

The Sixth Circuit's opinion in *White v. Arn*[188] is an excellent example of how this concept works in practice. After Ohio adopted the Model Penal Code's mental states, White alleged that criminal intent and voluntariness were still elements of every crime.[189] The court asserted that the common law requirement of *mens rea* had been replaced and refined, not eliminated.[190] In other words, Ohio's adoption of the Model Penal Code's intent standards merely modified the common law standard.

C. How the Suggested Standard Would Affect Existing Law

Despite what has been presented thus far, the law would not remain stagnant. Most notably, the Court's decision that claims of actual innocence cannot be brought under the Eighth Amendment

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187. It may be required under the activist approach, but only the future decision makers would know. As with any outwardly activist approach, it is hard to discern what is and what is not required without any previous indication from the Court.

188. 788 F.2d 338 (6th Cir. 1986).

189. *Id.* at 345. White also asserted that criminal conduct, unlawfulness, and disrupting the "Peace and Dignity" of the state were also required elements of every crime.

190. *Id.* at 346. *See also*, OHIO REV. CODE ANN. § 2901.22 (A-D) (2004), which reads:

> (A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.
>
> (B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.
>
> (C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.
>
> (D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

would be overturned.[191] New York has already come to that conclusion under its due process[192] and cruel and unusual punishment[193] clauses.[194] As the New York Court of Appeals noted, confinement of an innocent "violates elemental fairness" and "is disproportionate to the ... lack of crime."[195] An adoption of a substantive Eighth Amendment would require the Court to follow New York's example.

Another required change would be to prohibit strict liability offenses from satisfying the intent requirement when such offenses

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191. Herrera v. Collins, 506 U.S. 390 (1993).

192. N.Y. CONST. art. I, § 6 reads:

> No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his or her present office or of any public office held by him or her within five years prior to such grand jury call to testify, or the performance of his or her official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his or her present office by the appropriate authority or shall forfeit his or her present office at the suit of the attorney-general.

193. N.Y. CONST. art. I, § 5 reads, "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained."

194. People v. Cole, 765 N.Y.S.2d 477 (2003).

195. *Id.* at 485.

involve no "mental culpability."[196] Punishment under these circumstances "shock[s] the sense of justice of the community" because the offender's mental state does not rise to the level of the Model Penal Code's negligent or reckless levels.[197] If the offender's mental state does not rise to these levels, the crime is inherently less serious than if it was committed with some evil intent, even if the harm caused is the same.[198]

For example, the Eighth Amendment would require at least a showing of criminal negligence when a misdemeanor is used as the basis of an involuntary manslaughter charge.[199] If the offender failed to avoid creating certain dangerous circumstances or failed to foresee a risk that a reasonable person would have seen, the negligence standard would be satisfied and the Eighth Amendment would not prohibit punishing the offender.[200] The bottom line is, as with all criminal offenses, the intent requirement must be proven, not assumed. If the underlying offense requires some sufficient level of intent, the Eighth Amendment is satisfied.[201] If the result is unintended and unforeseeable, the Eighth Amendment serves as a bar to punishment.[202]

D. Constitutionalizing Insanity?

If the *Robinson* holding had been extended in *Powell*, the ability of a mentally ill defendant to raise the insanity defense almost certainly would have been held to be a constitutionally protected right.[203] Indeed, Kent Greenawalt, among others, did not believe, before *Powell* was decided, that the insanity defense could be abolished.[204] Not only would states not be permitted to abolish the insanity defense, but the Court would be flooded with cases whenever the states sought to regulate the admissibility of evidence offered to prove "disease" and "compulsion," since these terms were not clearly

196. State v. Campbell, 117 Ohio App. 3d 762, 765 (1997) (holding that the Cruel and Unusual Punishment clauses of both the Ohio Constitution and the U.S. Constitution prohibit the imposition of grossly disproportionate punishments).

197. *Id.* at 768.

198. *Id.*

199. State v. Yarborough, 905 P.2d 209, 214 (1995).

200. *Campbell*, 117 Ohio App. 3d at 771.

201. *Id.* at 770.

202. *Id.* at 766.

203. Powell v. Texas, 392 U.S. 514, 545 (1968).

204. Dressler, *supra* note 15, at 1531.

defined in *Robinson*.[205] The Court's greatest problem, however, would be which form of the insanity defense to adopt.[206]

1. The Argument for Constitutionalizing the Insanity Defense

"The United States Supreme Court has never held that there is a constitutional right to plead an insanity defense."[207] Additionally, the Court has never extended constitutional protection to any subset of insanity, including the irresistible impulse test.[208] All this would change, however, if the Court adopts the activist approach and constitutionalizes the insanity defense.

Those who have advocated for such a course of action have argued on deterrence grounds. Specifically stated, punishing those who are unable to appreciate the nature or consequences of their conduct is pointless. Imprisoning defendants who cannot conform their conduct to behave legally serves no deterrent purpose, because the prisoner is undeterrable.[209] In the language of due process, the insanity defense in general, and the irresistible impulse test specifically, are "implicit in the concept of ordered liberty;" and therefore constitutionally protected.[210]

2. Historical Analysis

Insanity was not recognized as a defense independent of the *mens rea* doctrine when the Constitution was ratified;[211] therefore, the insanity defense would not be protected by the Eighth Amendment if the Seventh Amendment Model is adopted. Notably, primitive forms of the insanity defense operated similarly to the systems currently used by the states which have statutorily abolished the insanity defense.[212]

Some jurists have argued that some form of the insanity defense can be traced back to the late Thirteenth Century.[213] The criminal responsibility test enunciated by Lambard in 1581 was essentially used to determine whether the allegedly insane defendant

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205. *Powell*, 392 U.S. at 546 .
206. Dressler, *supra* note 15, at 1524-25.
207. State v. Korell, 213 Mont. 316, 327 (1984).
208. Leland v. Oregon, 343 U.S. 790 (1952) (requiring a defendant to prove insanity beyond a reasonable doubt does not offend due process).
209. State v. Cowan, 260 Mont. 510, 519 (1993) (Trieweiler, J. dissenting).
210. *Id.*
211. *See infra* text accompanying notes 213-18.
212. *See infra* text accompanying notes 220-226.
213. State v. Searcy, 118 Idaho 632, 646 (1990) (McDevitt, J. dissenting).

could have formed criminal intent.[214] The same is true of the test offered by Dalton in 1630, which was no more than a general rule that the insane are unable to satisfy the *mens rea* requirement.[215] By the early 1700s, the test had morphed to include parts of what would become the irresistible impulse test.[216]

A century later, the developing insanity defense took a step back by disregarding the irresistible impulse test and shifting its focus to whether the defendant could determine whether his actions were right or wrong.[217] This version of the insanity test would become known as the M'Naughten test.[218] In other words, what scholars have regarded as the first true insanity test, M'Naughten, was not adopted until 1843, well after the Constitution was ratified. Also, the predecessors to the modern day insanity test did not differ significantly from the *mens rea* requirement and were far from stable enough to be regarded as established at the time the Eighth Amendment was ratified.

The degree to which the insane would be affected by the potential abolition of insanity, however, is uncertain. The state would still be required to prove the intent element, so evidence that the defendant could not form the requisite mental intent would still be admissible. Some states have already eliminated the insanity defense[219] and can be examined to determine exactly how the suggested approach would affect the insane.

3. Responsibility Without Insanity in Montana and Idaho

Although Idaho has statutorily abolished the insanity defense, the state Supreme Court has adopted an intent requirement by holding that only the criminally responsible may be convicted.[220] Additionally, the statute abolishing insanity does not prohibit

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214. *Id.* at 646-47 (quoting Lambard, *Eirenarcha or of the Office of the Justices of the Peace* at Cap. 21.218).

215. *Id.* at 647 (quoting Dalton, *The Country Justice*, 244 (1630)).

216. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN Vol. I, p. 1 (1724). "The guilt of offending against any Law whatsoever, necessarily supporting a willful disobedience, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it." *Id.*

217. Bellingham's Case, 1 Collinson on Lunacy 636, 671 (1812).

218. 8 Eng. Rep. 718 (H.L.1843).

219. IDAHO CODE § 18-207 (1) (Michie 2004) reads, "Mental condition shall not be a defense to any charge of criminal conduct." MONT. CODE ANN. § 46-14-214 (1979).

220. State v. Beam, 109 Idaho 616, 621 (1985); State v. Winn, 121 Idaho 850, 854 (1992).

defendants from presenting evidence of their mental state to refute the state's evidence of criminal intent.[221] Montana has also statutorily adopted the common law voluntary act requirement for any offense.[222] Montana courts have interpreted "voluntary act" as a statutory preservation of the *mens rea* and *actus reus* requirements.[223] As in Idaho, evidence of a defendant's mental deficiency is admissible to prove that the accused could not have formed the requisite criminal intent.[224] In sum, the *mens rea* requirement has been preserved, thereby maintaining a defense for insane persons.

In these instances, irresistible impulse is not directly addressed, but the classic standard offered by the *mens rea* requirement has been preserved. At first blush, this approach may seem rather harsh, but some commentators have noted that abolishing insanity may have actually eased the burden for insane defendants.[225] Instead of proving their insanity beyond a reasonable doubt or by clear and convincing evidence, the insane only need to create a reasonable doubt as to their ability to form intent in order to be acquitted.[226]

X. CONCLUSION

Robinson still can be built upon. A proper reading of *Robinson* and *Powell* shows that: (1) *Powell* reaffirms the act prong of *Robinson*; and (2) *Powell* mandates that *Robinson*'s status prong not be expanded recklessly. Since the act prong is still recognized long after *Powell*, the Supreme Court can expand upon the logical underpinnings of the Eighth Amendment that rely on a theory of moral blameworthiness and retributive punishment that the Court continues to embrace. Limiting this theory via the quasi-Seventh Amendment approach—constitutionally protecting only those common law rights that were acknowledged at the time the Constitution was ratified—would appeal to the federalism concerns expressed in *Powell* and allow the states to retain control over the development of substantive criminal law. In sum, the proposed extension of *Robinson* would

221. Potter v. State, 114 Idaho 612, 613 (1988).

222. MONT. CODE ANN. § 45-2-202 (2004) states, "A material element of every offense is a voluntary act ...." *See also*, State v. Korell, 213 Mont. 316, 337 (1984).

223. State v. Korell, 213 Mont. 316, 337 (1984).

224. *Id.* at 322.

225. *Id.* at 331.

226. *Id.*

provide important substantive protections without drastically changing the current state of criminal law.