NOTE

IS *POWELL* STILL VALID? THE SUPREME COURT'S CHANGING STANCE ON CRUEL AND UNUSUAL PUNISHMENT

Maria Slater[*]

In its seminal case Robinson v. California, the Supreme Court struck down a state statute criminalizing narcotics addiction. The Court held this statute, in criminalizing the disease of drug addiction, constituted cruel and unusual punishment prohibited by the Eighth Amendment. Six years later in Powell v. Texas, the Court declined to extend this holding to encompass alcoholism, because alcoholism involves the act of drinking rather than the status of addiction. However, the Court's modern Eighth Amendment jurisprudence has signaled a shift in its understanding of cruel and unusual punishment. The Court has begun to take into account brain development, and its relationship to culpability, for certain classes of offenders. Neurological findings regarding the brain development involved in chronic alcoholism necessitate a similar shift in the Court's framework for analyzing the penalization of chronic alcoholism and, given the Court's changing stance, call into question the constitutionality of Virginia's habitual drunkard statute. Rather than viewing alcoholism under the act-versus-status dichotomy, the Court's Eighth Amendment proportionality analysis signals a shift towards understanding addictions such as chronic alcoholism under a non-binary framework that takes into account recent scientific understandings of addiction. Much like the Court's shift in the juvenile and intellectual disability contexts, a similar shift should occur, this Note posits, in the Court's proportionality analysis as applied to statutes involving chronic alcoholism. This Note concludes by calling into question the continued constitutionality of Virginia's habitual drunkard statute under the Court's changing jurisprudence.

[*] Thank you to all of the members of Virginia Law Review who helped edit this Note and bring it to completion, and a special thanks to Dean Golubuff for her feedback and invaluable guidance throughout the writing of this Note. Thanks also to the attorneys at Legal Aid Justice Center who inspired the idea behind the Note in the first place by their sincere advocacy and optimism for their clients.

I. INTRODUCTION

In its seminal Eighth Amendment case *Robinson v. California*, the Supreme Court struck down a state statute criminalizing narcotics addiction.[1] The Court held that criminalizing the disease of drug addiction constituted cruel and unusual punishment prohibited by the Eighth Amendment.[2] Six years later in *Powell v. Texas*, the Court declined to extend this holding to alcoholism because alcoholism involves the *act* of drinking rather than the *status* of addiction.[3]

The Court's reasoning in modern Eighth Amendment decisions has signaled a shift in its understanding of cruel and unusual punishment. The Court increasingly takes into account brain development for certain classes of offenders, including juveniles and those with intellectual disabilities, when analyzing the culpability of these offenders under its proportionality rubric.[4] Recent neurological findings on brain development and alcohol addiction necessitate a similar shift in the Court's Eighth Amendment analysis of chronic alcoholism, from viewing alcoholism under an act-versus-status paradigm to viewing it as a rewiring of the brain's pathways affecting both learned behavior and cognitive functioning.[5] This Note proposes that alcoholism is not accurately characterized as a chronic, debilitative disease, but rather that it is better understood as a rewiring of the brain as learned behaviors cause neurological changes in the brain's pathways over time. Because chronic alcoholism does not fit into either the passive-disease or active-choice rubric laid out in *Powell*, the Court must develop a new framework

[1] 370 U.S. 660, 667 (1962).
[2] Id.
[3] 392 U.S. 514, 532 (1968).
[4] See, infra, Section III.
[5] See, infra, Subsection V.B

through which to analyze laws criminalizing chronic alcoholism—a third conceptual model of alcoholism as neither act nor status. This Note posits that, given new understandings of the neural functioning involved in chronic alcoholism, Virginia's habitual drunkard statute may no longer be constitutional under the Court's current Eighth Amendment proportionality analysis and that a third conceptual model is needed that better accords with modern conceptions of addiction.

Part I of this Note analyzes the Court's interpretation of cruel and unusual punishment in the context of drug addiction and alcoholism in *Robinson* and *Powell*. Part II examines the Court's evolving interpretation of cruel and unusual punishment as it has grappled with new scientific and behavioral studies on brain development in adolescents and persons with intellectual disabilities. Part III analyzes lower courts' evolving, and varying, understandings of chronic alcoholism, highlighting the false dichotomy created by the Court's act-versus-status rubric. Part IV examines current understandings of chronic alcoholism given recent neuroscientific findings, detailing the paradigm shift in the medical and scientific fields from viewing alcoholism under the behavior-disease model to understanding it as a change to the neural circuitry of the brain involving both learned behavior and cognitive functioning. Part V then applies these new findings to the Court's proportionality rubric, demonstrating the parallel between the Court's analysis of brain development in its juvenile and intellectual disability jurisprudence and analysis of the brain development involved in chronic alcoholism. Part VI then uses Virginia's habitual drunkard statute as a case study, recounting the statute's original purpose, detailing its current application, and reviewing lower court findings on its constitutionality both before and after *Powell*.

II. THE COURT'S INTERPRETATION OF CRUEL AND UNUSUAL PUNISHMENT UNDER *ROBINSON* AND *POWELL*

A. Robinson*: Criminalizing Drug Addiction Violates the Eighth Amendment*

In 1962, the Supreme Court held in *Robinson v. California* that a California statute criminalizing the status of drug addiction violated the Eighth Amendment's prohibition against cruel and unusual punishment.[6]

[6] *Robinson*, 370 U.S. at 667.

The California statute at issue declared that "[n]o person shall use, or be under the influence of, or be addicted to the use of narcotics," making violation of the statute a misdemeanor punishable by "not less than 90 days nor more than one year in the county jail."[7] The majority took issue with this latter provision, which made it criminal to "be addicted to the use of narcotics[.]"[8] The majority opinion found the trial judge's jury instructions on being "addicted to the use" of narcotics to be especially problematic.[9] The judge had instructed the jurors that they need only find that appellant was in the jurisdiction while "addicted to the use of narcotics," explaining that drug addiction

> is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms.[10]

The judge further instructed that the appellant could be convicted if the jury agreed that appellant "was of the 'status' [of being addicted to drugs] *or* had committed the 'act.'"[11] Because of these instructions, the Court held that the statute, as interpreted, criminalized the passive status of drug addiction and constituted cruel and unusual punishment prohibited by the Eighth Amendment.[12]

Justice Stewart, writing for the majority, explained that the appellant was subject to criminal punishment whether or not he had ever committed the illegal act of using or possessing drugs within the state's borders.[13] The jury could have found the appellant guilty not "upon proof of the actual use of narcotics within the State's jurisdiction,"[14] but upon observations of track marks on the appellant's arm. In fact, the

[7] Id. at 660–61 n. 1 (quoting Cal. Health & Safety Code § 11721, as it appeared in Act of June 13, 1957, ch. 1064, § 1, 1957 Cal. Stat. 2343). The "be addicted to" language was removed from the statute in 1963 (Act of June 13, 1963, ch. 913, § 1, 1963 Cal. Stat. 2162). And the division containing the provision later was repealed, and the provision itself was moved to a new section (Act of December 27, 1972, ch. 1407, §§ 2–3, 1972 Cal. Stat. 2987 (1972)) (current version at Cal. Health & Safety Code § 11550 (Deering 2010 & Supp. 2017)).

[8] *Robinson*, 370 U.S. at 662.

[9] Id. at 662–63.

[10] Id.

[11] Id. (emphasis in original).

[12] Id. at 667.

[13] Id. at 666.

[14] Id. at 665.

majority opinion noted that an officer had testified affirmatively that the appellant was not under the influence of narcotics nor suffering from withdrawal symptoms when arrested and that the marks and scabs were "several days old."[15] In essence, the jury had convicted based solely on evidence that appellant was an addict.[16] The majority likened punishment for the status of being an addict to punishing an individual for being mentally ill or having leprosy, reasoning that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold" or other illness that constituted a passive status rather than an act of illegal conduct.[17]

The act-versus-status distinction was controversial from the start. In concurrence, Justice Douglas cited scientific studies supporting the idea that drug addiction was a disease involving physical dependence and loss of self-control.[18] Justice Douglas reasoned that the constitutional violation occurred not from arrest and confinement in prison, but from the fact that appellant had been convicted of a crime "with its resulting stigma."[19] Also in concurrence, Justice Harlan specified that it was not the state law itself that was unconstitutional, but rather the trial judge's interpretation that allowed the jury to find appellant guilty based "on no more proof than that he was present in California while he was addicted to narcotics," in effect "authoriz[ing] criminal punishment for a bare desire to commit a criminal act."[20]

In dissent, Justice Clark argued that the criminal provision only applied to addicts "who retain[] self-control" and that appellant fell into this "volitional-addict" category.[21] Justice Clark argued that even if the statute criminalized nonvolitional addiction, it was within the state's power to criminalize narcotics addiction because of the threat of serious crime inherent in addiction.[22] Likening drug addiction to alcoholism, Justice Clark reasoned that "'status' offenses have long been known and

[15] Id. at 662.
[16] Id.
[17] Id. at 667.
[18] Id. at 668–76 (Douglas, J., concurring) (citing sources such as American Medical Association reports, the Council of Mental Health's studies, multiple physicians, and medical jurisprudence treatises).
[19] Id. at 676–77 (Douglas, J., concurring).
[20] Id. at 678–79 (Harlan, J., concurring).
[21] Id. at 681 (Clark, J., dissenting) (arguing that the ninety-day confinement was rehabilitative in purpose).
[22] Id. at 684 (Clark, J., dissenting).

recognized in the criminal law. . . . A ready example is drunkenness, which plainly is as involuntary after addiction to alcohol as is the taking of drugs."[23] Also in dissent, Justice White reasoned that there was no evidence demonstrating that appellant had lost the power to control his actions and that the conviction had not been for "some status" but for "the regular, repeated or habitual use of narcotics immediately prior to his arrest," regardless of whether these acts had occurred in the state in which appellant was convicted.[24]

B. Powell: *Criminalizing Public Intoxication Involves Act, not Status*

Six years later, the Supreme Court considered expanding *Robinson*'s scope to apply to chronic alcoholism. In *Powell v. Texas*, appellant was convicted under a Texas statute criminalizing public intoxication.[25] A plurality of the Court, in a 5–4 decision, declined to extend *Robinson* to alcoholism, holding that Texas's public intoxication statute was constitutional as applied.[26] Though lower courts had begun to shift from conceptualizing alcohol addiction as a morally blameworthy behavior to viewing it as a disease, the Supreme Court declined to do so in its plurality opinion.[27] The Court distinguished *Powell* from *Robinson* under an act-versus-status rubric of understanding alcoholism, explaining that "appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion."[28] Public intoxication, unlike drug addiction, involved engaging in an active behavior—drinking—that was "a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill, or a leper.'"[29] Because Texas sought to punish an act rather than a status, explained the plurality, the statute did not constitute cruel and unusual punishment. Pointing to the lack of evidence in the record that the appellant was homeless or a chronic alcoholic and noting the lack of consensus on chronic alcoholism in the scientific and medical

[23] Id. (Clark, J., dissenting) (citation omitted).
[24] Id. at 686 (White, J., dissenting).
[25] 392 U.S. 514, 517 (1968).
[26] Id. at 532.
[27] See, e.g., Risa Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s 74–75 (2016) (explaining that during the 1950s, some "judges, social workers, and other reformers became convinced that the penal model of punishing the poor and the alcoholic was ill conceived").
[28] *Powell*, 392 U.S. at 532.
[29] Id. (citation omitted).

fields, the plurality held that the public intoxication statute as applied was constitutional.[30]

1. Majority Opinion: Chronic Alcoholism as Morally Blameworthy

The plurality opinion in *Powell* referenced the longstanding association in the United States between alcoholism and lack of moral character when deciding that appellant's behavior constituted an act deserving of punishment.[31] Indeed, as early as the seventeenth century, Puritan preachers characterized alcoholism as an over-indulgence in pleasure, preaching that "God sends many sore judgments on people that addict themselves to intemperance in drinking."[32] Early conceptions of alcoholism in the medical field similarly characterized alcoholism as a morally blameworthy failure to exercise self-restraint,[33] with Benjamin Rush, a physician and signer of the Declaration of Independence, characterizing alcoholism as a "disease of the will."[34]

In the following centuries, this view permeated conceptions of alcoholism in the legal field. Indeed, the label "habitual drunkard" was often explicitly tied to a finding of bad moral character in the law—a connection still found in laws today.[35] For instance, Congress places

[30] Id. at 521–23, 552–53.

[31] Id. at 531 (referencing the "harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism" as a deterrent to revealing one's alcoholism in public).

[32] Maia Szalavitz, Unbroken Brain: A Revolutionary New Way of Understanding Addiction 23 (2016).

[33] See James Langenbucher & Peter E. Nathan, Psychoactive Substance Use Disorders, in Clinical Psychology: Historical and Research Foundations 206 (C. Eugene Walker ed., 1991) (describing the Calvinistic view, which influenced medical thought, that excessive drinking was sinful but not addictive because "man had been given free choice to drink to excess or not, either to elect or to repudiate evil"); W. F. Bynum, Alcoholism and Degeneration in 19th Century European Medicine and Psychiatry, 79 British J. of Addiction 59, 59–66 (1984) (describing prevalence of the theory of degenerationism in the nineteenth century, which framed alcoholism as a moral vice that could be passed on genetically, ultimately leading to degeneration of the bloodline); Karl Mann et, al., One Hundred Years of Alcoholism: The Twentieth Century, 35 Alcohol & Alcoholism 10, 10–11 (2000) (describing same).

[34] Szalavitz, supra note 32, at 24.

[35] Jayesh Rathod, Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law, 51 Hous. L. Rev. 781, 793–97 (2014). This is also seen in the temperance movement, which gained momentum in the late nineteenth century and led to passage of the Eighteenth Amendment and the subsequent Prohibition era of the early twentieth century. See also Langenbucher & Nathan, supra note 33, at 206 (describing as a central belief of the temperance movement "the conviction that alcohol inevitably leads to individual deviance

"habitual drunkards" in the same category as persons involved in genocide and torture, as well as individuals convicted of aggravated felonies, barring all three from meeting the standard for "good moral character" for immigration purposes.[36] The plurality opinion in *Powell* noted the longstanding negative correlation between moral character and alcoholism, attributing much of the deterrent effect of the Texas public intoxication law to the "harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism."[37] The plurality further explained that:

> Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo, just as we presume it serves to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct.[38]

For the plurality in *Powell*, this inverse correlation between moral character and alcoholism was good, stigmatizing what was "condemned as a moral defect" and thereby serving to bolster the law's deterrent effect.[39]

2. Dismissing the Act-Versus-Status Dichotomy

In concurrence, Justice White dismissed the plurality's act-versus-status dichotomy in conceptualizing chronic alcoholism, finding the plurality's differentiation between act and status a *non sequitur*. Punishing an addict for using drugs merely "convict[ed] for addiction under a different name . . . like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever

and violence . . . because alcohol inhibits the 'moral centers' of the brain"); Harry Gene Levine, The Discovery of Addiction: Changing Conceptions of Habitual Drunkenness in America, 39 J. Studies on Alcohol 143, 161 (1978) (explaining that the alcohol addict "came to be viewed less and less as a victim, and more and more as simply a pest and menace" towards the end of the nineteenth century and leading up to Prohibition).

[36] 8 U.S.C. §§ 1229b(b)(1), 1229c(b)(1)(B) (2012) (limiting eligibility for cancellation of deportation or voluntary departure to non-citizens of good moral character); 8 U.S.C. § 1101(f) (2012) (listing categories of people who lack good moral character and thus cannot seek discretionary relief).

[37] *Powell*, 392 U.S. at 531.

[38] Id.

[39] Id. at 530–31.

or having a convulsion."[40] Finding no meaningful difference between criminalizing compulsive symptoms of a disease and criminalizing the disease itself, Justice White explained that he did not see how "it cannot be a crime to *have* an irresistible compulsion to use narcotics[,]" but "it can constitutionally be a crime to *yield* to such a compulsion."[41]

The statute as applied to a homeless chronic alcoholic, according to Justice White, would be "in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk."[42] Justice White further explained that for the homeless chronic alcoholic, "the public streets may be home . . . not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking."[43] In other words, "[f]or some of these alcoholics . . . a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible."[44] For Justice White, the key was not the clean-cut distinction between act and status, but rather the lack of volition (and corresponding lack of culpability) involved in drinking in public for the homeless chronic alcoholic who had no choice not to drink in public.[45] Thus, if the appellant in *Powell* had demonstrated evidence of his alcoholism and homelessness in the record, Justice White would have sided with the four Justices in dissent, putting them instead in the majority in considering the Texas statute a violation of the Eighth Amendment's prohibition on cruel and unusual punishment.

3. Powell's *Dissent: Adopting the Disease Model of Alcoholism*

The four dissenting justices in *Powell* viewed alcoholism as a disease and thus found that the Texas statute violated *Robinson*'s principle that criminal penalties "may not be inflicted upon a person for being in a condition he is powerless to change."[46] The dissent found that the record

[40] Id. at 548 (White, J., concurring in the result).
[41] Id. (White, J., concurring) (emphasis added).
[42] Id. at 551 (White, J., concurring); see also id. at 553–54 (White, J., concurring) (stating that Powell "made no showing that he was unable to stay off the streets on the night in question").
[43] Id. at 551 (White, J., concurring).
[44] Id. (White, J., concurring).
[45] Id. (White, J., concurring).
[46] Id. at 567–69 (Fortas, J., dissenting).

and expert testimony provided in *Powell* conclusively demonstrated both that the appellant was a chronic alcoholic and that chronic alcoholism was a disease.[47] Rejecting the plurality opinion's understanding of alcoholism as an act deserving punishment, the dissent explained that public intoxication was a state "which is a characteristic part of the pattern of [appellant's] disease and which, the trial court found, was not the consequence of [his] volition but of 'a compulsion symptomatic of the disease of chronic alcoholism.'"[48] In other words, punishing an act symptomatic of a disease was no different from punishing a person for having the underlying disease—and both violated the Eighth Amendment's ban on cruel and unusual punishment.

III. THE COURT'S EVOLVING UNDERSTANDING OF CRUEL AND UNUSUAL PUNISHMENT

A. A Shift in the Court's Proportionality Analysis

Several decades after *Robinson* and *Powell*, the Court signaled a shift in its Eighth Amendment proportionality analysis by attributing greater consequence to evidence of diminished mental capacity. The Court has increasingly taken into account new understandings of brain development when considering the culpability of certain classes of offenders. This presents a heightened possibility that, under its current rubric, the Court may take into account recent studies on brain development in chronic alcoholics to determine whether criminalization of public intoxication for the chronic alcoholic constitutes cruel and unusual punishment, particularly in the case of chronic alcoholics who are homeless.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[49] The Court has interpreted the Constitution's prohibition on cruel and unusual punishments to "guarantee[] individuals the right not to be subjected to excessive sanctions."[50] The Court has held the Eighth Amendment to categorically forbid certain

[47] Id. at 568 (Fortas, J., dissenting).
[48] Id. at 558 (Fortas, J., dissenting).
[49] U.S. Const. amend. VIII.
[50] Miller v. Alabama, 567 U.S. 460, 469 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 560 (2005)).

forms of punishment, while prohibiting other punishments only when grossly disproportionate to the crime committed or the status of the offender.[51] Under its proportionality analysis, the Court considers a punishment cruel and unusual under the "'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense."[52] Only in rare cases has the application of this balancing led the court to find "an inference of gross disproportionality."[53]

The Court has explained that it begins its proportionality analysis by comparing "the gravity of the offense and the harshness of the penalty."[54] The Court can implement this proportionality analysis case by case,[55] or it can develop categorical restrictions on certain punishments for certain subsets of offenders.[56] In proportionality cases involving categorical restrictions on particular punishments, the Court has considered the nature of the offense or the characteristics of the offender when imposing a restriction. In *Kennedy v. Louisiana*, for example, the Court categorically prohibited capital punishment for nonhomicide offenses based on the gross disproportionality between the nature of the offense at issue and the punishment.[57] The Court has similarly categorically barred the death penalty in cases involving offenders who were juveniles at the time the offense was committed, holding that juveniles as a class were less culpable due to developmental

[51] See, e.g., Michael Vitiello, The Expanding Use of Genetic and Psychological Evidence: Finding Coherence in the Criminal Law?, 14 Nev. L.J. 897, 905 (2014) (noting the Court's categorical rules in the death penalty context).

[52] *Miller*, 567 U.S. at 469 (quoting *Roper*, 543 U.S. at 560) (internal quotations omitted).

[53] Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgement); see also Graham v. Florida, 560 U.S. 48, 60 (2010) (quoting *Harmelin*, 501 U.S. at 1005).

[54] *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring) (quoting Solem v. Helm, 463 U.S. 277, 290–91 (1983)).

[55] *Solem*, 463 U.S. at 303 (finding unconstitutional a life without parole sentence for defendant's seventh nonviolent felony of passing a worthless check).

[56] See, e.g., Hope v. Pelzer, 536 U.S. 730, 735–37 (2002) (finding that handcuffing inmate to hitching post for seven hours without regular water or bathroom breaks constituted cruel and unusual punishment); see also Vitiello, supra note 51, at 905 (noting the Court's categorical rules in the death penalty context).

[57] Kennedy v. Louisiana, 554 U.S. 407, 437–38 (2008) (finding the Eighth Amendment prohibited the death penalty for a case involving aggravated rape of a child that did not result or intend to result in death of the child).

immaturity and ability to reform.[58] In doing so, the Court examined "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of punishment in question."[59]

B. The Court's Increased Reliance on Neuroscience in Analyzing Proportionality of Sentencing

Over the past two decades, the Court has relied increasingly on developments in neuroscience to understand how brain development can affect culpability and its proportionality analysis for certain classes of offenders.[60] While the Court's analysis has mostly focused on two subsets of offenders—juveniles and those with intellectual disabilities—new understandings of brain development in chronic alcoholics make this subset of offenders a field ripe for extension of the Court's Eighth Amendment protection. Such an extension would follow from the Court's reasoning in *Robinson* and would operate in conjunction with the previously discussed shifts in the Court's proportionality analysis.

1. Intellectual Disability and the Death Penalty

In 2002, the Court held in *Atkins v. Virginia* that states cannot execute persons with severe deficits in intellectual capacity, explaining that the Eighth Amendment must be interpreted in light of the "evolving standards of decency that mark the progress of a maturing society."[61] The Court noted that state legislation exhibited a continuing trend toward prohibiting capital punishment for offenders with intellectual disabilities, "provid[ing] powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."[62] In deeming intellectually disabled defendants categorically less culpable under its proportionality analysis, the Court

[58] See Miller v. Alabama, 567 U.S. 460 (2012); *Graham*, 560 U.S. 48; Roper v. Simmons, 543 U.S. 551 (2005).

[59] *Graham*, 560 U.S. at 67; see also *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in the judgement).

[60] See, e.g., *Roper*, 543 U.S. at 569 (citing to psychology articles on brain development in juveniles to support the idea of diminished responsibility for juveniles based on developmental immaturity); Atkins v. Virginia, 536 U.S. 304, 318 (2002) (relying on clinical definitions of "mental retardation" and updates in the psychiatry field showing diminished capacities of those with "mental retardation" to understand and process information, engage in logical reasoning, and control impulses).

[61] 536 U.S. 304, 312 (2002).

[62] Id. at 316.

looked specifically to both clinical definitions and updates in psychiatric understandings of intellectual disability. For instance, the Court noted that the definition of "mental retardation" required "subaverage intellectual functioning" and cited psychiatry studies demonstrating the diminished capacity of a mentally retarded person "to understand and process information . . . to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[63] Because of these impairments and lower levels of development in brain functioning, the Court found "abundant evidence" that mental deficiencies resulted in diminished culpability for this subset of offenders.[64]

Six years later, the Court in *Hall v. Florida* further extended Eighth Amendment protections for those with severe intellectual deficits, prohibiting states from relying solely on intelligence test scores to determine intellectual capacity in borderline cases.[65] In *Hall*, the Court examined, for compliance with *Atkins*, a Florida statute that had been narrowly interpreted by the Florida Supreme Court to require defendants, "as a threshold matter," to show an IQ score of 70 or under for consideration of intellectual disability.[66]

The Court found that established medical practice was to take into account evidence besides IQ scores in determining an individual's intellectual and cognitive functioning, such as deficits in adaptive functioning and evidence of past performance, environment, and upbringing.[67] Based on these established medical practices, the Court struck down Florida's statute and required that an individual be able to present mitigating evidence of intellectual disability in borderline cases before the death penalty could be imposed.[68] Leaning into newly developing understandings of how brain functioning should be measured and assessed in those with intellectual disabilities, Justice Kennedy reiterated the Court's commitment to look to "evolving standards of decency that mark the progress of a maturing society," cautioning that

[63] Id. at 318.
[64] Id.
[65] 134 S. Ct. 1986, 1990 (2014).
[66] Id. at 1992 (citation omitted).
[67] Id. at 1996.
[68] Id. at 2001.

the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[69]

In dismissing the rationales of deterrence and retribution, the Court noted the lack of ability of an intellectually disabled person to control impulses and conduct, explaining that "those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale."[70] Their diminished ability to process information, engage in logical reasoning, and control impulses made it "less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[71] This diminished capacity lessened the moral culpability of this class of offenders "and hence the retributive value of the punishment."[72] Kennedy likewise noted that the death penalty had no rehabilitative purpose, thus dismissing all three traditional rationales of punishment.[73]

2. Cruel and Unusual Punishment for Juveniles

A similar shift can be seen in the Court's Eighth Amendment proportionality analysis for cases involving juvenile offenders. The Court has increasingly taken into account new understandings of brain development in determining culpability of this subset of offenders. In 2005, the Court held in *Roper v. Simmons* that the Eighth Amendment prohibited imposition of the death penalty on all juvenile offenders who were under eighteen when they committed the crime for which they were convicted.[74] In so deciding, the Court relied on scientific studies demonstrating that adolescents are less able than adults to conform their conduct to the requirements of the law due to the stage of maturation in brain development.[75] Writing for the majority, Justice Kennedy explained that, "as any parent knows and as the scientific and sociological studies . . . tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults,"

[69] Id. at 1992 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).
[70] Id. at 1993.
[71] Id. (quoting Atkins v. Virginia, 536 U.S. 304, 320 (2002)).
[72] Id at 1993.
[73] Id. at 1992–93.
[74] 543 U.S. 551, 578 (2005).
[75] Id. at 569–72.

often resulting in "impetuous and ill-considered actions and decisions."[76] This lower level of brain development and maturation, corresponds with an underdeveloped sense of responsibility, diminishes culpability, and makes the death penalty categorically cruel and unusual for this class of offenders.[77]

Five years later, the Court extended its holding in *Roper* to a different category of punishment. In *Graham v. Florida*, the Court held that sentencing a juvenile to life without parole for a non-homicide crime constituted cruel and unusual punishment in violation of the Eighth Amendment.[78] With this decision, the Court again signaled a shift in its proportionality analysis, taking into account brain development and corresponding culpability not only for some subsets of offenders but for certain categories of punishment. "Life in prison without the possibility of parole," explained Justice Kennedy, writing again for the majority, "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[79]

Under its proportionality analysis, the Court reiterated its finding in *Roper*—that because youths are less culpable due to a "lack of maturity and an underdeveloped sense of responsibility," they are "less deserving of the most severe punishments."[80] The Court relied on developments in psychology and neuroscience presented in amicus briefs to bolster its decision, finding that studies "continue[d] to show fundamental differences between juvenile and adult minds"[81] in rashness and inability to assess long-term consequences.[82] The Court reasoned that as neurological development continued to occur in juveniles, this maturation presented an enhanced prospect that these "deficiencies w[ould] be reformed."[83] Focusing on the nature of the non-homicide offense, the diminished culpability of juveniles as a subset of offenders, and the severity of a life-without-parole sentence, the Court categorically

[76] Id. at 569 (citations omitted).
[77] Id. at 569, 578.
[78] 560 U.S. 48, 82 (2010).
[79] Id. at 79.
[80] Id. at 68 (quoting *Roper*, 543 U.S. at 569).
[81] Id. (citing to briefs from the American Medical Association and American Psychological Association on brain development and behavior control throughout adolescence).
[82] Id. at 68, 78.
[83] Id. at 68 (quoting *Roper*, 543 U.S. at 570).

prohibited such sentences for juvenile offenders convicted of non-homicide crimes.[84]

Two years later in *Miller v. Alabama*, the Court extended its holding in *Graham* to juvenile offenders with homicide offenses, striking down mandatory life-without-parole sentences for juveniles convicted of homicide.[85] Relying again "on what 'any parent knows' . . . [and] on science and social science as well," the Court explained as it had in *Roper* and *Graham* that "children are constitutionally different from adults for purposes of sentencing" because of their lack of maturation in brain development, correspondingly reduced culpability, and their greater capacity for reform.[86] Under the Court's rubric, mandatory life-without-parole sentences for juvenile offenders are cruel and unusual regardless of the offense, based entirely on the nature of the offender class and the lower stage of brain development of that class.

Atkins, *Hall*, *Roper*, *Graham*, and *Miller* each demonstrate how the Court's evolving understanding of cruel and unusual punishment has been influenced by emerging scientific understanding of the brain. Unifying the Court's decision making regarding both juvenile and intellectually disabled offenders is the fact that each group does not possess the same level of brain development as the average adult, thereby diminishing culpability for both classes of offenders.[87] While the Court has cautioned that "the science of psychiatry . . . informs but does not control ultimate legal determinations,"[88] its recent Eighth Amendment jurisprudence demonstrates the increasingly large role developmental neuroscience plays in informing the Court's understanding of cruel and unusual punishment.[89]

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[84] Id. at 78–79.

[85] 567 U.S. 460, 470.

[86] Id. (quoting *Roper*, 543 U.S. at 569).

[87] See, e.g., Vitiello, supra note 51, at 904 (noting that *Roper* "is an example of where the Court's view of the Eighth Amendment has been influenced by an emerging scientific understanding of the brain").

[88] Kansas v. Crane, 534 U.S. 407, 413 (2002); see also *Hall*, 134 S. Ct. at 2000 ("These views [of medical experts] do not dictate the Court's decision, yet the Court does not disregard these informed assessments.").

[89] See, e.g., *Roper*, 543 U.S. at 569 (citing to Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)); see also Laurence Steinberg, The Influence of Neuroscience on US Supreme Court Decisions About Adolescents' Criminal Culpability, 14 Nature Revs. Neuroscience 513, 513–18 (2013)

IV. RETHINKING *POWELL*: LOWER COURT CONFUSION UNDER *POWELL*'S BINARY FRAMEWORK

As scientific findings on brain development and addiction have evolved, lower courts have begun to grapple with the question of precisely how culpable an alcoholic is for acts symptomatic of his or her addiction. Decisions out of the Fourth and the Ninth Circuits aptly demonstrate the confusion created by *Powell*'s binary framework, illustrating how differently lower courts are responding to new understandings of alcoholism in the scientific and medical communities.

A. The Ninth Circuit's Analysis in Ledezma-Cosino v. Lynch

In *Ledezma-Cosino v. Lynch*, a case involving the Immigration and Nationality Act's "habitual drunkard" provision under 8 U.S.C. § 1101(f)(1), a Ninth Circuit three-judge panel embraced the idea that alcoholism is a disease undeserving of punishment, citing to Justice White's concurrence in *Powell* in support of its holding.[90] The panel found that there was no rational basis for classifying people who suffered from chronic alcoholism as lacking good moral character, which would have made the petitioner ineligible for cancellation of his removal order.[91] However, after rehearing en banc, the Ninth Circuit reversed the panel's decision, holding that the statute at issue withstood constitutional scrutiny under rational basis review.[92] A petition for certiorari to the Supreme Court was subsequently filed on August 25, 2017, and denied on January 8, 2018.[93]

While *Ledezma-Cosino* involved an equal protection challenge under the Fourteenth Amendment,[94] the Ninth Circuit's analysis of chronic alcoholism proves instructive for Eighth Amendment analysis of laws criminalizing chronic alcoholism. The decision illustrates both current confusion surrounding conceptions of chronic alcoholism and the Ninth Circuit's—and other courts'—willingness to shift from conceptualizing alcoholism under the disease–behavior framework to a more scientific

(discussing the role of scientific evidence regarding adolescent brain development in the Court's rationale in *Roper*, *Graham*, and *Miller*).

[90] 819 F.3d 1070, 1075 (9th Cir. 2016) (citing Powell v. Texas, 392 U.S. 514, 549–51 (1968) (White, J., concurring)), rev'd en banc, 857 F.3d 1042 (9th Cir. 2017).

[91] Id.

[92] Ledezma-Cosino v. Sessions, 857 F.3d 1042, 1048–49 (9th Cir. 2017).

[93] Id., cert. denied, 2018 WL 311332 (U.S. Jan. 8, 2018).

[94] *Ledezma-Cosino*, 819 F.3d at 1075.

understanding of alcoholism as a rewiring of the brain involving both learned behavior and cognitive functioning.[95]

At the heart of the issue for the original three-judge panel, and later for the court sitting en banc, was how to conceptualize chronic alcoholism and its impact on an individual's volition, as well as corresponding culpability, and the level of scrutiny to use on review. In the original three-judge panel opinion in *Ledezma-Cosino*, both the majority and the dissent miss the mark in their portrayal of alcoholism. The majority does so by embracing the conceptual model of alcoholism as a passive disease, and the dissent by adopting the conceptual model of alcoholism as an act worthy of punishment—both creating simplifications along a binary framework of addiction that cannot adequately characterize the impact of chronic alcoholism on an individual's will power. On reviewing this case en banc, the Ninth Circuit struggled to cohesively define the term "habitual drunkard," determine its relation to moral character, and decide which level of review to use to assess the statute's constitutionality.[96] *Ledezma-Cosino* illustrates the confusion created by *Powell*'s act-versus-status paradigm and the need for a new conceptual framework through which to analyze chronic alcoholism and behavior.

1. Alcoholism as a Disease Undeserving of Punishment

Ledezma-Cosino reached the Ninth Circuit on appeal after the Board of Immigration Appeals determined that appellant, a noncitizen, was ineligible for cancellation of removal or voluntary departure due to lack of good moral character.[97] This finding of lack of good moral character was predicated solely on the fact that the appellant met the statutory definition of a habitual drunkard.[98] On appeal, the Ninth Circuit overturned the Board of Immigration Appeals' decision, holding the classification of a person "as to moral character on the basis of a medical disability"[99] was irrational and in violation of the Equal Protection Clause. The Ninth Circuit held that chronic alcoholism was a disease it

[95] Id. at 1076.

[96] *Ledezma-Cosino*, 857 F.3d at 1048–49 (issuing a fractured opinion over the correct definition of "habitual drunkard" and whether the statute's "good moral character" language was relevant under rational basis review).

[97] *Ledezma-Cosino*, 819 F.3d at 1072–73.

[98] Id at 1073.

[99] Id.

had "long recognized" as a medical condition "undeserving of punishment."[100] In reaching its conclusion, the panel cited to a 1975 Ninth Circuit opinion, in which the court found "[t]he proposition that chronic acute alcoholism is itself a disease, 'a medically determinable physical or mental impairment' . . . hardly debatable."[101]

2. Alcoholism as a Morally Blameworthy Act

On appeal, the Government argued that the statute at issue did not target the status of alcoholism but rather the act of excessive drinking, which it argued was morally blameworthy using reasoning similar to that of the plurality in *Powell*.[102] The Government noted that "habitual drunkards have been the target of laws intending to protect society since the infancy of the nation," using history to bolster its argument that the legislation rationally tied alcoholism to moral character.[103] In addition, the Government cited to numerous sources showing links between alcoholism and increased risk of violence.[104]

In rejecting this argument, the Ninth Circuit panel noted that "new insights and societal understanding can reveal unjustified inequality . . . that once passed unnoticed and unchallenged,"[105] reasoning that just as the Court had shifted from upholding sterilization of the mentally ill[106] to deploring the "grotesque mistreatment" of those with mental disabilities,[107] similar new insights called for treating alcoholism "as a disease rather than a character defect."[108] The panel found that the historical treatment of alcoholism "undercut[] rather than buttresse[d] the Government's argument," as chronic alcoholics, like those with mental illness, had faced prejudice throughout history.[109]Moreover, they found the Government's equating of alco-

[100] Id. at 1075.
[101] Id. (quoting Griffs v. Weinberger, 509 F.2d 837, 838 (9th Cir. 1975) (internal quotations omitted)).
[102] Id. at 1075.
[103] Id. at 1078.
[104] Id. at 1077.
[105] Id. at 1078 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015)).
[106] Buck v. Bell, 274 U.S. 200, 207 (1927) (notoriously noting that "[t]hree generations of imbeciles are enough").
[107] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 438 (1985) (quoting Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984)).
[108] *Ledezma-Cosino*, 819 F.3d at 1078.
[109] Id.

holism with bad moral character "deplorable,"[110] embracing the disease model of alcoholism as an ailment undeserving of punishment.

The Ninth Circuit also repudiated the Government's idea that alcoholics could try harder to stop drinking as unsupported by the medical literature.[111] The panel cited to numerous articles in psychology, public health, and medical journals on alcoholism among veterans, Native Americans, and the homeless, which demonstrated that inability to stop drinking was "a function of the underlying ailment" of alcoholism.[112] Much like Justice White and the dissent in *Powell*, the panel found the distinction between criminalizing a disease and criminalizing acts compulsive as symptomatic of that disease to be a non sequitur.[113]

3. A False Dichotomy

In dissent, Judge Clifton argued that the majority had created a false dichotomy by characterizing alcoholism as either a disease or a morally blameworthy act. That chronic alcoholism was a disease did not, for Judge Clifton, rule out the idea "that there can be no element of drunkenness that is subject to free will or susceptible to a moral evaluation."[114] The majority, according to Judge Clifton, assumed that a habitual drunkard was in a state of drunkenness "only because of factors beyond his control," creating a dichotomous understanding that a disease could involve no act of the will.[115] Judge Clifton argued that if this were the case, chronic alcoholics would never have the ability to stop drinking, yet some chronic alcoholics are able to achieve long-term

[110] Id. at 1076.

[111] Id. ("[T]he theory that alcoholics are blameworthy because they could simply try harder to recover is an old trope not supported by the medical literature; rather, the inability to stop drinking is a function of the underlying ailment.").

[112] Id.

[113] Id. at 1075. ("Just as a statute targeting people who exhibit manic and depressive behavior would be, in effect, targeting people with bipolar disorder and just as a statute targeting people who exhibit delusional conduct over a long period of time would be, in effect, targeting individuals with schizotypal personality disorder, a statute targeting people who habitually and excessively drink alcohol is, in effect, targeting individuals with chronic alcoholism.").

[114] Id. at 1079 (Clifton, J., dissenting).

[115] Id.

sobriety.[116] This, for Judge Clifton, demonstrated that there was an element of volition in drinking even amongst chronic alcoholics.[117]

Further, Judge Clifton argued that the majority ignored scientific and behavioral evidence supporting his position that some of these actions were "properly subject to moral evaluation."[118] Citing to a study showing motivation in alcoholics as critical to achieving sobriety, Judge Clifton wrote that there must be some amount of volition for motivation to be positively correlated with long-term sobriety.[119] According to Judge Clifton, if that volition was exercised, it could motivate an alcoholic to refrain from habitual drunkenness.[120]

Ironically, the article that Justice Clifton cites in dissent actually provides support for the majority's understanding of alcoholism as a disease involving a complete lack of volition. In it, author and professor of psychology William Miller contrasts motivation, which he correlates with acceptance of one's disease, with denial, which he describes as a patient rationalizing his or her drinking and denying having a problem.[121] Professor Miller notes that an alcoholic's acceptance that he or she is an alcoholic, "[v]iewed at a broader level, . . . represents the individual's willingness to acquiesce to the sick role and its central assumptions of need for external help *and inability to overcome the problem by volitional control*."[122]

Thus, for Miller, motivation in getting treatment occurred precisely because a patient "hits bottom, accepts the illness, admits personal powerlessness over alcohol, and undergoes the processes of surrender and reduction of ego."[123] If a patient does not admit his or her powerlessness over the disease and "inability to overcome the problem by volitional control,"[124] the patient then lacks the motivation with which to truly engage in the process of achieving sobriety.[125] Miller

[116] Id. at 1080.
[117] Id.
[118] Id.
[119] Id.
[120] Id.
[121] William R. Miller, Motivation for Treatment: A Review with Special Emphasis on Alcoholism, 98 Psychol. Bull. 84, 84–87 (1985).
[122] Id. at 87 (citations omitted) (emphasis added).
[123] Id. at 85 (citations omitted). Miller instead explains that motivation should be defined not as involving conscious choice suggestive of volition, but as the probability of engaging in behaviors that lead to positive outcomes. Id. at 99.
[124] Id. at 87.
[125] Id. at 87–89.

cautions against relating what he terms as motivation with volition, which, he says, will lead to inaccurate "moralistic blame attributions" if and when treatment fails, as it inevitably will at some point in the recovery process.[126]

Miller's analysis stands in contrast with Judge Clifton's claim that motivation in recovery demonstrates that some amount of volition is involved when a chronic alcoholic achieves sobriety. These divergent views of alcoholism create a Catch-22 for the chronic alcoholic seeking to recover: admit powerlessness over your illness—a lack of volition and inability to recover on your own—in order to engage in treatment, or engage in treatment, thereby showing your volition over your illness.

4. Rehearing En Banc

In an en banc rehearing of *Ledezma-Cosino*, the Ninth Circuit reversed the panel's decision, holding that the statute at issue withstood constitutional scrutiny under rational basis review.[127] However, the judges issued fractured opinions regarding which level of scrutiny to use in reviewing the statute's "habitual drunkard" provision and whether alcoholism had any rational relation to good moral character.[128] A plurality concluded that Congress could have found that persons who drink more alcohol pose more risk to themselves and others, which would mean making "habitual drunkards" ineligible for cancellation of removal could be rationally related to a legitimate government interest.[129] In concurrence, three judges held that the government's burden was even lighter than rational basis review because the statute should be accorded more deference under the plenary power doctrine as a statute governing immigration.[130] In concurrence, three other judges found that the statute survived rational basis review, and that the question of whether habitual drunkards should be considered morally blameworthy for actions associated with their condition was a question for Congress, not the courts.[131] The two dissenting judges argued for a

[126] Id. at 99.
[127] *Ledezma-Cosino*, 857 F.3d at 1047–49.
[128] Id. at 1048–60.
[129] Id. at 1047–49 (plurality opinion).
[130] Id. at 1050 (Kozinski, J., concurring).
[131] Id. at 1053 (Watford, J., concurring) ("Whether the volitional component is weighty enough to warrant treating habitual drunkards as morally blameworthy for their condition is a policy question for Congress to resolve.").

more definitive explanation of the phrase "habitual drunkard" to avoid statutory ambiguity.[132] In their opinion, they used the act-versus-status rubric to emphasize that the statute should only refuse admissibility to alcoholics whose *acts* pose a threat to welfare, and that it "would be inconsistent with the statute, when considered in context, to construe it to mean that the disease of alcoholism, by itself, would per se disqualify a petitioner."[133]

B. The Fourth Circuit's Interpretation of Robinson *before and after* Powell

The Fourth Circuit's interpretation of *Robinson* before and after *Powell* further demonstrates the confusion caused by the *Powell* opinion's act-versus-status framework. Two years before the Court upheld the Texas public intoxication statute in *Powell*, the Fourth Circuit in *Driver v. Hinnant* interpreted *Robinson* as extending Eighth Amendment protection against cruel and unusual punishment to chronic alcoholism.[134] *Driver* involved a North Carolina statute that criminalized public drunkenness.[135] In Durham County, where the offenses at issue took place, the first misdemeanor was punishable by imprisonment for up to thirty days.[136] Because the appellant, a chronic alcoholic, had received three misdemeanors for public drunkenness within a twelve-month period, he was sentenced to imprisonment for two years[137] through a statutory scheme reminiscent of Virginia's habitual drunkard law.[138]

The Fourth Circuit found that *Robinson* "sustain[ed], if not command[ed]," its holding that North Carolina's public intoxication law violated the Eighth Amendment's prohibition on cruel and unusual punishment.[139] Much like the dissent in *Powell*, the Fourth Circuit panel explained that drinking was "compulsive as symptomatic of the disease" of alcoholism and that, accordingly, the state could not "stamp an

[132] Id. at 1056–57 (Thomas, J., dissenting)
[133] Id.
[134] Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966).
[135] Id. at 763. The statute stated that if any person "shall be found drunk or intoxicated . . . at any public place or meeting . . . he shall be guilty of a misdemeanor." Id.
[136] Id.
[137] Id. (stating that appellant's two-year terms were to run concurrently).
[138] See infra Part VII.
[139] *Driver*, 346 F.2d at 764–65.

unpretending chronic alcoholic as a criminal if his drunken public display [was] involuntary as the result of disease."[140] Though "the alcohol-diseased may by law be kept out of public sight," explained the Fourth Circuit, "many of the diseased have no homes or friends, family or means to keep them indoors. [Appellant] examples this pitiable predicament, for he is apparently without money or restraining care."[141] In other words, criminalizing public intoxication for those who had no choice but to manifest symptoms in public constituted cruel and unusual punishment in violation of the Eighth Amendment.[142]

The court wrote that "nothing we have said precludes appropriate detention of him for treatment and rehabilitation so long as he is not marked a criminal,"[143] noting, as Justice Douglas had in *Robinson*, that the violation adhered not as a result of involuntarily detaining or incarcerating the individual, but in labeling the chronic alcoholic a criminal.[144] Just as the California statute in *Robinson* criminally punished the status of drug addiction, "the North Carolina Act criminally punishe[d] an involuntary symptom of a status—public intoxication."[145] Much like Justice White and the *Powell* dissent, the panel found meaningless the distinction between criminalization of a disease and criminalization of a compulsive act symptomatic of that disease.[146]

Both state and federal courts later interpreted *Powell* as overruling *Driver*.[147] In the 1979 case of *Fisher v. Coleman*, a federal district court upheld the constitutionality of the interdiction statute and the Fourth Circuit affirmed on appeal.[148] The trial court determined that *Powell* overruled and made inapplicable *Driver*'s holding "insofar as [*Driver*]

[140] Id.
[141] Id. at 764.
[142] Id. at 765.
[143] Id.
[144] Id. at 764; see also *Robinson*, 370 U.S. at 676–77 (Douglas, J., concurring) (noting that the constitutional violation lay not in confinement itself but in the criminal conviction "with its resulting stigma").
[145] *Driver*, 356 F.2d at 764–65.
[146] Id. at 764.
[147] See Fisher v. Coleman, 486 F. Supp. 311, 316 (W.D. Va. 1979) (citations omitted), aff'd per curiam, 639 F.2d 191 (4th Cir. 1981); see also Jackson v. Commonwealth, 604 S.E.2d 122, 124–25 (Va. Ct. App. 2004); Commonwealth v. Reyes, 72 Va. Cir. 105, 106 (2006).
[148] Fisher v. Coleman, 639 F.2d 191 (4th Cir. 1981) (per curiam) (affirming lower court decision).

held that the Eighth Amendment bars criminal punishment of behavior symptomatic of alcoholism."[149] In 2004, the Virginia Court of Appeals similarly upheld Virginia's interdiction statute, stating that, "in accord with *Powell* and *Fisher*, we hold that Code § 4.1-322 does not violate the Eighth Amendment by punishing status or by imposing cruel and unusual punishment."[150] Two years later, a Virginia state circuit court in *Commonwealth v. Reyes* upheld again on similar grounds the constitutionality of Virginia's interdiction statute as applied to a chronic alcoholic arrested for public intoxication.[151]

V. A PARADIGM SHIFT: ADOPTING A THIRD CONCEPTUAL MODEL FOR UNDERSTANDING CHRONIC ALCOHOLISM

A. Rejecting Powell's *Act-Versus-Status Framework*

Given the confusion created by *Powell* among the lower court and updated neurological findings, this Note posits that it is time to abandon the act-versus-status paradigm when analyzing chronic alcoholism, moving from the binary extremes of act and status toward a middle ground approach that better accords with modern conceptions of addiction.

There are two alternate ways the Court considers alcoholism in *Robinson* and in *Powell*: as an act of moral blameworthiness or as a disease over which the alcoholic has no control. However, between these two conceptions lies a third model in which chronic alcoholism is better understood as a rewiring of the brain—a change in the circuitry of the brain's pathways over time that affects both the chronic alcoholic's cognitive function and volition.[152]

To accurately analyze chronic alcoholism, the Court must reject *Powell*'s binary framework in favor of this third model. Doing so would require the Court to update its understanding of brain development in chronic alcoholics, much as it has done in the context of juveniles and persons with intellectual disabilities.[153] This third model would allow for a compromise between the two extremes that judges have struggled

[149] *Fisher*, 486 F. Supp. at 316.
[150] *Jackson*, 604 S.E.2d at 125.
[151] 72 Va. Cir. at 106.
[152] See, e.g., Marc Lewis, The Biology of Desire: Why Addiction Is Not a Disease 22–26 (2015).
[153] See supra Part III.

with, yielding outcomes more consistent with the Court's changing proportionality analysis and providing a middle space for judges on opposing ends of the spectrum.

B. Alcoholism as a Rewiring of the Brain

The science behind alcohol addiction has undergone a major shift in the past half century, as studies increasingly demonstrate a correlation between specific neurological pathways in the brain and behaviors of those suffering from addiction.[154] The National Institute on Alcohol Abuse and Alcoholism has published a growing number of studies demonstrating how changes in neural functioning over time affect a person's behavior, decision-making, and cognitive processing.[155] These studies associate alcoholism with structural and functional abnormalities in the prefrontal cortex of the brain—the region of the brain most closely associated with impulse control and executive functioning.[156] As a person becomes addicted to alcohol, neural adaptations in the prefrontal cortex of the brain change the way that person responds to alcohol, impairing the executive functioning required to regulate reward-related behavior and triggering automatic processes that reduce inhibitory control.[157] Implicit associations to alcohol-related cues further inhibit the cognitive processing involved in consuming alcohol; as a person becomes chronically addicted, that person's ability to make informed decisions and exhibit self-control becomes increasingly impaired.[158]

Neuroscience journalist Maia Szalavitz advocates for a new conception of alcoholism as neither a disease nor an act, but rather as a developmental disorder involving a rewiring of the brain.[159] Addiction,

[154] Nasir H. Naqvi & Jon Morgenstern, Cognitive Neuroscience Approaches to Understanding Behavior Change in Alcohol Use Disorder Treatments, 37 Alcohol Research: Current Revs. 29, 29–31 (2015).

[155] Id. at 31; see also Joseph P. Schacht, Raymond F. Anton, and Hugh Myrick, Functional Neuroimaging Studies of Alcohol Cue Reactivity: A Quantitative Meta-analysis and Systematic Review, 18 Addiction Biology 121, 121–133 (2013) (conducting a meta-analysis of functional magnetic resonance imaging studies in which patients were exposed to alcohol-related cues and showed activation in the cortical regions involved in decision-making, cognitive control, and emotional experience).

[156] Naqvi & Morgenstern, supra note 154, at 31 (noting that studies link dysfunction in the dorsolateral prefrontal cortex to impaired inhibitory control).

[157] Id. at 32–34.

[158] Id. at 32.

[159] Szalavitz, supra note 32, at 4, 273, 277; see also Lewis, supra note 152, at 195–98 (describing the relearning and synaptic rewiring that takes place in the brains of patients

according to Szalavitz, is not a choice or a moral failing, but neither is it a chronic, progressive brain disease.[160] Szalavitz contends that the addicted brain is not diseased, but rather has "simply undergone a different course of development . . . addiction is what you might call a wiring difference, not necessarily a destruction of tissue."[161] Szalavitz applies this new understanding to a vast array of addictions; however, her research presents a convincing case that alcohol addiction does not fit either the disease or choice paradigms laid out by the Court in *Powell*.[162]

Professor Marc Lewis likewise argues that relegating alcohol addiction to either the disease model or to the morally-blameworthy-act model fails to capture what is actually occurring in the brain.[163] Chronic alcoholism, according to Lewis, is better understood as a rewiring of the brain as learned behaviors cause neurologic changes in the brain's pathways.[164] Lewis explains that addiction to alcohol over time causes a rewiring of the "neural circuitry of desire" in the brain, capitalizing on the brain's neuroplasticity to swiftly and deeply instill substance and behavioral dependencies.[165] These dependencies are learned, yet they also involve "an insidious process of change in our . . . synaptic patterning."[166] Like Szalavitz, Lewis posits that addiction is a dysfunction in learned behavior, a distortion of reward-related pathways in the brain resulting in feedback loops that disrupt normal cognitive functioning, affecting a person's ability to regulate and modify behavior.[167] Urges toward particular actions, as they become in-

following strokes and concussions); Mogilner et al., Somatosensory Cortical Plasticity in Adult Humans Revealed by Magnetoencephalography, 90 Proc. of the Nat'l Acad. of Sciences 3593 (1993) (showing adjustments to wiring and reorganization in the somatosensory cortex following surgery on patients with webbed fingers to adjust to patients' changed physical anatomy).

[160] Szalavitz, supra note 32, at 37.

[161] Id. at 6.

[162] Id. at 34–39, 53, 59–63.

[163] Lewis, supra note 152, at 23–25.

[164] Id. at 23–45.

[165] Id. at x, 170.

[166] Id. at 44.

[167] Id. at 40. A quick summary of the neuroscience involved may help explain how these synaptic patterns emerge. Cells connect via synaptic pathways through which neurons fire. Each time a neuron is fired, the resultant electrical charge creates an increase in that cell's firing rate, forming a stronger synaptic pathway. Conversely, the less neurons are fired, the more grown-over that neural pathway becomes. As cells fire more, their connections become "hardwired" through emotion, attention, and repetition. Id. at 39–41.

creasingly repetitive, create a "chronic automaticity" linked to changed stimulus-response pathways in the brain.[168] The more habitual a person's alcohol use, the more that person's actions become dominated by compulsions linked with certain stimuli rather than by the normal processing of reward-related pathways.[169] Synaptic pathways formed through repetitive drinking eventually become "hardwired" such that, over time, the chronic alcoholic's learned behaviors become more a function of automaticity rather than any degree of volition.[170] Thus, alcoholism is not accurately characterized as a chronic, debilitative disease, but neither can it accurately be reduced to a simple act of the will.

Yet these changes are not irreversible in nature. Due to the brain's neuroplasticity, or its ability to constantly change and form new neural pathways throughout a person's life, these same neural pathways can be rewired again.[171] The brain continuously remodels itself based on new experiences, allowing pathways to form as neurons develop new connections—in effect, "rewiring" the brain.[172] Just as gray matter in the prefrontal cortex of the brain may thin out over time with lack of use, new neural pathways can form as new behavioral patterns develop.[173] As a result, experts assert that reduction of gray matter volume in specific regions of the prefrontal cortex due to chronic alcoholism can reverse after several months of abstinence from alcohol.[174] These regions are able to not only return to normal baseline density level within a year,[175] but can also increase beyond these baseline levels of volume and density.[176] Thus, chronic alcoholism begins as a choice, but that "choice is biological."[177]

The Court's current act-versus-status dichotomy does not allow for this more nuanced understanding of the complex interaction of learned behavior and neurophysiological change in the chronic alcoholic.[178]

[168] Id. at 128, 130.
[169] Id. at 126.
[170] Id. at 40, 125–28.
[171] See id. at 29–32 (describing plasticity of the brain in shaping and reshaping addiction).
[172] See, e.g., id. at 194–98.
[173] Id. at 40–43, 168–69.
[174] Id. at 137.
[175] Id.
[176] Id. at 137–38.
[177] Id. at 138.
[178] Id. at 23–24.

Much as it did in the intellectual disability and juvenile justice contexts, the Court must change its understanding of chronic alcoholism to accord with current understandings of alcohol addiction before determining the proportionality of punishment in the Eighth Amendment context.

VI. RECONCEPTUALIZING CHRONIC ALCOHOLISM IN EIGHTH AMENDMENT ANALYSIS

A. Similarities in Brain Development of Juveniles and Chronic Alcoholics

Similarities in the brain development of juveniles and chronic alcoholics support the idea that the Court in its proportionality analysis should take into account brain development and its effect on volition and culpability for both groups of offenders as separate classes. The same brain scans showing differing amounts of gray matter in recovering alcoholics are used in understanding brain development and maturation in juveniles from adolescence to adulthood, bolstering the idea that the same cognitive and behavioral neurology is at play in both cases.[179] If the Court decides to take such updated understandings of neuroscience into account in the juvenile context, it would seem to follow that it should take similar studies into consideration for a different subset of offenders.

The same factors the Court has identified as different in the brain development of juveniles and of persons with intellectual disabilities are likewise present in a chronic alcoholic: lessened ability to restrain impulses, diminished capacity to consider alternatives or account for long-term consequences of actions, susceptibility to short-term rewards, and lack of processing in executive functioning.[180] Just as decision-making is less developed in juveniles as their prefrontal cortexes develop, inhibitory control and cognitive processing are impaired in the

[179] Compare Lewis, supra note 152, at 170 with Adam Ortiz, Adolescence, Brain Development and Legal Culpability 1–2, American Bar Association: Juvenile Justice Center (2004), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section _newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf [https://perma.cc/W4NM-X9KY] (describing gray matter production's effect on cognitive functioning in adolescents).

[180] Compare Naqvi & Morgenstern, supra note 154, at 31–32 with Graham v. Florida, 560 U.S. 48, 68 (2010) (citing to briefs from the American Medical Association and American Psychological Association on brain development and behavior control throughout adolescence).

chronic alcoholic, changing the brain's capacity for self-regulation and processing.[181] The developmental differences in both classes of offenders mitigate the culpability involved for such offenders in actions that are symptomatic of these neurological changes. For both juveniles and chronic alcoholics, there is a continuing capacity for change as the brain develops and its neurocircuitry continually adapts.[182] The same heightened capacity the Court has noted for change and rehabilitation in juveniles exists for the chronic alcoholic if given proper treatment and rehabilitation.[183] And in all three contexts—the juvenile, the intellectually disabled, and the chronic alcoholic—brain wiring for these individuals as classes of offenders make them categorically less culpable than the average adult.

B. Applying Neuroscientific Findings to the Court's Proportionality Analysis

Under its more recent proportionality analysis, the Court has displayed a greater willingness to take a holistic view in determining whether a punishment should be barred as disproportionate under the Eighth Amendment's ban on cruel and unusual punishment. For instance, in *Hall v. Florida*, Justice Kennedy found the Florida statute at issue violated the Eighth Amendment only after taking into account clinical definitions of "mental retardation," updates in the field of psychiatry showing diminished capacities for those with "mental retardation" to process information and control impulses, and the range of error in IQ scores in determining these cognitive impairments.[184] And in *Graham v. Florida*, the Court took into account both the culpability of the class of offenders and the sentence imposed in determining that life without parole was too onerous a sentence for juveniles.[185]

However, while the Court has acknowledged this gray area in its understanding of brain development in juveniles and those with intellectual disabilities, it has yet to take into account new findings regarding brain development in chronic alcoholics. The Court must also

[181] See Navqi and *Graham*, supra note 180.

[182] Compare Lewis, supra note 152, at 38-42 with *Graham*, 560 U.S. at 68 (relying on "development in psychology and brain science" showing "[j]uveniles are more capable of change than adults. . .").

[183] Compare Lewis, supra note 152, at 195–99 with *Graham*, 460 U.S. at 68.

[184] 134 S. Ct. 1986, 1990, 1994 (2014).

[185] 560 U.S. 48, 67–70, 74 (2010).

reconceptualize its understanding of chronic alcoholism. By doing so, the Court could align its Eighth Amendment proportionality analysis in the chronic alcoholic context to comport with modern understandings of alcohol addiction.

The neuroscience behind chronic alcohol addiction is not unlike that recognized by the Court in *Graham*, *Roper v. Simmons*, *Atkins v. Virginia*, and *Hall*. As in those cases, chronic alcoholism creates a class of offenders whose brain development categorically changes the culpability involved in decision-making, impairing inhibitory control, executive functioning, and cognitive processing.[186] The courts in *Powell*, *Fisher v. Coleman*, *Jackson v. Commonwealth*, and *Commonwealth v. Reyes* all failed to accurately understand chronic alcoholism as involving a change in brain development affecting learned behavior and changing neural circuitry patterns—in other words, as neither an act of the will or a disease, but rather an addiction that effectively rewires the brain.[187]

Under the Court's Eighth Amendment proportionality analysis, however, such findings would be critical in ascertaining volition and culpability for the chronic alcoholic—and in determining proportionality of punishment. In keeping with its analysis in *Atkins* and the case's progeny, the Court would likely find that chronic alcoholics, like juveniles and those with intellectual deficits, have diminished culpability as a subset of offenders, whose sentencing must be viewed with an understanding of this diminished culpability. This would require rejecting *Powell*'s binary act-versus-status framework, as well as the perception of public intoxication by the chronic alcoholic as either morally blameworthy behavior or an intractable disease. Chronic alcoholism should instead be understood as an addiction causing a complex rewiring of the brain's pathways—physiological in nature, yet not intractable. Such a view would better cohere with the Court's reasoning and outcome in *Robinson* and would align with modern understandings of alcoholism. Moreover, chronic alcoholism under this third model would occupy a middle space between the act-versus-status extremes that judges have found problematic since *Powell*.

[186] See supra Section V.B.
[187] See supra Section IV.B

C. Implications of the Third Approach

Were the Court to view chronic alcoholism under this third model, it should take an approach similar to that which it took in cases involving intellectually disabled persons and juveniles. Accordingly, the Court should begin its proportionality analysis by examining "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of punishment in question."[188]

Under such an approach, the Court would first have to define who comprises the class of individuals deemed categorically less culpable due to their chronic alcoholism under the Eighth Amendment. The Court does not quickly extend such protection and has cautioned that "the science of psychiatry . . . informs but does not control ultimate legal determinations."[189] As they did in *Atkins* with respect to "mental retardation," the Court should look specifically to clinical definitions of chronic alcoholism and to changes in psychiatric understandings of alcohol addiction.[190] And, as in *Atkins*, the Court would find "abundant evidence" showing that changes in brain functioning and impairment of executive functioning result in diminished culpability for chronic alcoholics.[191] The Court could utilize research showing neural adaptations in the prefrontal cortex of the brain to differentiate the neurological development in chronic alcoholism from that involved in other learned behaviors, and would have ample data to rely upon in doing so.[192]

The Court would then have to determine whether the particular sentence at issue for the chronic alcoholic is grossly disproportionate, given the diminished culpability of chronic alcoholics. As in cases involving juveniles and intellectually disabled persons, this would only lead to categorical restrictions on punishment when severely

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[188] *Graham*, 560 U.S. at 67; see also Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring in part and concurring in judgment) ("[*S*]*tare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years.").

[189] Kansas v. Crane, 534 U.S. 407, 413 (2002); see also *Hall*, 134 S. Ct. at 2000 ("These views [of medical experts] do not dictate the Court's decision, yet the Court does not disregard these informed assessments.").

[190] 536 U.S. 304, 318 (2002).

[191] Id.

[192] See, e.g., Lewis, supra note 152, at 29–44 (explaining the chronic automaticity linked to changed neural stimulus-response pathways in chronic alcoholism); Naqvi & Morgenstern, supra note 154, at 32; Schacht et al., supra note 155, at 121.

disproportionate to the crime.[193] The Court has categorically restricted punishments only in extreme cases—cases involving the death penalty and mandatory life without parole.[194] Rather than barring certain punishments for chronic alcoholics, the Court might be inclined to require additional safeguards for them as a subset class of offenders, such as allowing the individual's chronic alcoholism to be brought before the court as a possible mitigating factor.

A critic could argue that the same neurological studies involved in chronic alcoholism apply to every type of addiction, begging the question of where to draw the line in determining volition and culpability. In other words, the same "rewiring of the brain" research could apply to reduce sentences for other types of addictions that might have neurological bases, opening the floodgates of Eighth Amendment protection to numerous groups of offenders.

However, such concerns over line-drawing assume a more expansive conclusion than justified by the analysis undertaken in this Note. The fact that a line-drawing problem may exist means not that the Court should avoid the constitutional issue, but rather that it must distinguish chronic alcoholics as a subset class from other groups of offenders—just as it has done in cases involving juveniles and those with intellectual disabilities. This Note merely proposes that a third conceptual approach is necessary in the context of chronic alcoholism to maintain internal consistency with the Court's Eighth Amendment analysis in *Atkins*, *Roper*, and their progeny.

VII. CASE STUDY: APPLYING THE COURT'S PROPORTIONALITY ANALYSIS TO VIRGINIA'S HABITUAL DRUNKARD STATUTE

To illustrate application of the third conceptual approach to understanding chronic alcoholism, this Note uses Virginia's habitual drunkard statute as a case study, analyzing the statute under the Court's Eighth Amendment proportionality rubric in light of updated neuroscientific research. Part A begins by describing Virginia's habitual drunkard statute, recounting its original purpose, and detailing its current enforcement. Part B then questions whether, under this new framework, Virginia's habitual drunkard statute would withstand constitutional

[193] See Roper v. Simmons, 543 U.S. 551, 575, 578 (2005); *Atkins*, 536 U.S. at 311–12.

[194] See, e.g., Miller v. Alabama, 567 U.S. 460, 470 (2012); *Graham*, 560 U.S. at 82; Kennedy v. Louisiana, 554 U.S. 407, 437–38 (2008); *Roper*, 543 U.S. at 578.

scrutiny under the Eighth Amendment's ban on cruel and unusual punishment. This Note ultimately posits that, given new understandings of neural functioning in chronic alcoholism, Virginia's habitual drunkard statute may no longer be constitutional under the Court's current Eighth Amendment proportionality analysis. While a federal district court found the statute constitutional,[195] it did so without taking into account new findings on the neuroscience behind chronic alcoholism. Instead, it used the framework from *Powell*'s plurality opinion to differentiate the act of drinking alcohol from the status of being a chronic alcoholic.[196] The court cited district court precedent such as *Fisher v. Coleman* and *Jackson v. Commonwealth* for the proposition that the interdiction statute punishes specific acts and behavior—possession or consumption of alcohol—rather than a person's status.[197] The case is currently pending appeal to the Fourth Circuit.[198]

A. Virginia's Habitual Drunkard Statute

1. Statutory Text

Virginia's interdiction statute, much like the Texas public intoxication statute at issue in *Powell*, makes it a crime for a person to be drunk in public or to possess alcohol in public after being labeled a habitual drunkard.[199] Section 4.1-333 of the Virginia Code creates a civil proceeding by which a prosecutor can ask the circuit court judge in any Virginia locality to interdict a person by declaring them a "habitual drunkard."[200] To interdict an individual, the state is required to make a showing that the individual is a "habitual drunkard," which it can do by demonstrating evidence of multiple citations or arrests for alcohol-

[195] Hendrick v. Caldwell, 232 F. Supp. 3d 868, 883 (W.D. Va. 2017).

[196] Id. at 887–88.

[197] Id.

[198] Notice of Appeal, Hendrick v. Caldwell, No. 7:16cv95 (W.D. Va. filed Nov. 16, 2017), https://advance.lexis.com/api/permalink/19a13299-36fd-493f-b8e8-db5a86db5af0/?context=1000516 [https://perma.cc/7BWY-8NLH].'

[199] Va. Code Ann. § 4.1-322 (1996).

[200] Va. Code Ann. § 4.1-333 (1993). Section 4.1-333 provides that "[w]hen after a hearing upon due notice it appears to the satisfaction of the circuit court of any county or city that any person, residing within such county or city . . . has shown himself to be a habitual drunkard, the court may enter an order of interdiction prohibiting the sale of alcoholic beverages to such person until further ordered."

related offenses.[201] An individual has no right to a court-appointed lawyer in this proceeding or to any other protections guaranteed to criminal defendants.[202] Nor does the statute provide any definition of "habitual drunkard" or any process by which a person can appeal or remove the label once interdicted.[203]

Once an individual is interdicted, it becomes illegal for that person to possess or consume alcohol, or to attempt to possess or consume alcohol, in public.[204] Violation of any part of the statute constitutes a Class 1 misdemeanor, punishable by up to a year in prison.[205] Once interdicted, the penalty for public intoxication similarly jumps from a Class 4 misdemeanor, carrying a maximum fine of $250, to a Class 1 misdemeanor, carrying a fine of up to $2,500 and a penalty of up to a year in prison.[206] Operating together, these two provisions constitute the "habitual drunkard" statute. Utah is the only other state with a similar law criminalizing possession of alcohol by a habitual drunkard.

2. Original Purpose of Habitual Drunkard Statute

The original purpose of the 1873 interdiction statute was to found and maintain an "institution for the care and reclamation of inebriates."[207] Under the statute, "the Virginia inebriates' home shall have power to receive and retain all inebriates who may enter it as patients, either voluntarily or by committal of aforesaid justices,"[208] in essence authorizing mandatory treatment for chronic alcoholics. The process for having a patient committed in 1873 involved the following steps: upon receiving a written complaint by any two family members or friends that a person was a habitual drunkard, a justice of the peace would issue a warrant ordering the individual to appear before him for an examination

[201] See Interdiction Fact Sheet from the Legal Aid Justice Center & Skadden, Arps, Slate, Meagher & Flom LLP, at *1 (last visited May 10, 2016), https://www.justice4all.org/wpcontent/uploads/2016/03/LAJC_Interdiction_Fact_ Sheet.pdf [https://perma.cc/6EBA-978C].

[202] Id.; see also Complaint at 5, Hendrick v. Caldwell, 232 F. Supp. 3d 232 (W.D. Va. 2016) (No. 7:16-CV-0095) [hereinafter Hendrick Complaint] (stating same).

[203] Hendrick v. Caldwell, 232 F. Supp. 3d 868, 876 (W.D. Va. 2017) (quoting plaintiffs' complaint).

[204] Va. Code Ann. § 4.1-322 (1996).

[205] Id.; Va. Code Ann. § 18.2-11 (2000).

[206] Va. Code Ann. § § 18.2-388 (1990), 4.1-322 (1996), 18.2-11 (2000).

[207] Va. Code Ch. 83 (1873).

[208] Id.

and hearing.[209] If, after this examination, it appeared that the person was a "habitual drunkard and lost to self-control, and that . . . the benefits of the inebriates' home would possibly restore him to sobriety and self-control," then a justice would "assign the . . . inebriate to the care and protection of the inebriates home."[210]

3. Modern Enforcement of Habitual Drunkard Statute

While the language of the 1873 version of Virginia's habitual drunkard statute suggests a rehabilitative purpose, today the statute is used to incarcerate homeless chronic alcoholics.[211] Because Virginia law provides no clear standard or procedure for removing the status once a person is interdicted, "habitual drunkard" becomes a lifelong label, subjecting a person who has been interdicted to up to a year of incarceration per violation for the remainder of his or her life.[212] According to data submitted to the Virginia Department of Alcoholic Beverage Control, over 1,220 people have been listed as interdicted in Virginia since 2007.[213] Many of them have been arrested and jailed repeatedly for possession or consumption of alcohol.[214] As of 2015, sixty cities and counties had interdicted "habitual drunkards" in Virginia,

[209] Id.

[210] Id.

[211] See Sarah Kleiner, Attorneys File Class-Action Lawsuit against Virginia's 'Habitual Drunkard' Laws, Richmond Times-Dispatch (Mar. 6, 2016), http://www.richmond.com/news/attorneys-file-class-action-lawsuit-against-virginia-s-habitual-drunkard/article_2c3126bb-43db-5215-aa6f-bcf9db981137.html [https://perma.cc/8QXX-NMWS]; M. L. Nestel, Virginia Jails People for Even Smelling Like Alcohol, The Daily Beast (Mar. 16, 2016), https://www.thedailybeast.com/virginia-jails-people-for-even-smelling-like-alcohol [https://perma.cc/GNY6-8LAE]; see also Hendri ck Complaint, supra note 201, at 13–14, testimony of Richard Deckerhoff (stating that incarceration under interdiction statute caused plaintiff to go without needed surgery and acc- ess to primary care services); id. at 15, testimony of Eugene Walls (stating that inter- dicted status caused plaintiff to lose access to public benefits which could have kept him off of the streets).

[212] See Hendrick Complaint, supra note 202, at 7, 9, 14 (providing examples of individuals who have been repeatedly prosecuted under this statute); see also Va. Code § 4.1-333 (1993) (providing no procedure for removal of the "habitual drunkard" label, instead allowing the court to remove the label "as it deems proper").

[213] Hendrick Complaint, supra note 202, at 17 (stating that data was obtained through FOIA request of Virginia Department of Alcoholic Beverage Control records); Interdiction Fact Sheet, supra note 201, at *1 (same).

[214] Interdiction Fact Sheet, supra note 201, at *1.

resulting in 4,743 convictions of interdicted persons under the statute.[215] Given these statistics, it appears that law enforcement seem to use the statute predominantly to "clean up" the streets.[216] Many of those targeted by the interdiction statute are homeless and struggle not only with chronic alcoholism but also with physical and mental illnesses.[217]

Each time an interdicted person is convicted under the statute for possession of alcohol in public, that individual faces up to one year in jail as a sentence—depending on the discretion of the commonwealth's attorney pursuing the charge.[218] Moreover, the statute itself appears to be selectively enforced, with commonwealth's attorneys in jurisdictions such as Virginia Beach and Roanoke interdicting high volumes of persons while commonwealth's attorneys in jurisdictions like Charlottesville refuse to enforce the statute at all.[219] Virginia Beach reported 616 interdictions to the Virginia Department of Alcoholic Beverage Control from 2010–2015, while Roanoke reported 140 interdicted individuals in its jurisdiction during the same time period. It is likely these numbers are underreported and that there are more interdicted individuals than have been reported to the Department of Alcoholic Beverage Control.[220]

The Legal Aid Justice Center in Charlottesville, Virginia, has filed a class action lawsuit, currently pending appeal to the Fourth Circuit, challenging the constitutionality of the statute on behalf of a group of chronic alcoholics repeatedly arrested and jailed under the statute.[221] The complaint described the variance in enforcement depending on the county, stating that "Commonwealth's Attorneys in certain jurisdictions appear to be selectively enforcing the interdiction law against homeless

[215] Hendrick Complaint, supra note 202, at 17–18; Interdiction Fact Sheet, supra note 201, at *1. For rates of interdiction for specific municipalities, see Interdiction Fact Sheet, supra note 201, at *2.

[216] See Kleiner, supra note 211; Nestel, supra note 211. One example is that of a plaintiff in a lawsuit filed by the Legal Aid Justice Center who was arrested under the Interdiction Statute not for drinking alcohol in public but "for possession of alcohol while sleeping in a park bathroom [after] a beer can was found in the trash can and was attributed to [him]." Hendrick Complaint, supra note 202, at 12.

[217] Interdiction Fact Sheet, supra note 201, at *1.

[218] Id.

[219] Id. at *2 (containing a list of a number of individuals interdicted by jurisdiction from 2010–2015).

[220] Id.

[221] See Hendrick Complaint, supra note 202, at 2; Interdiction Fact Sheet, supra note 201, at *1.

individuals to 'clean up' the streets" and explained that "[d]espite the quasi-criminal nature of this proceeding, the defendant has no right to a court-appointed lawyer or other protections constitutionally guaranteed to criminal defendants."[222] The district court dismissed the complaint, holding that the statute did not violate due process, the Eighth Amendment, or the Equal Protection Clause.[223] However, in doing so, the court continued to use the binary act-versus-status framework created in *Powell*.[224] Had the court viewed the statute under a third conceptual model, chronic alcoholism as a rewiring of the brain, it would have had to determine whether the sentencing for habitual drunkards is grossly disproportionate in light of their diminished culpability as a group of offenders.

B. Questioning the Continued Constitutionality of Virginia's Habitual Drunkard Statute

Under the Supreme Court's evolving framework, Virginia's habitual drunkard statute should not pass constitutional muster under an Eighth Amendment proportionality analysis. The statute, on its face, targets only chronic alcoholics, labeling such individuals as "habitual drunkards." Based on this delineation, the statute then subjects them to up to a year of imprisonment for each instance of possession of alcohol in public. Once interdicted, these individuals can be sentenced to a year in prison for each violation of the statute, such that they can be subject to years of imprisonment over their lifetimes for what is otherwise not a crime. The statute also fails to provide individuals a right to counsel in order to rebut being permanently labeled a "habitual drunkard."[225]

Taking into account updated understandings of chronic alcoholism and the diminished culpability of chronic alcoholics as offenders, imprisonment for up to a year for possession of alcohol in public is extremely disproportionate as a sentence. This is especially true given

[222] Interdiction Fact Sheet, supra note 201, at *1.

[223] Hendrick v. Caldwell, 232 F. Supp. 3d 868, 895 (W.D. Va. 2017).

[224] Id. at 885–86.

[225] The Supreme Court has observed that the Due Process Clause creates a presumption that an indigent litigant has a right to appointed counsel when an adverse decision would result in his or her deprivation of physical liberty. See Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C., 452 U.S. 18, 25 (1981) ("The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.").

the compounding effect of these sentences over a person's lifetime. In light of the mitigating factors impacting culpability for chronic alcoholics, one could argue that incarceration of these individuals for even one day violates the Eighth Amendment. Furthermore, interdiction for the chronic alcoholic is akin to life without parole, imposing for the remainder of an interdicted person's life a sentence whereby each occurrence of alcohol possession in public can result in a year of incarceration.[226] Looking to "the evolving standards of decency that mark the progress of a maturing society,"[227] and the diminished culpability of chronic alcoholics, a court could easily find such sentencing in violation of the Eighth Amendment's ban on cruel and unusual punishment.

The fact that Virginia's interdiction statute is applied to, and in fact directed at, *homeless* chronic alcoholics merely makes overt what likely already constitutes an Eighth Amendment violation. The Fourth Circuit correctly ascertained in *Driver v. Hinnant* that the reality that a homeless chronic alcoholic's actions occur in public is "unwilled and ungovernable by the victim."[228] Though the Fourth Circuit in *Fisher v. Coleman* interpreted *Powell* as overruling *Driver*'s holding "insofar as [*Driver*] held that the Eighth Amendment bars criminal punishment of behavior symptomatic of alcoholism,"[229] this decision was made in 1981, predating new scientific research on chronic alcoholism and the Court's more recent proportionality decisions. As Justice White noted in his *Powell* concurrence, for the homeless chronic alcoholic, "the public streets may be home . . . not because their disease compels them to be

[226] Indeed, many of the interdicted individuals interviewed by Legal Aid Justice Center reported having spent years in prison for recurrent possessions of alcohol in public due to their interdicted status. See Hendrick Complaint, supra note 202, at 8–15. See also Sydney Kupkin, A 'Habitual Drunkard' Law is Keeping Homeless Alcoholics on the Streets in Virginia, Vice News (Mar. 20, 2016), https://news.vice.com/article/a-habitual-drunkard-law-is-keeping-homeless-alcoholics-on-the-streets-in-virginia [https://perma.cc/6TE2-M49G] (stating that one interdicted individual had been arrested more than thirty times since 2010 and "has spent the majority of the last five years behind bars as a result"); See also Kleiner, supra note 211 (noting same).

[227] Graham v. Florida, 560 U.S. 48, 58 (2010) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (quotations omitted)).

[228] 356 F.2d 761, 764 (4th Cir. 1966).

[229] 486 F. Supp. 311, 316 (W.D. Va. 1979), aff'd per curiam, 639 F.2d 191 (4th Cir. 1981).

there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking."[230]

A statute passed in 1873 hardly reflects modern understandings of mental and neurological development. New understandings of the neurophysiological changes involved in the development of chronic alcoholism exist, yet neither Virginia state courts nor the Fourth Circuit have taken this new research into account. Doing so should lead to different results in the habitual drunkard context. As Justice Kennedy cautioned, the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[231] In the habitual drunkard context, this requires that courts take into account updated understandings of the neuroscience behind chronic alcoholism to determine whether incarceration of a chronic alcoholic for a single instance of alcohol possession is disproportionate under the Eighth Amendment. This will not only yield better outcomes, but will also align the Court's proportionality analysis in the context of chronic alcoholism with its Eighth Amendment jurisprudence in the juvenile and intellectual disability contexts.

[230] Powell v. Texas, 392 U.S. 514, 551 (1968) (White, J., concurring in the result).

[231] Hall v. Florida, 134 S. Ct. 1986, 1992 (2014) (quoting Weems v. United States, 217 U.S. 349, 378 (1910) (quotations omitted)).